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Responsibility for the Wounding in Head and Face Area in Georgian Customary Law

1. Introduction

We shall consider the responsibility for the wounding in head and face areas on the basis of ethnographic materials of the second half of 19th and 20th centuries. Data about these issues are maintained, in relatively complete form, in the customary law of mountain areas of Georgia, mostly–in customary law of Khevsureti. Discussing of this issue based on Georgian customary law is of interest, as here are maintained many elements, not mentioned in ancient Georgian legislative monuments at all.

2. Responsibility for the Head Wounds

2.1 Bases for Imposing Responsibility for Head Wounds

The most complete data about head wounds were found in Khevsureti. Law of Khevsureti maintained provisions on differentiated fines for the head wounds, depending on their depth. There are no similar data in the materials of customary law of any other region of Georgia, as well as ancient Georgian legislative monuments. According to the materials, Khevsureti law differentiates the rules of assessment of the face wounds and head wounds. They measure the face wounds with the grains and thus calculate the quantity of the fine. As it was mentioned earlier, the head wounds are measured based on their depth. According to the explanations of Khevsuretian informers, of the wound was "below three wrinkles of the forehead", it was measured by means of the grains while of the wound was "above three wrinkles of the forehead", it was not measured and they measured its depth for the purpose of determining of the relevant fine to be imposed on a guilty person.[1] Thus, for assessment of the wounds "below three wrinkles of the forehead" the method of measuring with the grains was used, while for those, "over the three forehead wrinkles", the head wounds' evaluation method was used.

Different methods of assessment of wounds below and over the three forehead wrinkles was conditioned by the fact that the area over three wrinkles was covered by hair or a hat, making the wounds invisible, unlike the wounds below three wrinkles of forehead. According to explanations of one of Khevsuretian informers of *M. Kekelia*: "wounds of head, under the hair were not measured… the wounds below three forehead wrinkles are measured while those over them are not measured. This

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1 *Kekelia M*., Materials on Customary Law of Khevsureti, Ethnographic Notebook, 1977, № 4, 29; Ibid, №5, 29; ibid, №6, 41; *Jalabadze D*., Materials on Customary Law of Khevsureti, Ethnographic Notebook. 1988, 38; *Ochiauri Al.,* Law of Khevsureti, 1945, manuscript, personal archive, notebook №3, 39-40, archive of *Al.Ochiauri* is mainrtained in the TSU Ivane Javakhishvili Archive of the Institute of History and Ethnology

is because the wounds over the forehead can be covered with the hat."[2] According to the explanations of the other Khevsuretian informer, "if the wound is over three wrinkles on the forehead, it can not be measured with the grains, as it is covered with hair, while those, below these wrinkles can be measured with the grains".[3] Now we shall discuss the wounds over three forehead wrinkles, severity of which is determined by their depth.

Khevsuretian law bases the quantity of fine for head wounds on anatomical structure of the head. One of Khevsuretian informers, local healer, well aware in assessment of head wounds, explained: there is a bone under the head skin and there is thin layer between the skin and bone, uport surface of the bone, called by Khevsuretians "ska", there is the other bone below this one and there is so called "Chkhimi" between these two bones. Under the lower bone there is a brain.[4] According to *Al. Ochiauri*, the head wound was measured based on the bone. According to his explanation, "the bone is divided into three parts: upper bone, "chkhimiani" and lower bone."[5] Thus, the Khevsuretians distinguished the upper and lower bones. The upper bone implied the skull bone (or as *Al. Ochioauri* explained the upper surface of the head bone), and the lower bone meant the hard layer.[6] According to Khevsuretian law, the fine for head wounds was determined by the depth of wound: up to "ska", first bone, "chkhimi", lower bone or brain. Deeper was the head wound, greater was the fine imposed on the guilty person.

Severity of head wounds was determined by the physician treating the wounded person - local healer. At the trial the law men[7] asked him, which bone came out, the upper bone, "chkhimiani" or the lower one.[8]"Coming out" of the bone meant that the pieces of the broken bone came out as a result of healer's efforts. "The come out bone allowed exact identification of the wound depth and its severity and on this basis the law men determined the quantity of fine.

To determine the depth of wound, the layer, up to which the wound penetrated, the healer used his instruments: "khmalika"–small flat stick and so called "khvetsi" – a scarper with iron or steel blade. This was done in case of fracturing of some bone.[9] According to *R. Kharadze* and his informatory, the healer made small "khmalika", examine the wound with it to determine the wound depth."[10] And fir this, the healer widened the wound edges and scarped[11] the damaged bone by means of the "khotsi" ("khvetsi").[12] Removing of the bone peaces, their "coming out" was required not only for identification of the wound severity but also, primarily, for healing of a wounded person. Even smallest peace of the bone could result in suppuration and possibly death of the victim. *Al. Ochiauri* describes the process of wound examination, treatment and identification of its severity as follows: "The healer widened the wound with

2 *Kekelia M.,* Materials on Customary Law of Khevsureti, Ethnographic Notebook, 1977, №5, 29.

3 *Jalabadze D.,* Materials on Customary Law of Khevsureti, Ethnographic Notebook, 1988, 38.

4 *Zoidze O.,* Materials on Customary Law of Khevsureti, Ethnographic Notebook 1988, №1, 100 (In Georgian).

5 *Ochiauri Al.,* Law of Khevsureti, 1945, manuscript, personal archive, notebook №3, 40 (In Georgian).

6 *Kharadze R.,* Law of Khevsureti, Annals, Works of Iv. Javakhishvili Institute of History, Vol.1, 1947, 171, *Ochiauri Al.*, Cutting and Wounds in Khevsureti, Personal Archive, 1954, 6/1, 9 (In Georgian).

7 Man of Law – mediator judge elected by the parties in Khevsureti.

8 *Ochiauri Al.,* Law of Khevsureti, 1945, manuscript, personal archive, 1954, 6/1, 5 (In Georgian).

9 *Khizanishvili N.,* Ethnographic Writings, Tb., 1940, 52; *Makalatia S.,* Khevsureti, Tb., 1984, 95 (In Georgian).

10 *Kharadze R.,* Law of Khevsureti, Annals, Works of Iv, Javakhishvili Institute of History, Vol.1, 1947, 171 (In Georgian).

11 Ibid.

12 In Arkhoti it was called "Khvetsi" and in BudeSvaneti – "Khotsi" (In Georgian).

"khmailka", examined whether the bone was damaged or not. If the bone was damaged, the wound was dangerous and it would not be healed if not all broken peaces came out. If the bone was not cut or broken, the wound would heal very quickly. The healer had the remedies made of various medicinal herms. He was experienced and knew the remedies best for one or another wound or place and applied these remedies on this basis."[13] As a result of a case of confrontation, several persons had the head wounds. *Al. Ochiauri* provided very interesting description of the actions of local healer "akimi", including removal of the bone pieces, for the purpose of their "coming out": "healer did not allow closing of the wounds for long time, almost about two or three weeks, he examined them every day, with the "khmalika" and "khvetsi" blade, to find out, whether the bones came out or not. Whether the bone was broken or not? After this the small pieces of bones started to come out… The healer said that on the lower surface of the bones to come out the flesh would form and cause its movement upwards and finally it would come out and that he had to move slightly the broken bones upwards every day with "khmalika" or "khvetsi". Thus, in some of the wounded in that confrontation, the upper bone pieces came out, while from the wounds of both, Tushi and Martiai (they wounded one another) "chkhimi" came out."[14] These data clearly show that the healer was a person best informed about severity of wounds and therefore, his testimony was decisive in determining the size of fines for the head wounds. It should be noted here that the healers used to treat the head wounds with so called "darishkana" to prevent their closing and the law men were well aware in that and took this into consideration in all cases.

Now, let us discuss the sizes of fines for the head wounds, based on their depth. It should be noted that mostly, the size of fine was predetermined.

2.2 Light. "Sapatle" (Healed with the Leaves") Wounds

The lowest fine was imposed for the light, so called "sapatle" wounds.[15] According to explanations of the authors and most of informers, a wound without damage of bone was regarded as such. Informer of *R. Kharadze* specifies" "if the head wound penetrates up to the bone but the bone is not damaged, the guilty person shall compensate it with three sheep. Healer of Gudani, MgelaChincharauli said that: "we call it "sapatle" wound, if the bone is not damaged, in this case a guilty person shall pay 3 chareki copper or 3 hand[16] sheep and compensate expenses for food of the wounded person while he is at the healer's place. In cutting up to the moneKhevsuretians imply cutting of the skin over the bone and they

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13 *Ochiauri Al.,* Cutting and Wounds in Khevsureti, personal archive, 1954, 6/1, 9 (In Georgian).

14 Ibid, 10. Coming out of a broken bone, in many cases was decisive for healing of the wounded individual, this could be seen in the specific case described by *Al. Ochiauri.* According to him, someone *Gigia* with the wound on his head, was sick for 3-4 months. He had a dagger wound on his head and the bone pieces pressed the "ska" of brain …. The healer moved the broken bone higher, the flesh grew on its lower side and the bone came out of the brain cover … when the bone came out, a patient recovered. He had the eyesight problems and after bone removal his eyesight improved as well.", *Ochiauri Al.,* ibid, 3-4 (In Georgian).

15 It was called "Sapatle", as it could be healed by means of the ribwort leaves only (In Georgian).

16 In Khevsureti, property charge was generally called "drama", here the value of blood was usually compensated with the livestock, as well as the sheep. In Khevsureti and Pshavi the property charges could be paid "as legs" - i.e. directly, cows (sheep) and "as hand" - compensation of the cow value, in particular, with the copper items, pots, as well as silver articles (In Georgian).

understood meaning of this very well.[17] This is conformed by *Al. Ochiauri's* work as well. According to him, the wound without bone damage is a "sapatle" wound and fine for it is three sheep.[18] According to *N. Khizanishvili*and *S. Makalatia,* the guilty person shall pay no more than "drama", he shall pay only "sapatle", though they mentioned one sheep and not three,[19] as specified by *R. Kharadze*and *Al. Ochiauri*. According to the materials recorded in 70-80-ies of the 20th century, by *M. Kekelia* and staff of the Laboratory Studying Georgian Customary Law, the picture is actually the same. According to their data, "sapatle" is a wound without bone damage and according to some date fine for it is three sheep, while other data state that it is one sheep only.[20]

These data show that all authors and Khevsuretian informers agree on which head wound is a light one. This is a "sapatle" wound – the one without bone damage. Though there are some differences with respect of the fines for such wounds – some data state that these are three sheep and some – one only.

We suppose that this is due to the fact that "sapatle" wounds could differ and respectively, a guilty person had to contribute one or three sheep. Data of some Khevsuretian informers provide basis for this proposition, they said that the "sapatle" wounds differ by whether the "ska" was damaged or not, in addition to the skin. For example, one of the informers specify that "if only skin is cut, the fine is insignificant, while in case of simple scrapping of the flesh the fine is three sheep."[21] In the former case the wound is insignificant, only kin on the head is damaged and "ska" is not, while if the flesh scrapping over the bone is needed, it means that "ska" is damaged as the "ska" is a layer over the upper surface of the bone and its scrapping is implied here. The same trend is evident with the other informer as well. He stated that if "ska" is visible, the fine is lower, while if there is seen the bone, fine is higher.[22] Here, in the former case, it is clear that only skin was cut and "ska" became visible, though it was undamaged while in latter case the bone is visible and this is impossible without damage of "ska". Thus, these data confirm differentiation of "sapatle" wounds of head–in case where only skin is cut the fine is lower, while in case of cutting of "ska" it is higher.

BabutsaAladauri, experienced Khevsuretian healer explains this issue very clearly: "if the skin is cut and "ska" is visible, this is "sapatle" wound, it was worth one sheep … if "ska" is cut but the bone remains undamaged, it was worth three sheep."[23] The mentioned data show that the head wound without damaging of "ska" was worth one sheep, while the wound up to upper layer of "ska", without damaging of the bone was worth 3 sheep. And this explains different data in the literature about fines for the "sapatle" wounds.

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17 *Kharadze R.,* Law of Khevsureti, Annals, Works of Iv. Javakhishvili Institute of History, Vol.1, 1947, 171 (In Georgian).

18 *Ochiauri Al.,* Law of Khevsureti, 1945, manuscript, personal archive, Notebool No: 3, 39-40 (In Georgian).

19 *Khizanishvili N.,* Ethnographic writings, Tb., 1940, 52; *Makalatia S.,*Khevsureti, Tb., 1984, 94 (In Georgian).

20 *Kekelia M.,* Materials on Customary Law of Khevsureti, Ethnographic Notebook, 1977, № 6, 22, 40; *Jalabadze D.,* Materials on Customary Law of Khevsureti, Ethnographic Notebook, 1988, 12, 38; *Merabishvili J.,* Materials on Customary Law of Khevsureti, Ethnographic Notebook, 1988, 45 (In Georgian).

21 *Kekelia M.,* Materials on Customary Law of Khevsureti, Ethnographic Notebook, 1977, №6, 22 (In Georgian).

22 *Jalabadze D.,* Materials on Customary Law of Khevsureti, Ethnographic Notebook, 1988, 12 (In Georgian).

23 *Zoidze O.,* Materials on Customary Law of Khevsureti, Ethnographic Notebook, 1988, №1, 100-101(In Georgian).

2.3 Damage of the Upper Bone. "Coming out" of the Upper Bone

According to the majority of data, "coming out" of the upper bone was worth five cows.[24] Khevsuretian healer mentioned above said: "if the bone was cut and "chkhimi" could be seen, fine was 5 cows.[25]*B. Gaburi*mentioned the same: "if, in case of head wound, the upper bone comes out, a person who wounded the other should pay five cows to the victim."[26] According to data of *Al. Ochiauri*, "if upper bone was coming out, "drama" was five cows."[27] The specific cases described in the materials show that the "men of law" assessed fine for "coming out" of the upper bone as five cows.[28] In relation with one of the conflicts, *Al. Ochiauri* specified that: "both parties knew that fine for coming out of the upper bone was five cows."[29] Regarding these data, it should be taken into consideration that fine was five cows in case of "coming out" of the upper bone, its fracturing, when "chkhimi" was visible but not damaged, the wound did not penetrate into "chkhimi". In addition, it should be noted that "coming out" of the bone was maximally significant possible damage of one or another bone.

There are some different data as well. For example, *N. Khizanishvili* noted that if the upper bone was cut, the fine would be five cows, but it could be three cows as well.[30] In case of relatively light damage of the upper bone, when this bone did not "come out" but it was simply cut, in the specific case, the guilty person was imposed the fine of three cows. According to *R. Kharadze*and his informer, "if the head wound penetrates up to the half of bone, the party in fault has to pay 5 cows, while the wound is deep enough so that the upper bone is crushed, the person in fault shall pay equivalent of 8 cows. MgelaJincharauli describes this as follows: "if the upper bone comes out and penetrates up to "chkhimi", equivalent of 8 cows shall be paid."[31]*R. Kharadze's* information requires some comments. If the wound penetrates up to the middle of the upper bone, five cows are charged, while if the bone is crushed, the fine is eight cows. This explanation by *R. Kharadze* does not correspond to the data provided above. As we have seen, according to the most data, min case of "coming out" of the upper bone, the fine is five cows and not eight. Below we shall see that according to the most data, the fine of eight cows is charged in case of the wound penetrates up to "chkhimi" and damages it. The cause of this mismatch should be inaccurate interpretation of explanation by MgelaChincharauli, *R. Kharadze's* informer, in this case *MgelaChincharauli* did not discuss "coming out" of the upper bone separately, he linked "coming out" of the upper bone with penetration of the wound to "chkhimi" and its damage. Phrase–"where the upper bone comes out and penetrates to chkhimi" should mean this. In general, the wound can not penetrate to the "chkhimi", without "coming out" of the upper bone and in discussing the wound damaging "chkh-

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24 *Kekelia M.,* Materials on Customary Law of Khevsureti, Ethnographic Notebook, 1977, №5, 42; Ibid, №6, 22; *Jalabadze D.,* Materials on Customary Law of Khevsureti, Ethnographic Notebook, 1988, 38 (In Georgian).

25 *Zoidze O.,* Materials on Customary Law of Khevsureti, Ethnographic Notebook, 1988, №1, 101

26 *Gaburi B.,* Materials of Khevsureti, "Annual Publication of Georgian Linguistic Society", 1923-1924, 141. Makalatia mentioned the same (*Makalatia S.,* Khevsureti. Tb., 1984, 94) (In Georgian).

27 *Ochiauri Al.,* Blood Feud in Khevsureti, 7/14, Personal Archive, 158 (In Georgian).

28 *Kekelia M.,* Materials on Customary Law of Khevsureti, Ethnographic Notebook, 1977, №2, 56-57, 62; *Ochiauri Al*., Cutting and Wounds in Khevsureti, personal archive, 1954, 6/2, 23 (In Georgian).

29 *Ochiauri Al.,* Cutting and Wounds in Khevsureti, Personal Archive, 1954, 6/4, 44 (In Georgian).

30 *Khizanishvili N.,* Ethnographic Writings, Tb., 1940, 52 (In Georgian).

31 *Kharadze R.,* Law of Khevsureti, Annals, Works of Iv. Javakhishvili Institute of History,Vol.1, 1947, 171 (In Georgian).

imi", mentioning of "coming out" of the upper bone is absolutely natural. Hence, MgelaChincharauli links charge of eight cows, primarily, with damage of "chkhimi". If we assume that our interpretation of *MgelaChincharauli* is correct, that it would not contradict to the other data, showing that if wound penetrates to "chkhimi", the charge is eight cows. Where *R. Kharadze* discusses charging of eight cows for crushing of the upper bone, he says nothing about penetration of the wound to "chkhimi". And excluding of the latter factor comprises inaccurate interpretation of *MgelaChincharauli's* explanation. It should be also mentioned that *R. Kharadze,* providing detailed description of the system of charges for head wounds, does not specify separately the fine for damaging of "chkhimi", from discussing the charges for crushing of the upper bone he directly moves to damage of the lower bone and this is certain gap. Supposedly, *R. Kharadze* did not mention the fine for "chkhimi" damage because inaccurate understanding of MgelaChincharauli's explanations. R. Kharadze regarded information about charge for damage of "chkhimi" as the charge for crushing of the bone and therefore, completely missed the charge for "chkhimi" damage.

As a conclusion we could state on the basis of the available materials, according to Khevsuretian law, charge for damage of the upper bone of the head, its crushing, "coming out" of the upper bone is five cows and this is confirmed by the specific facts. In our opinion, even in case of damage of the upper bone, if "chkhimi" is not damaged, the charge should not exceed five cows. Relatively light damage of the bone (e.g. where the bone is cut but it is not broken, "coming out"), charge could be lower.

2.4 Damage of "Chkhimi". "Coming out" of "Chkhimi" Bone

According to the most data available to us, damage of "chkhimi", "coming out" of "chkhimi" with the bone was charged with eight cows.[32] *B. Gaburi* mentioned seven cows: "if chkhimi comes out with the bones, tan the fine shall be seven cows."[33] Charging of seven or eight cows for coming out of "chkhimi" bone implies uniform assessment of the crime severity and such insignificant difference of the charges, regarding the principles of customary law, is not substantial. Maybe, in certain cases, the "men of law" charged seven cows for coming out of "chkhimi" bone, as mentioned by *B. Gaburi,* but mostly, there are specified eight cows. *Al. Ochiauri* provides specific examples where, for coming out of "chkhimi" bone the men of law have charged eight cows For example, as a result of a conflict, the "chkhimi" bone came out from the wound of someone Garsia and the men of law charged the party in fault to pay fine of eight cows.[34] In case of conflict between *Utrigat Davit* and *AbikatGigiai*, "chkhimi" bone came out o *AbikatGigiai's* head and for this, the men of law made decision to charge the party in fault with eight cows.[35] The specific cases reflect the reality best of all and examples provided by *Al. Ochiauri,* together with the other information, unambiguously shows that the Khevsuretian law provided charging of eight cows for "coming out" of the "chkhimi" bone.

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[32] *Jalabadze D.*, Materials on Customary Law of Khevsureti, Ethnographic Notebook, 1988, 38; *Ochiauri Al.,* Law of Khevsureti, 1945, manuscript, personal archive, notebook №3, 40;*Ochiauri Al.,* Blood Feud in Khevsureti, 7/14, Personal Archive, 158 (In Georgian).

[33] *Gaburi B.,* Materials of Khevsureti, "Annual Publication of Georgian Linguistic Society", 1923-1924, 141. *Makalatia* mentioned the same (*Makalatia S.*, Khevsureti, Tb., 1984, 94) (In Georgian). Supposedly, *Makalatia* relies on information from *B. Gaburi*.

[34] *Ochiauri Al.,* Blood Feud in Khevsureti, Personal Archive, 158, 6/2, 17-18 (In Georgian).

[35] Ibid, 23-24.

In discussion of "coming out" of the upper bone, we provided data of *R. Kharadze*and on the basis of these data we offered that *R. Kharadze's* informer stating that "if the upper bone above "chkhimi" comes out, the charge must be equivalent of eight cows", implies charge for damage of "chkhimi" and not of the upper bone. As explained by *R. Kharadze*. Data about damage of "chkhimi", including the specific facts confirm this offer. These data clearly show that coming out of "chkhimi" bone was really charged with eight cows and coping out of the upper bone could not be charged with the similar value.

2.5. Damage of the Lower Bone. "Coming out" of the Lower Bone

Charge for the lower bone damage depended on severity of the damage.

According to *R. Kharadze's* data, if the lower bone was half broken, the party ion fault was charged to pay twelve cows.[36] Also, according to explanation by one of informers of *M. Kekelia*, if the head wound penetrates to the lower bone below "chkhimi" and the bone is damaged, the fine was twelve cows.[37] This is confirmed by one more Khevsuretian informer.[38] These data show that damage of the lower bone, where it was not completely broken, crushed, did mot come out was charged with the fine of twelve cows.

All these authors and informers discuss the heavier wound of the lower bone, related to crushing of this bone, its "coming out". This was regarded as the heaviest head wound. Here the lower bone was completely cut and the wound penetrated to the brain (more exactly, to the thin film over the brain called brain "ska" by Khevsuretians) and according to the data of absolutely all authors, charge for such wound was sixteen cows.[39] Informer of *R. Kharadze* describes such wound as follows: "if the lower bone is cut and the brain can be seen the fine is equivalent of sixteen cows"[40] Many others, similar to *R. Kharadze'*s informer, associate the mentioned wound with opening of the brain "ska". In such case the "over-brain bone came out,"[41] i.e. the lower bone "came out".

According to R. Kharadze's information, the wound resulting in opening of the brain "ska", was called "shari", "we call it sharti".[42]*BatiraArabuli*, *Al. Ochiauri'*s informer from Batsaligo explained: "Shari, tavshari, coming out of the bone over the brain all these imply one and the same. There were many cases where the Khevsuretian village healers removed the bone, if it was cut or broken. On the lower

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36 *Kharadze R.,* Law of Khevsureti, Annals, Works of Iv. Javakhishvili Institute of History, Vol.1, 1947, 171 (In Georgian).

37 *Kekelia M.,* Materials on Customary Law of Khevsureti, Ethnographic Notebook, 1977, №2, 63 (In Georgian).

38 *Jalabadze D.,* Materials on Customary Law of Khevsureti, Ethnographic Notebook, 1988, 12 (In Georgian).

39 *Kekelia M.,* Materials on Customary Law of Khevsureti, Ethnographic Notebook, 1977, №2, 63; *Kekelia M.,* Materials on Customary Law of Khevsureti, Ethnographic Notebook, 1977, №5, 42; *Kekelia M.,* Materials on Customary Law of Khevsureti, Ethnographic Notebook, 1977, №6, 22, 40; *Zoidze O.,* Materials on Customary Law of Khevsureti, Ethnographic Notebook, 1988, №1, 101; *Jalabadze D.,* Materials on Customary Law of Khevsureti, Ethnographic Notebook, 1988, 12; *Merabishvili J.,* Materials on Customary Law of Khevsureti, Ethnographic Notebook, 1988, 45; *Ochiauri Al.,* Blood Feud in Khevsureti, 7/14, Personal Archive, 158; *Gaburi B.,* Materials of Khevsureti, "Annual Publication of Georgian Linguistic Society", 1923-1924, 141; *Khizanishvili N.,* Ethnographic Writings, Tb., 1940, 52.

40 *Kharadze R.,* Law of Khevsureti, Annals, Works of IVol.Javakhishvili Institute of History, Vol.1, 1947, 171 (In Georgian).

41 *Ochiauri Al.,* Cutting and Wounds in Khevsureti, personal archive, 1954, 6/5, 7 (In Georgian).

42 *Kharadze R.,* Law of Khevsureti, Annals, Works of Iv. Javakhishvili Institute of History, Vol.1, 1947, 171 (In Georgian).

side of bone and over the brain there is a paper-thin membrane called by Khevsuretians brain "ska" and the brain was covered only with this "ska". When the wound was healed, brain movement could still be seen. Such wound was charged with sixteen cows."[43] According to one more explanation of *Al. Ochiauri*, "tavshari was removal of the bone over the brain and opening of brain covered with the thin membrane only."[44] These data clearly show that the Khevsuretians called the heaviest wounds penetrating to the brain "shari", "tavshari", "coming out of the over-brain bone". Its characteristics are clear as well: full removal of the lower bone, its "coming out" and opening of the brain "ska". Of course, such wound was dangerous for life. Khevsuretian healer, *BabutsaAludauri* explained that the root of "shari" is attached to the skull and if its detaching results in death.[45]

The best way to reliably confirm the mentioned general data is to provide specific examples. *Al. Ochiauri* provides description of several cases of wounds penetrating to the brain.

At a time of mass confrontation between Arabuli and Chincharauli, in GudaniJvari (over hundred people participated in this confrontation), someone *Gigia* (*Aramuli*) wounded the head ofaged man *Karchauli*(*Chincharauli*). *Al. Ochiauri* provides description of this case as follows: "sword cut the bone and penetrated to the "ska" of brain. Finally, the bone over the brain came out completely. And the membrane covering the brain called "ska" by Khevsuretians" was throbbing. Once the situation calmed down and the wounds were healed, Gigia and Karchauli applied to trial and the men of law established that Gigia had to give sixteen cows to Karchauli."[46] In the other case the head wound was discussed by the men of law: "it could be seen that the entire bone over the brain has come out. Only brain ska was left. The movement of brain could be seen. And the healer confirmed that the bone over the brain was removed and as the bone over the brain has come out, they decided that the fine was sixteen cows."[47] These specific examples clearly show that for the wounds where the bone over the brain "came out" completely and the brain "ska" could be seen, the fine was sixteen cows. In one more case described by *Al. Ochiauri*, a person was wounded twice and both wounds of such type. The men of law charged the party in fault to pay double fine "both wounds were on his head. … Healer removed the bones of both wounds. In both wounds the shari was seen. … according to the law, the fine for shari was twice 15 cows, i.e. 32 ones and Totia (a person who wounded the victim) paid the fine, half in a form of cows and half–the equivalent."[48]

Available ethnographic data do not contain any information that there was any similar system in any of Georgian regions, while such system is well known in the customary law of the North Caucasus mountain peoples. As an example we provide data of *T. Leontovich* from the customary law of Ingushetia. Similar to Khevsureti, here the fines for wounds in head area depended on their depth: 1. if the wound was slightly cut head skin, without bone damage (so that the bone can not be seen), usually the conciliation feast, with the sheep and one pot of vodka was sufficient; 2. if the wound involved scratch on the skull, requiring cleaning with the knife was charged with three cows and small sheep and four pots of vodka for the feast is sufficient; 3. wound involving broken skull, to the second bone, the soft one, as the locals say, to the hard crust of the brain, was charged with six cows and for the feast big sheep and six or four pots of

43 *Ochiauri Al.*, Cutting and Wounds in Khevsureti, Personal Archive, 1954, 6/5, 57 (In Georgian).
44 Ibid, 55
45 *Zoidze O.,* Materials on Customary Law of Khevsureti, Ethnographic Notebook, 1988, №1, 101 (In Georgian).
46 *Ochiauri Al.,* Cutting and Wounds in Khevsureti, Personal Archive, 1954, 6/5, 55 (In Georgian).
47 Ibid, 6/1, 5.
48 Ibid, 6/7, 74.

vodka were needed; 4. wound involving cut of the skull, penetrating to the brain (it can not be seen yet) was charged with eight cows and for the feast–big sheep and six pots of vodka; 5. Wound with breaking of skill so that the brain can be seen, is charged with ten cows and one bull with the fabric of three rubles value, comprising twelve cows. For the feast big sheep and six pots of vodka are required.[49]

These data are apparently to those from Khevsureti. Here as well the wound without damaging of the bone is regarded as an insignificant. Light one and is associated with cutting of the skin. The criteria for setting of the fine for skull damage are actually similar to those of Khevsureti. The decisive factor is layer of skull to which the wound penetrated, which bone is damaged and whether the brain can be seen.[50] Comparison of the data about responsibility for damage of head from Khevsureti and Ingushetia clearly shows that the customary laws of North Caucasian mountain population and Georgian mountain peoples (particularly Khevsureti) are based on common principles.

3. Responsibility for the Face Wounds

Face wounds were regarded as the ones heavier than the head wounds, due to their visibility. As a result of such wounds an individual could have the irrecoverable injury, which, unlike the head wounds, could not be covered with hair or hat. This primarily deals with wounds on open parts of the face. If the light wounds on the other parts of body could be regarded as insignificant ones and could be neglected, similar wound on the face was regarded as more significant one and was charged more severely. *N. Khuzanishvili* noted that face wounds were regarded as the severe ones in Khevsureti, though not the wounds on areas covered with "hair" but on the open areas. As he said, a Khevsuretians do not care much about their faces …. But if there are wounds, they make much of it and demands great blood in lieu."[51]

There are certain specific data about face wounds in Pshav-Khevsuretian, Tushetian and Svanetian customary law.

3.1 Responsibility for Face Wounds in Svaneti

Svanetian customary law regards the face wounds as heavy crime. This, primarily, deals with the face wounds causing disfiguring of the face. According to *Eg. Gabliani,* "half "tsori"[52] was the charge

[49] *Leontovich F.,* Customs of Caucasian Mountain Peoples, vol. 2, 1882, 162 (In Russian).

[50] *R. Kharadze* provides inormation confirmed by Gvelesiani in Andia Region about charges for head wounds: "Among Didoians, the head wounds not penetrating to the bone, the charge is 1 ruble and 40 kopecks; if the wound penetrates to the bone – 2 rubles, if the upper part of skull is damaged – 4 rubles and if to the brain – 8 rubles; according to the customs of Unkratlchamalali, for the wound penetrating to the bone 30 rubles shall be charged and payment to the doctor shall be as agreed. If only skin is cut as a result of head wound, the party in fault shall pay to the victim one ruble, for the wound penetrating to the bone – 4 rubles; if the upper layer of the bone is cut – 10 rubles; for cutting of the second layer – 15 rubles; in the Karatin customs: if the wound penetrates to the brain – 25 rubles; if only the skin of head is cut and the bone can not be seen, 1 ruble and 40 kopecks shall be paid and of the part of the bone is detached – 17 rubles." (*Kharadze R.,* Law of Khevsureti, Annals, Works of Iv. Javakhishvili Institute of History, Vol. U, 1947, 175). These data clearly show that the charge for head wounds depend on their depth. Here, similar to Khevsureti, severity of head wounds is determined by the depth of penetration – whether the skin is cut, ot penetrates to the bone or damaged the bone or penetrated to the brain.

[51] *Khizanishvili N.,* Ethnographic Records, Tb., 1940, 51 (In Georgian).

[52] "Tsori" – charge for the murder in customary law of Svaneti.

for scars resulting from the face wounds"[53] Half "tsori" was the charge for damaging of one or the other organ, in general in Svaneti and it seems, that it was applicable to irrecoverable disfiguring of face as well.

Materials recorded by *M. Kekelia* in 60-70-ies of 20th century contain interesting data. Many informers of Svaneti mention that the wounds disfiguring the faces are regarded as heavy ones and the charge for this is quite significant, though they did not specify the amounts[54] and only generally emphasized significance of such wounds. The informers discussing specific charges for such wounds also emphasize their severity, though they did not consider them as heavy as the injuries of arms or legs. Informer of Kali said: "if the wound on face is intentional and it causes face disfiguring, the fine shall be up to one third of "tsori" and if the wound is not disfiguring, the fine may be lower."[55] Informer from Tsvrimi also confirms that the party in fault was charged with at least one third of "tsori"[56] One more informer mentioned payment of one third "tsori" for similar wound, while for arm or leg injury the fine is half of "tsori"[57] According to some data the fine for such wound is even lower. For example, informer from BalsKvemoSvaneti (*Etseri*) stated that charge for the wound was ten-fifteen cows.[58] I.e. the wound disfiguring the face, depending on its characteristics, is charged with about one fourth of "tsori". One of informers from Latali[59] said that fine for face disfiguring is half of that for the arm or leg[60] wounds. There are the different data as well; showing that charge for face disfiguring wound was one third "tsori".[61]

These data indeed confirm that face disfiguring wound was regarded as a heavy wound in Svanetian customary law. Supposedly, in relatively early period, in particular, according to the data of beginning of 20th century, such wounds were actually equalized with the injuries of the other parts of the body (e.g. arms, legs) and hence, were charged with half of "tsori". Though according to *M. Kekelia*'s materials, in the Soviet period, the charges for face disfiguring were relatively reduced compared with "tsori", to about one third–one fourth of "tsori".

Though according to *M. Kekelia's* materials, the charges for the face disfiguring wounds were reduced compared with "tsori" or charges for arms or legs' injuries, such wounds still were in the category of heavy wounds and the relevant fine is quite high. If the face wound did not cause irrecoverable disfiguring of face, naturally, the fine would be lower, depending on its heaviness.

It would be interesting to compare the charges for face disfiguring wounds in customary law of Svaneti with the charges for similar wounds in monuments of Georgian law. According to the laws of George the Brilliant, "if the scar is on the face", the charge is one fifth of livesock.[62] This monument shows the trend that charges for face irrecoverable disfiguring was lower than damage of eyes or legs (one fourth of cattle) and hand injury (damage of the right hand–one third of livestock).[63] As we have

53 *Gabliani Eg.,* Free Svaneti, Tb., 1927, 111(In Georgian).
54 *Kekelia M.,* Materials on Customary Law of Svaneti, Ethnographic Notebook №1, 1967, 26, 34; №3, 83 (In Georgian).
55 *Kekelia M.,* Materials on Customary Law of Svaneti, Ethnographic Notebook №6, 1969, 2 (In Georgian).
56 *Kekelia M.,* Materials on Customary Law of Svaneti, Ethnographic Notebook №3, 1968, 66 (In Georgian).
57 *Kekelia M.,* Materials on Customary Law of Svaneti, Ethnographic Notebook №1, 1967, 77 (In Georgian).
58 *Kekelia M.,* Materials on Customary Law of Svaneti, Ethnographic Notebook №1, 1967, 105 (In Georgian).
59 *Kekelia M.,* Materials on Customary Law of Svaneti, Ethnographic Notebook №1, 1967, 56 (In Georgian).
60 Ibid.
61 *Kekelia M.,* Materials on Customary Law of Svaneti, Ethnographic Notebook №3, 1969, 8 (In Georgian).
62 Monuments of Georgian Law, Editor: *I. Dolidze*, Vol. 1, Tb., 1963, 416 (In Georgian).
63 Ibid.

seen, the trend was similar with respect of irrecoverable disfiguring of face based on materials recorded by *M. Kekelia*.

Similar wound is punished more severely according to the law of *Vakhtang VI*. In particular, according to Article 48 of this monument: "if a man wounds another man below the eyebrows and above the throat so that the wound was wider than little finger or the face was irrecoverably injured…" the fine shall be similar to one for a hand, or one third of the livestock.[64] As we can see, according to the *Vakhrang's Book of Law*, irrecoverable disfiguring of the face is regarded as the wound of hands (as well as eyes, legs), implying classification of such wounds as the heaviest wounds, just like Svanetian customary law, according to *Eg. Gabliani*. Of course, the decisive factor in this case is visible disfiguration of individual as a result of such wound, while it is natural that with respect of functional damage, such wound is not comparable with loss of hand, leg or eye.

3.2 Responsibility for Face Wounds in Khevsureti, Tusheti and Pshavi, Measuring of the Face Wound with Grains

Customary law of Khevsureti, Tusheti and Pshavi provide the rules for measuring of severity of the face wounds, based on their size, length. We imply measurement of the length of wound by means of the grains and charging of the relevant fine according to the number of grains corresponding to the wound.

Scientific literature considers this issue in details. Many authors provide quite complete discussion of this issue. Initially, we provide information from *R. Kharadze* and his informers from Khevsureti about rules of measuring of the face wounds by means of the grains: "the grains shall be placed along the face wound (*UkanKhadu, UntsruaKerauli*). In this case the part of face not covered with the hat is implied. This is below three upper folds on the forehead. Fine for injuring of the face is calculated in the following manner: once the wound is healed, the scare is measured with the straw–"chkumi". On the image of the straw made on the stone the grains of ipkli[65] and barley are placed, the wheat grains are placed lengthwise and the barley – broadwise. They described as follows: "if the wound is on the face parts free of hair it is measured with the straw "chkumi", then put it on the stone. On the stone the wound shall be drawn with the stone. Further the grains shall be taken, half–ipkli and half–barley, the former shall be placed along the and the latter–across the wound." (*UkanKhadu, UntsruaKerauli*). According to *MgelaChincharauli*'s description: if the wound is on the face, below three folds on the forehead, "the wound is measured with the straw, it is further sketched on the stone with coal, further the grains of ipkli are placed on it along and the barley grains–across the wound sketch. The number of grains shall be counted. The number cows shall be calculated according to the number of grains, which can be placed on the wound sketch, five or seven" (*village Gudani*). After finding out the number of grains, which can be placed on the wound's sketch the charge–cows shall be calculated as total number of grains less two. For example, if ten grains can be placed on the wound, the charge shall be eight cows, as the wound, after healing, would become smaller."[66] These data clearly show the cases, where the wound length was measured with the grains in Khevsureti and the method of measurement. Discussing the wounds on the head

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64 Monuments of Georgian Law, editor: *I. Dolidze*, Vol. 1, Tb., 1963, 494 (In Georgian).

65 "Ipkali" – mountain wheat, sowed in Khevsureti in spring.

66 *Kharadze R.,* Law of Khevsureti, Annals, Works of Iv. Javakhishvili Institute of History, Vol.1, 1947, 172 (In Georgian).

we mentioned that the wound was measured if it was below "three wrinkles on the forehead," the place not covered by hair or hat and is visible. This is confirmed by the informers of *M. Kekelia* as well.[67] *G. Tedoradze* provides further details about the face areas where the wounds were measured my means of the grains. According to his explanation: "if the wound is on the face, the calculations should be made using the grains. Face means the area between three folds on the forehead, chin and ears, Wounds within this area is called face wound…"[68]

As we can see, informers of R. Kharadze provide quite detailed description of the method for measurement of face wounds with the grains, though the method is quite old.

In addition to R. Kharadze, many authors have mentioned the method of measurement of face wounds with the grains in Khevsureti (*Vazha-Pshavela, N. Khizanashvili, S. Makalatia, Al. Kamarauli, M. Kovalevski, G. Tedoradze, B. Gaburi, Al. Ochiauri*). Actually, each of them described this method as the informers of *R. Kharadze* did. For example, they mentioned measuring of the wounds after their healing, placing of the grains crosswise to the wound and use of ipkli (wheat) and barley grains, sketching of the wound size on the stone etc.[69] Certain nuances are provided differently as well. For example, the wound size could be measured not only with the straw (chkumi) but also by means of the thread,[70] and sketching of the wound not on the flat stone but rather on the board[71] or paper[72].

To illustrate the method of face wound measurements by means of the grains, we provide also information of *Al. Ochiauri*, the description of specific case of the face wound measurement: "they measured the wound by means of a thread, placed the thread on the flat stone, drew the line of the same length, brought the grains of wheat and barley and placed on that line, along and across one by one. In aggregate, twelve grains could be placed, they removed two grains from the ends (removed the side grains) and ten ones were left."[73] As we can see, removing of one grain from each side was called "removing of the side grains"[74], in some texts there is "removing of the end grains"[75]

It should be noted that the method of measuring of the face wounds by means of the grains was described in sufficient details in the materials recorded in 70-80-ies of 20th century in Khevsureti by *M. Kekelia* and the personnel of the "Laboratory for Studying of Georgian Customary Law" established by him. It shows that this rule was maintained in Khevsureti for quite long time and in 20th century it was widespread. These materials actually confirm all nuances of measurement of face wounds by means of the grains specified by the above mentioned authors.

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67 *Kekelia M.,* Materials on Customary Law of Svaneti, Ethnographic Notebooks 1977, №1, 62; №4, 29; №6, 22 (In Georgian).

68 *Tedoradze G.,* Five Years in Pshav-Khevsureti, Tb., 1930, 112 (In Georgian).

69 *Vazha-Pshavela*, Head of Khevsuri, Full Collection of Works in Ten Volumes, 1964, 284; *Khizanishvili N.,* Ethnographic writings, Tb., 1940, 51 (In Georgian); *Tedoradze G.,* Five Years in Pshav-Khevsureti, Tb., 1930, 113 (In Georgian); *Ochiauri Al.,* Law of Khevsureti, 1945, manuscript, Personal Archive, Notebook №3, 39, (In Georgian).

70 *Ochiauri Al.,* ibid, *TedoradzeG.,* ibid; *Makalatia S.,*ibid; *Khizanishvili N.,* ibid.

71 *Tedoradze G.,* ibid.

72 *Khizanishvili N.,*ibid.

73 *Ochiauri Al.,* Cutting and Wounds in Khevsureti, Personal Archive, 1954, 6/1, 11; similar description of the mentioned rule is provided in the other data of *Al,. Ochiauri* (see ibid, 6/6, 65; *Ochiauri Al.,* Law of Khevsureti, 1945, manuscript, personal archive, notebook №3, 39-40) (In Georgian).

74 Side grains – grains located in the ends (*Ochiauri Al.,* Cutting and Wounds in Khevsureti, 6/3, personal archive, 31).

75 *Ochiauri Al.,* Law of Khevsureti, 1945, manuscript, Personal Archive, notebook №3, 40 (In Georgian).

For example, one of *M. Kekelia's* the informers of Arkhoti described the details of his face wound measurement: "they measured the wound with the straw, sketched its length on the flat stone, crossed its ends and placed the grains of wheat and barley on it. The grains were placed as follows: first the barley, crosswise and further wheat – lengthwise, further the barley lengthwise, wheat–crosswise and so on, in total, 9 grains were placed."[76] Similar descriptions were provided by the other informers as well.[77] The same materials confirm also that the wounds were measured by means of the grains after their healing.[78] These data about measuring of the face wounds with the grains show that nothing was changed in this measurement method in 2nd half of 20th century and it was applied in the old, traditional manner.

If there were several wounds on the face, each of them was measured separately, number of grains on each of them was counted, less two grains from the ends and the numbers of remained grains were summarized. According to *G. Tedoradze*, "for example, 30 grains could be placed on three wounds. According to the described measurement method, six grains were to be deducted …. 24 grains were left, hence, the party in fault had to pay twenty four cows,"[79], i.e. the final number was obtained deducting twice number of wounds from the total number of grains place d along the wounds.

In data from *G. Tedoradze*, the reason of deducting of two end grains differed from the one mentioned by *R. Kharadze*. As he stated, he could not obtain clear answer about why the first and the last grains were removed, though as he noticed, removing of these grains was the sign of certain forgiveness.[80] May be the mentioned reason of removing of the two end grains is real, in our opinion, the reason named by *R. Kharadze*, i.e. that the wound would become shorter after healing is more likely to be the true one. This opinion is verwell reasoned by *J. Merabishvili*: "though measuring … took place after healing of the wound, it seemed than nothing was to be disputed but Khevsuretian law provided for that in the future the wound would become shorter, it would be healed, as a result of regeneration of the tissues."[81]

It should be noted that in certain cases the grains on the ends were not deducted. Such cases took place, where so called "first damaging of the face" occurred, i.e. where the face wound was the first one for the wounded person. *Al. Ochiauri*explained: "if the wound on the face was the first one, in the life of the victim, and he had no wounds before, the end grains were not deducted and if the wound was not the first one, the grains from the ends were removed…"[82] He provides more detailed explanation: "where the face wound was the first one, the grains were not removed from the ends and their total number was counted and if the wounded person had already had the face wounds, the end grains were removed... If a person was wounded two or more times, the side grains were deducted and the charge was deducted two cows and the remained number was the number of cows to be paid by the party in fault to the damaged party."[83] *Al. Ochiauri* described the specific case, relying on the informer from Shatili, about the enmity

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76 *Kekelia M.,* Materials on Customary Law of Khevsureti, Ethnographic Notebook, 1977, №1, 60-61 (In Georgian).

77 Ibid, №5, 29, 42; *Jalabadze D.,* Materials on Customary Law of Khevsureti, Ethnographic Notebook, 1988, 10 (In Georgian).

78 *Jalabadze D.,* Materials on Customary Law of Khevsureti, Ethnographic Notebook, 1988, 10 (In Georgian).

79 *Tedoradze G.,* Five Years in Pshav-Khevsureti, Tb., 1930, 113 (In Georgian).

80 Ibid.

81 *Merabishvili J.,* Crime against Life and Health (Part 2, chapter 1 "Crime", Customary Law of Pshavi), Collection of Works: Georgian Customary Law, 3, Tb., 1991, 56 (In Georgian).

82 *Ochiauri Al.,* Cutting and Wounds in Khevsureti, Personal aAchive, 6/6, 65 (In Georgian).

83 Ibid.

between someone Khtiso and Levan: "sixteen grains could be placed on Khtiso's face wound and as "his face was wounded for the first time", the end grains were not deducted and Levan was charged to pay sixteen cows (half in kind and half–as equivalent value, as generally accepted in Shatili).[84] Materials of 70-80-ies of 20th century contain quite vast data on this issue. One of *M. Kekelia*'s informers stated that the first wound on the face was called "face disturbing" and in such case the party in fault was charged with the number of cows equal to the number of grains on the wound.[85] The above story told by informer of Arkhoti confirms this as well. As we have seen, nine grains could be placed on his wound but, as the informer said, if he had already had a wound on his face, they would count the grains and deduct the side ones but as this was his first wound, (he was sixteen, when wounded) they have not removed the grains and the party in fault was charged with nine cows.[86] The same is confirmed by the other informers as well.[87] Data provided here show that law of Khevsureti regards the first wound as a circumstance qualifying the responsibility and imposes the charge higher than each of further (second, third etc.) wounds. It made no difference, whether the party in fault was aware that this was the first wound or not. Responsibility for "face disturbing" was increased in any case.

In measurement of the face wound by means of the grains, location of the wound, whether it is in the area covered by beard or not, makes difference. The discussed method of wound measuring was applicable to the wounds on the face areas not covered with beard. In case of wounds on face areas covered with beard it was still measured by means of the grains, though the charge was calculated in a different way. Materials recorded in 70-80-ies of the 20th century contain most complete data about this.

According to these materials, the wounds on face areas not covered by hair (beard) was called "bare wound" and the one on the jaws, i.e. areas covered with the beard was called "covered wound".[88]

One of informers of *M. Kekelia* specified that the face wound on whole face, below the forehead, if located on areas covered with beard, was charged at half rate.[89] The informer implies that for the wound on the area covered with the beard only half of the grains placed on the wound shall be counted. According to the second informer, half of the grains placed on the wound shall be removed and the half shall be counted.[90] According to explanation of one more informer, "if the wound is on the jaw, i.e. on the area covered with beard, than half of the grains shall be deducted".[91] According to the same informer, there was no difference, whether such wound was the first, second or etc. one.[92] This, the wound on the

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84 *Ochiauri Al.,* Cutting and Wounds in Khevsureti, Personal Archive, 6/6, 65 (In Georgian).

85 *Kekelia M.,* Materials on Customary Law of Khevsureti, Ethnographic Notebook, 1977, №6, 40. Other authors also call "face distortion" the first wound on the face (see *Kekelia M*., Materials on Customary Law of Khevsureti, Ethnographic Notebook, 1977, №2, 85; *Jalabadze D.,* Materials on Customary Law of Khevsureti, Ethnographic Notebook, 63 etc) .

86 *Kekelia M.,* Materials on Customary Law of Khevsureti, Ethnographic Notebook, 1977, №1, 61 (In Georgian).

87 *Merabishvili J.,* Materials on Customary Law of Khevsureti, Ethnographic Notebook, 1988, 41; *Jalabadze D.,* Materials on Customary Law of Khevsureti, Ethnographic Notebook, 1988, 63; *Kekelia M.,* Materials on Customary Law of Khevsureti, Ethnographic Notebook, 1977, №2, 60; №5, 29; №6, 22.

88 *Kekelia M.,* Materials on Customary Law of Khevsureti, Ethnographic Notebook, 1977, №1, 62; №2, 85 (In Georgian).

89 *Kekelia M.,* Materials on Customary Law of Khevsureti, Ethnographic Notebook, 1977, №2, 60 (In Georgian).

90 Ibid, 85 (In Georgian).

91 *Jalabadze D.,* Materials on Customary Law of Khevsureti, Ethnographic Notebook, 1988, 11 (In Georgian).

92 Ibid, 12.

area covered with the beard was measured with the grains as well, though in a different way, compared with the wounds on open areas, only half of the grains placed on the wound was counted for calculation of the charge in any case (as for the first wound, also for the further ones). Of course, the wounds on the areas covered with the beard was charged at lower rate (e.g., in case of the first wound, at a half rate) because it was less visible.

Lower charges for the wounds on the face areas covered with beard are recorded by some authors of the earlier period. For example, *B. Gaburi* mentioned about face wound that: "if the wound is on the lips or jaws, half of the grains shall be removed and the number of cows to be given to the wounded shall be equal to the number of the remained ones."[93] (lips and jaws imply the area covered with the beard). *Al. Ochiauri*also mentions that the wound on the "covered" areas was charged differently than the one on the bare area.[94]

The face wound could be located partially on the area covered with the beard and partially on the bare area. In such cases the half of grains on the part of wound covered with the beard was counted while those on the open area were counted in full (if the "face distortion" took place), ir two end ones were deducted (if this was not the first face wound). Grains calculated separately for the areas covered and not covered by the beard were further added and the obtained number was the number of cows to be charged.[95]

Actually similar methods of face wounds measurement was recorded in Pshavi and Tusheti as well.

Such method in Pshavi is fully studied by *J. Merabishvili*. According to his explanation, in Pshavi, measurement of face wounds was provided similarly to the rules effective in Khevsureti. In particular, according bto the materials recorded in Pshavi, the wound length was measured by means of the rope (thread, straw etc.), further the rope was placed on the board (stone, land), the wheat grains were placed along the wound length and number of grains was equal to the number of cows to be charged over the party in fault.[96] Similar rules are mentioned by Vazha-Pshavela, *S. Makalatia*. According to them, in Pshavi, the face wounds were measured by means of the grains and some of them were placed along and the others–across the wound. The legal outcome was the same.[97] Similarity with the rules effective in Khevsureti is apparent though *J. Merabishvili* stated that its operation in Pshavi has almost disappeared and in Khevsureti it was still effective up to the end of 20th century. At the same time, law of Pshavi, unlike the law of Khevsureti, did not provide for any criteria for making punishment more severe or lighter. In particular, unlike Khevsureti, in Pshavi there was not recorded the rule of deduction of the two end grains and imposing relatively heavy punishment for "face distortion", as well as relatively light punishment for the wounds located on the areas covered with the beard.[98]

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93 *Gaburi B.,* Materials of Khevsureti, "Annual Publication of Georgian Linguistic Society", 1923-1924, ibid (In Georgian).

94 *Ochiauri Al.,* Cutting and Wounds in Khevsureti, personal archive, 1954, 6/3, 31 (In Georgian).

95 *Kekelia M*., Materials on Customary Law of Khevsureti, Ethnographic Notebook, 1977, №6, 22 (In Georgian).

96 *Merabishvili J.,* Crime against Life and Health (part 2, chapter 1 "Crime", Customary Law of Pshavi), Collection of Works: Georgian Customary Law, 3, Tb., 1991, 55-56 (In Georgian).

97 *Vazha-Pshavela,* Head of Khevsuri, Full Collection of Works in Ten Volumes, Vol. IX, Tb., 1964, 72; *Makalatia S.,* Pshavi, Tb., 1985, 79 (In Georgian).

98 Ibid, 56-57.

Al. Khakhanashvili confirms existence of rule of face wound measurement by means of the grains. According to his explanation, "face wound was measured by means of the barley grains, two of the grains placed on the wound were deducted and for each of the remained grains the party in fault had to contribute one cow to the victim"…[99] *V. Lagazidze* mentioned about existence of this rule in Tusheti as well.[100]

Data provided here show that the rule of face wound measuring by means of the grains is maintained in more complete and differentiated form. In Pshavi and Tusheti, this rule does not contain the elements maintained in Khevsureti. This was caused by the factor that due to different factors, the norms of Khevsuretian law were maintained for longer time, compared with the customary law of Tusheti and Khevsureti.

The rule of measuring of wounds by means of the grains was applied quite extensively in ancient Georgia. Supposedly, it was characteristic for mountain regions of eastern Georgia, as well as in the lowlands. It is not surprising that this reality was reflected in the Book of Law of Vakhtang, which has sanctioned such rule of wound measurement by means of the grains. It should be noted that according to the Vakhtang's Book of Law, unlike the mountain regions of eastern Georgia, the wounds were measured by means of the barley grains not on the face buy on the body, legs, arms.[101] Supposedly, this is due to the fact that Khevsuretian law (as well as Pshavi law) has formulated different rules of wound assessment.

Rule of measuring of the wounds by means of the grains, in addition to the customary law of Georgian mountain people, is contained in the customary laws of the other peoples. For example, the customs of Unkrat-Chamalali, one of the peoples of Dagestan contain the provision that if the scar is left by the face wound, the party in fault shall pay four rubles for each grain on the wound.[102] Rule of measuring of wounds by means of the grains is contained in Ossetian law as well. M. Kovalski called such rule of measuring of the wound severity "archaic". According to him, for each grain of barley placed on the wound the party in fault had to pay one cow, though the charge could not be more than twelve cows.[103] According to *M. Kovalevski*, the mentioned rule was accepted among Ossetians living in South Caucasus, subjected to political influence of Georgia for many ages and therefore, we should seek the roots of these rules in Georgian law.[104]

M. Kovalevski reasons that the rule of measuring of wounds by means of the grains is ancient by the fact that assessment of the wound severity based on its size was adopted in the ancient law. According to this law, the wounds were assessed by their size. All wounds were charged with one solid, if it was smaller than distance between the first and second fingers, charge grew to four solids and if it was from the wrist to the tip of the third finger, it was charged with twenty four solids and this was the highest charge.[105]

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99 *Khakhanashvili Al.,* Traveller's Diary, "Iveria", 1888 №185 (In Georgian).

100 *LagazidzeVOL.,* From Ethnographic-Historical Past of Tusheti, Tb., 1966, 299 (with the right of manuscript, dissertation for award of the degree of candidate of sciences), 146 (In Georgian).

101 Monuments of Georgian Law, editor: *I. Dolidze*, Vol. I. Tb., 1963, 494-495 (In Georgian).

102 *Kharadze R.,* Law of Khevsureti, Annals, Works of Iv.Javakhishvili Institute of History, Vol.1, 1947, 176 (In Georgian).

103 *Kovalevski M.,* Contemporary Customs and Ancient Law, Vol. 3, M., 1886, 139 (In Georgian).

104 Ibid, 140.

105 *Kovalevski M.,* Contemporary Customs and Ancient Law, Vol. 3, M., 1886, 139-140; Rules of wounds' measuring with fingers was among the customs of one of the Dagestanian peoples. According to these rules, the fingers are placed on the wound and the charge is three times the number of fingers, which could be placed on

The rule of measuring of the wounds by means of the grains, contained in ancient Georgian law, based on *M. Kovalenko*'s observations, supposedly, is indeed ancient and it maintained in customary law of eastern Georgia (completely in Khevsureti) up to 20th century.

4. Conclusion

According to Khevsureti law, for the head wounds, the charges for the wounds according to their heaviness were predetermined. In particular: 1. cutting of head skin (without damaging of "ska") - one sheep; (2. damage of "ska" (without damage of the upper bone) - three sheep; 3. crushing of the upper bone, "coming out" - five cows (damage of upper bone, without its crushing, its "coming out" could be charged at lower rate); 4. damage of "chkhimi", "coming out" of the "chkhimi" bone–eight cows damage of the lower bone, where it is not fully crushed "come out" - twelve cows; full crush of the lower bone, "coming over the brain", when the "ska" of brain can be seen–sixteen cows.

In Svaneti, face wound causing irrecoverable disfiguring of the face was charged with half of the "tsori" (value of the livestock). According to the data recorded in 60-70-ies of the 20th century, its value decreased to about one third or fourth of "tsori".

In Khevsureti, Tusheti and Pshavi the severity of face wounds was assessed based on their length. Length was measured by means of the grains. With respect of the rules of measuring of the face wounds by means of the grains the following conclusions could be made:

1. Wound is measured after its healing; 2. the wound is measured by means of the straw or grass "chkumi" (the wound could be measured by means of the thread); 3. measure taken by the straw or thread is further sketched on the flat stone (board, paper) and with the stone (coal) the wound length is marked (make the line of wound length); 4. grains of ipkli are placed on the line; 5. mixed wheat and barley grains are used for measuring of the wound size; 6. the grains are placed as follows: wheat along and the barley grains–across the wound sketch; 7. number of grains shall be counted; 8. for the wounds on the bare area of face, two end grains are removed and number of the remained ones shall be the number of cows as a charge; 8. the end grains are removed as the wound becomes shorter after healing (possibly there is some element of forgiveness as well); 9. in case of the first face wound. i.e. "face distortion" the end grains are not removed 10. wounds on the areas of face covered with beard are measured by means of the grains as well; 11. grains placed on the part of the wound on the area with beard shall be deducted the half, irrespective of whether the wound is the first one or not and the remained number of grains determine the number of cows as a charge.

the wound, in rubles (*Kharadze R.,* Law of Khevsureti, Annals, Works of Iv.Javakhishvili Institute of History, Vol.1, 1947, ibid).

Sulkhan Oniani*

For the Meaning of the Term "Ganchineba" in Old Georgian Law

1. Introduction

Juridical language as any other professional language is an inseparable part of a speech language. Each word in the juridical language, as in the speech language, has its special place and denotes this or that concrete concept or a group of events.

By paraphrasing *H. Berman's* idea it can be said that law and especially a juridical term "has not only history, but it tells us a history itself".[1] Each term expresses a historical will of a legislator and it is some kind of clue to understand law philosophy of those times. Just this is a reason of a special interest of researchers of law history in relation to each juridical term scattered in law monuments and indirect information sources.

The term "Ganchineba" ("Court decision") has been generally established in today's judicature and it was also broadly used in the old Georgian court procedures.

The purpose of the present article is to give answers to the following questions: Why does the term "Ganchineba" denote the court decision? Why was just this juridical meaning assigned to this word and what does it talk of itself? In a different way, why is "Ganchineba" called so?

Before giving the answers to these questions it must be emphasized that "Ganchineba" (decision or judgment) in the old Georgian justice did not only mean the court decision, but a normative act adopted by a legislative body as well and moreover, by the modern idea it also implies an individual administrative-legislative act.

2. "Ganchineba" in Monuments of Old Georgian Law

In the old Georgian law the term "Ganchineba" in its narrow meaning means a court decision, but in a broader meaning it implies determination of obligatory rules of behavior, creation of justice. These meanings do not contradict one another, as a judicial trial is a particular case of "creation of justice". If the obligatory rules of behavior indicated in the court decision concern the concrete parties participating in the process, the normative demand "created" and ascertained by a legislative body is intended for a wide range of society and has a generally binding character.

The reason because of which under the term "Ganchineba" in the old Georgian law is implied as a normative act, as well as a court decision and by the modern idea it also implies an individual administrative-legislative act, is simple to be explained: in feudal Georgia the rights of law-makers and justice were not delimitated strictly and as a rule, a lawmaker (the King himself or King's Senate-

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1 *Berman H.J.,* Law Tradition of West: Age of Formation, 2nd ed., Moscow, 1998, 26 (Russian translation of *H.J. Berman,* Law and Revoltion, the Formation of the Western Legal Tradition, Cambridge/Massachusetts/ London, "Harvard University press," 1983).

Hall and etc.) was entitled to adjudicate as well. And it is natural that an administrative apparatus was obeying the lawmaker.[2]

The term "Ganchineba" is most frequently used in "Dzeglisdeba" - the set of rules made by King George V the Illustrious (XIII-XIV c.c.). The reasons which caused such a legislative initiative are particularly emphasized with this very term in the introduction of this law book[3] and almost all the articles in this law document have the name of "Ganchineba".[4] Also in all the articles phrase "Ganvachinet"//"Gagvichenia" ("we have created decision") is obviously dominating,[5] with the exception of several articles, the titles of which are indicated like this: "Asre Iqnas" ("So it will be")[6] and "Asre Ikos" ("So it must be")[7].

In Law book of Beqa-Aghbugha (XIII-XIV c.c.) the references to "Ganchineba" are analogous to those in the law document of King George V the Illustrious.[8]

The above mentioned term is also broadly and interestingly used in the introduction of King Bagrat Kuropalati's Law book[9] and not only in the introduction but in other parts of this book too.[10]

"Ganchineba" is often found in certificates-manuscripts, such as for example, in Queen Tamar's deed of donation according to which she was donating serfs to Shiomghvime Monastery (1201 y.)[11]; King Alexander's deed (1440 y.)[12]; "Ghmrtaebis Gujari" (1722 y.)[13]; the document made by King Erekle II and Patriarch Anton I about respect and place of Bishop Ninotsmindeli (1749 y.)[14]; a document made by King Theimuraz II for Sacheremlo parish (1757 y.)[15]: a document made by King Erekle II's son Prince Leon for Mountain and hill dwellers, renewed by Prince Vakhtang in 1782 year[16] and etc.

Besides IV-VI volumes of Monuments of Georgian Law published by *I. Dolidze* are completely devoted to court acts, which are just called "Ganchineba".[17]

According to *Iv. Javakhishvili* the term "Ganchineba" is connected with "appearance" of rules, with "creation" of justice – "Justice is a habit and rule created either by public life of the nation or by

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2 The only real attempt of separation of powers in the century-old history of feudal Georgia – Kutlu-Arslan's team's revolt against Queen Tamar in the 80s of the XII century – collapsed. As for the creation of the Supreme Court institution "Saajo Kari" (word by word "the Persuing Door," The Court) by David the Builder (XI-XII c.c.), it is far from the idea of separation of powers.

3 *Dolidze I.,* Monuments of Georgian Law, Vol. I, the text was published, reserch and glossary was attached by Prof. Tb., 1963, 401-402 (In Georgian).

4 Ibid, 402, 403, 405, 407.

5 Ibid, 414, 415, 416, 419, 420.

6 Ibid, 405, 416, 418.

7 Ibid, 416.

8 Ibid, 426, 448, 450.

9 Ibid, 464.

10 Ibid, 470.

11 *Dolidze I.,* Monuments of Georgian Law, Vol. II, the text was published, reserch and glossary was attached by Prof. Tb., 1965, 31 (In Georgian).

12 Ibid, 126, 127.

13 Ibid, 353.

14 Ibid, 399, 400.

15 Ibid, 409.

16 Ibid, 450.

17 See *Dolidze I.,* Monuments of Georgian Law, Vol. IV, Tb., 1972, (Court Decisions of the XVI-XVIII c.c.), Vol. V, 1974 (Court Decisions of the XVIII century), Vol. VI, Tb., 1977 (Court Decisions of the XVIII-XIX c.c.) (In Georgian).

the state government and a legislative meeting. In the ancient epoch of course justice and the nation's customs-habits were the same. Later when mankind developed and created successful civil life, justice separated from customs-habits. It advanced and became legislation law... The laws in old Georgia were usually made by the clergy, high rank representatives and meeting of the State Senate-Hall, so law in those days was called "Gachenili" ("created", "made") and the action itself was called "Ganchineba" ("creation") or "Ganacheni" ("created")."[18] *Iv. Javakhishvili* gives comparison from Canon Law and thinks that it is the same as "eqthesis" (εχθεσις) indicated in Greek-Orthodox manuscripts.[19]

In connection with the meaning of the term "Ganchineba" *Iv. Javakhishvili's* version is right, but it does not exclude, on the contrary, it supplements the version offered by the present article, which is emphasizing farther roots of etymology of "Ganchineba". Namely it does not only mean "appearance" or "creation" of something that did not exist before. It has also the second meaning, which is connected with "Chin" – clear, shining, bright, illuminated, turned into light. This meaning presumably is originated from the ideological basis established by the Christian doctrine.

3. Denial of Two Bases in the Christian Doctrine

By developing of monotheistic points the Christian doctrine denied the existence of two bases of the Universe. Most likely it can be said that just this ideology was reflected in certain old Georgian terms denoting law and crime.

In the opinion of *St. John the Damascus*, "There is no existence of two bases – kind and evil: these two bases are opposite to each other and they can't be existed together. So each of them must have been existed in only one part of the universe, but firstly both of them would have been encircled not only by the universe, but by the part of the universe as well and secondly who would have defined a separate place for each of them, as nobody can tell that the two would have been able to come to a settlement and conclude peace. It's the truth that the evil, which has peace with kindness, is not evil, and the kindness which is joined with evil, is not kindness either. So it would have been someone else to define a place for each of them that would have been God. Besides it must have been one from these two: either they would have been in contact and spoiled each other or there must have been something medial, where there would have been neither kindness nor evil like a middle wall, bordering them from each other. In such a case there would have been three bases instead of two. Besides it would have been necessary to be one of the following: either both would have had peace, that is impossible for evil (as the peaceful is not evil) or both would have been in struggle, that is impossible for kindness (as fighting is not completely kind) or evil would struggle, but kind would not and would have been depraved and suffered from evil, which is not characteristic feature of kindness. So there is only one basis – kind, which is free from any kind of evil. But then a question may be arisen. If it is so, where is evil from? It is true that evil can't be originated from goodness. So we can say that evil means lack of kindness and going from naturalness to unnaturalness, as nothing is evil by nature. And really everything created by God is very good in the form, as it was created. So if they remain in the form as God created them, they are very good, but if they turn away from naturalness willfully, they will not have anything in common with kindness. Hence every creature is obedient to the Creator. So when any creature willfully becomes unrestrained and

[18] *Javakhishvili Iv.,* Works in 12 Volumes, Vol. VI, Tb., 1982, 29 (In Georgian).
[19] Ibid.

rebellious to the Creator, it firmly joins with evil, because evil is accidental or declining willfully from naturalness, which represents a sin. Where is a sin from? It is a finding of a devil's intention. Is the devil evil? In the way, as it was created, it is kind, not evil, because it was born from the Creator as a shining and light angel. Besides as a thinker it rightfully and willingly departed from the natural kindness and found itself in the darkness of evil, far from God, which is only kind. So as it departed from the kindness willingly (not by its place), it turned out to be in the darkness of evil".[20]

So Christian teaching denied a substantial nature of evil and recognized it as unsubstantial, only as the lack of kindness (as existed and having an essence) -"God is the outset and reason of all types of kindness, without whose joint action and help it will be impossible for us to want and do kind actions. ...Evil means separation of kindness, as it is in the case of darkness – it is separation of light. So if we are settled in what is natural, we are in goodness, but if we depart from the natural, or move from a line of kindness, we will be in evil".[21]

Similarly as in case of kindness and evil, clergymen admitted light as an existed substance, but darkness - not an independent and equivalent substance, but only as the lack of light _ "Darkness is not a creature; it is fortuity, as it is the lack of light... So lessening of light to the air was called darkness by God".[22] This opinion was connected with the act of creation of the Universe by God. _ "Light was just created by God and it was created as kind, as "God saw everything that He had made, and behold, it was very good" (Genesis 1.31)".[23]

They acted analogously in relation to health and sickness. The first one was admitted as a natural state, but the latter – as losing of this natural connection (wholeness). It should be noted that in old Georgian the word "Ganrghveuli" (destroyed, ruined) means "sick", "ill person".[24] According to the opinion accepted in theology "Hard sufferings and sickness must not be admitted as quite lawful and natural cases, they are more representing departure from the norm".[25] God created man to be kind and man "got a perfect body from God. It's certain that this incredibly flawless body did not receive either inner or outer defects from the Creator. There were new, undamaged forces in it; there was not even a slight disorder in this body, not touched by any suffering and sickness, which in the book of Genesis is explained as a punishment for the sins committed by our ancestors".[26]

Just echoes of these opinions are found in the strophes of "The Knight in Panther's Skin" (XII-XIII c.c.). Quotation from this poem: "O King, why accuse the Almighty, Creator of earth and of Heaven? Why should the Father of men, the Creator of good make evil?"; "Dionysius the sage has revealed the following wisdom to us: God is the giver of good and not the creator of evil. Evil is short-lived and transient while good endures for ever. He, the Supreme and Perfect, makes His perfect self more perfect"; "O God, you have turned into light the darkness around me. Now do I see how short-lived and weak is the power of evil!"; "Now that the sun is approaching there exists no darkness for us. Evil is vanquished by good for the essence of good is enduring."[27]

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20 *John of Damascus,* Through Transfer of the Orthodox Faith, Tb., 2000, 453-454 (In Georgian).
21 Ibid, 378.
22 Ibid, 349.
23 Ibid, 345-346.
24 See New Testament (in Old Georgian): Matthew 8.6; 9.2; 9.6; Acts 8.7; 9.33.
25 *Pomaznski M.,* Dogmatic Theology, Tb., 2004, 99 (In Georgian).
26 Ibid, 97.
27 *Rustaveli Sh.,* The Knight in Panther's Skin, Tb., 1986, 37, 471, 454, 426 (In Georgian).

4. Connection of Denying of Two Bases with Juridical Terms

It's easy to note that most old Georgian terms denoting Law and Infringement of the Law are associatively connected with one of these antonyms:

- "Stsori – Mrudi" ("Right – Wrong//Un-right" or "Straight – not Straight");
- "Mteli – Darghveuli" ("Whole - Destroyed");
- "Natheli – Bneli" ("Light - Dark").

Furthermore the first one is considered as a substance and the other – without substance, as ripping and lacking of the substance of the first one.

For example an antonym "Right - Wrong" can be implied in the following terms:

a) "Kanoni" ("Canon", "Law") – it came into Georgian from Greek, but into Greek it came from one of Semitic languages, where it meant "reed" (tall, grass-like plant). In Greek it was the name of one of the wooden instruments used in carpentry for measuring smoothness (evenness) like a leveling instrument, which afterwards became the word denoting a lawbook. The opposite of this word is "Ukanonoba" ("lawlessness"). With the meaning of "punishment" this term ("Kanoni") was used as independently, as well as in the derived form "Gankanoneba" ("turning into law", word by word - making someone "off side" of Law, without the Law).[28]

b) "Samartali" ("Justice") – this word is originated from the word "Marti" ("Just", "Smooth"), which from the very start meant "Right", "Straight".[29]

c) "Marti" ("Right", "Straight") – is a base of "Samartali" ("Rightness," "Fairness") and it also means "Right." Compare: "Martali" ("Right") - not false; "Marteba" ("Owing") _ having in debt; "Martebuli" ("Proper") – doing proper thing; "Martva" ("Ruling") – straightening something".[30]

To the above listed terms were opposed terms: "Gardasvla" and "Gardakhdoma" ("Overstepping" the bounds of proper behavior), which meant "Crime". According to *Iv. Javakhishvili*: "The aim of legislation was settlement of relations between people, putting a border of a line of good behavior, crossing of which represented abusing interests or rights of the state, religion or somebody else. By putting this border basing on the lawbook "lawfulness" should have been established between people and therefore the right actions and behavior of people were also called lawfulness... Violation of the concept of this border or law or rule was assumed as violation of the concept "Gardasvla" ("Overstepping").[31] And really the Bible is identifying the fairness with choosing the right (straight) way and the crime - with the deviation from the right (straight) way: "Ye shall observe to do therefore as the Lord your God hath commanded you: ye shall not turn aside to the right hand or to the left" (Deuteronomy 5.32).[32]

It is possible that term "Tsodva", "Shetsodeba", "Tsdoma" ("Sin", "Fault," "Mistake") denoting a "Crime," implies the idea of deviation from the right way, which in Georgian Language is connected with "falling because of mistake" or "falling down while walking", or "missing the right way". Compare: "Tsdena" and "Tsduneba" - tempting of the right man; "Shetsdomili" – tempted person, having lost the way.[33]

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28 *Javakhishvili Iv.*, Works in 12 Volumes, Tb., Vol. VI, 1982, 24-25 (In Georgian).

29 Ibid, 28.

30 *Orbeliani S.,* Georgian Lexicon, Tb., 1991, Vol. I, 439 (In Georgian).

31 *Javakhishvili Iv.*, Works in 12 Volumes, Tb., 1984, Vol. VII., 188-189 (In Georgian).

32 The same is repeated in Old Testament (Deuteronomy 17.11; 28.14 and *Joshua* 1.7; 23.6) and also in the Canon Law. See *Euthymius of Athos,* Small Canon Law, Tb., 1972, 33 (In Georgian).

33 *Orbeliani S.,* Georgian Lexicon, Tb., Vol. II, 1993, 332, 297 (In Georgian).

The second opposition ("Whole – Destroyed//Ripped") is confirmed again by the term "Samartali" ("Justice"), which apart from "Rightness" must be expressing the "Whole" – flawless by appearance and healthy ("Mrteli" – not ill, not destroyed, without any fault, without any sick).[34] "Samartal-Darghveva" ("Infringement of the law") has the opposite meaning, as disintegration, distribution – "Tsinaaghmdgomi da Damarghueveli" ("resisting and violating the law")[35] – is the same as unlawfulness. Here is also "Naklulevaneba" ("defects"), which is the synonym of imperfection, having a sin, which is not complete, not full; "Ganrghveuli" and "Rghveva" ("Ripped"//"Destroyed" and "Rapping"//Destroing") in Georgian Language are connected with "Shla" ("forbid"), "Dashla" ("not allowing"), "SheShla" ("as making a mistake") and its homonym "Sheshla" ("as going mad").

In the third opposition ("Light – Dark") there will be included "Gachenili", "Ganacheni" as "Light", "Clear", which are connected with "Chin" ("Light"). Compare: "Chena" - eyesight; "Chini" – eye-function; "Ganchineba" - conclusion of judgment; "Ganacheni" - court decision":[36] So the terms: "Gachenili Samartali" ("created law"), "Samartlis Gachena" ("creation of law"), "Ganchineba" ("conclusion of judgment") apart from the meaning of "creation" have the meaning of "light". It means that what is in the darkness can't be seen. There might be lots of suppositions and discussions about what can be in the darkness, but it's enough to "turn light upon it", and "make visible the hidden in the dark", that the polemic will be ceased. Compare: "Sakitkhis Gashuqeba" ("elucidation of the question"); "Natheli Mohpina" ("someone made something enlightened"); "Gamochena" ("doing something such a way that anyone should be able to see it" or "to be appeared – to make clear"),[37] to this is also connected "Gankhilva" ("discussion"), which means "to see something with one's own eyes", what is obvious, from it comes "Gantskhadeba", "Gamotskhadeba", which means "to declare", "to let everyone know about it" and its opposite occurrence is "Danashauli" ("Crime"), "Dashaveba" ("damage", "injury"), or "turning something into black", dark. Compare: "Danashauli" ("Crime") - to commit a sin; "Dashaveba" - to cause somebody physical injury; "Kheibari"- means injured man" or word by word, "person who was darkened".[38]

It should be noted that "Gachaveba" (in Mokheuri and Qizikuri dialects of Georgian language) and "Gachieba" (in Ingilouri dialect) means disclosure, reveal a secret. When somebody is asked to keep a secret and not to tell anybody, he/she is told: "Arsad Gaachao" ("don't let this secret see the daylight").[39] In Megrelian Language "Che" means "white", but "Ucha" _ black, or word by word, lack of whiteness. Compare: "Sikethe" ("Kindness") – "Ukethureba" ("lack of kindness", "not Kind").

5. Conclusion

So the term "Ganchineba" in Georgian Language means "making decision", "creation of Law", "to be illuminated", "to be enlightened", "turned into light" and it impartially proves: there is reflected the denying of the existence of the model of two bases of the universe by Christian Doctrine. Moreover apart from idea of "creating" and "originating" a legislative or court decision not existed before, it implies "throwing light on" and disclosure an obscure issue.

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34 *Orbeliani S.,* Georgian Lexicon, Tb., 1991, Vol. I, 519 (In Georgian).

35 *Javakhishvili Iv.,*Works in 12 Volumes, Tb., 1984, Vol. VII, 190-191 (In Georgian).

36 *Orbeliani S.,* Georgian Lexicon, Tb., 1993, Vol. II, 318, 320; Tb., 1991, Vol. I, 144, 136 (In Georgian).

37 Ibid, Tb., 1991, Vol. I, 134 (In Georgian).

38 Ibid, Tb., 1991, Vol. I, 195, 207; Tb., 1993, Vol. II, 420 (In Georgian).

39 *Glonti A.,* Lexicon of Georgian Dialects, Tb., 1984, 142, 143 (In Georgian).

Gvantsa Gugeshashvili*

Features of Implementation of Proprietary Rights, Existing on the Intellectual Property Objects, in the Form of Contribution

1. Introduction

The Intellectual Property Law regulates the relations with regard to utilization and protection of intangible property objects. The rights originated on the mentioned objects may be of personal nonproprietary nature, as well as proprietary, i.e. the exclusive nature. One of the significant differences, existing between the personal nonproprietary and proprietary rights, is that personal nonproprietary rights are un-disposed, and the proprietary rights may be easily transferred to the third party. The proprietary rights are independent of the private nonproprietary rights; therefore, it is easily possible to have the owner of the private nonproprietary right and proprietary right as the different persons. In many cases it definitely takes place.

The physical person, as well as the legal entity, may be the subject of the Intellectual Property Law. However, it has to be taken into consideration that the creator of object of Intellectual Property Law may be only the physical person, because, as a rule, creation of object of intellectual property law requires the intellectual creative activity. Accordingly, the legal entity may not be the creator of object of Intellectual Property Law. However, the legal entity may easily become the subject of Intellectual Property Law, through obtaining the intellectual property rights. Obtaining of the mentioned right is possible based on the law or the agreement.

Proceeding from the fact that the proprietary rights are disposable, it is worth to clarify, whether it is possible for the owner of rights to contribute the proprietary rights to the enterprise, in the form of contribution, or not. If it is defined that this is possible then it is expedient to define the ways, how they might be transferred to the enterprise and whether the enterprise can use the object of intellectual property, received as contribution, for the activities of enterprise.

The analysis of specific features of the intellectual property object and issues related to the contribution is required for finding answers on the mentioned issues.

2. General Description of Contribution

The agreement of partners to jointly implement entrepreneurial activities is not sufficient in the process of formation of capital society. It is required to make an agreement on the contribution. Transfer of the contribution to the property of society ensures creation of necessary capital for the enterprise.[1]

Each partner bears the equal responsibility for making contributions, unless agreed otherwise.[2]

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1 *Burduli I.,* Theoretical and Practical Issues of Modern Corporate Law, Team of Authors, editor, *Elizbarashvili N.,* Tb., 2009, 211 (In Georgian).

2 *Kindler P.*, Grundkurs Handels-und Gesellchaftsrecht, München, 2008, 240.

The contribution made to the society may be of different type; it means that the form, as well as the volume of contribution may be different. Each contribution has to be made personally by the founders.[3]

The societies of capital types have two differentiating signs: separated legal subjectivity and limited liability. The corporate subjectivity means that the enterprise, but not the partners, is responsible for the debts of the enterprise.[4] However, the mentioned does not mean that the partners' responsibility is absolutely excluded.

The members of capital society are responsible for the liabilities, originated from the agreements concluded by the enterprise, with the volume of contribution that they made for creation of initial capital of the society.[5]

Proper creation of initial capital is of paramount importance. In terms of economy, it is necessary to adequately implement the capitalization. Inadequate capitalization takes place in case if the contributions made to the enterprise are obviously minor compared with the risks related to the activities of the enterprise.[6] This, finally, hampers the normal operation of the society and complicates the relations with the third parties.

Immediately after the partners of the enterprise make contribution, such contribution becomes the property of the society, and does not represent their own property any more.[7] The corporation is protected not only by limited liability of the members, but with the opportunity of having the ownership right on the property.[8]

Based on the article 21 of the Constitution of Georgia, the owners enjoy the right to freely dispose their property. Utilization of this property definitely represents one of the forms of disposal, for founding the Legal Entity of private Law, in particular, for transferring them into ownership. The property of the legal entity is the property of legal entity, as the legal subject, but not the property of its founders or the participants.[9]

3. Objects Capable to Contribute

It is important to determine, which object is considered as capable of making contribution.

In accordance with the paragraph 5, article 3 of the Law of Georgia "on Entrepreneurs", at the moment of founding of the society the partners have to agree on distribution of shares and negotiate the amount of their contribution to the capital. The contribution can be made in the form of tangible, as well as intangible property, performance of works and/or providing the services.[10]

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3 *Hueck G.*, Gesellschaftsrecht, München, 1991, 51.

4 *Ferran E.*, Principles of Corporate Finance Law, Oxford, 2008, 14.

5 *Burduli I.,* Theoretical and Practical issues of Modern Corporate Law, Team of Authors, editor, *Elizbarashvili N.,* Tb, 2009, 211 (In Georgian).

6 *Hamilton R. W.*, The Law of Corporations, St. Paul, Minn, 2000, 142.

7 *Schneeman A.*, The Law of Corporations and other Business Organizations, Delmar Cengage Learning, 5th ed., New York, 2010, 67.

8 *Bevans N.R.*, Business Corporations and Corporate Law, Thomson Delmar Learning, New York, 2007, 5.

9 *Zoidze B.,* Theoretical and Practical Issues of Modern Corporate Law, Team of Authors, Tb., 2009, 79 (In Georgian).

10 Georgian Law On Entrepreneurs (In Georgian), <https://matsne.gov.ge/index.php?option=com_ldmssearch&view=docView&id=28408&lang=ge>, [20.02.2014].

In accordance with the article 147 of the Civil Code of Georgia, not only the items are assumed in the property, but also the intangible property benefits.[11] The concept of intangible property benefit is provided in the article 152 of Civil Code of Georgia, according to which: "intangible benefit represents those requirements and rights, which may be transferred to other parties, or is intended to be transferred, to create the material benefits for their owner, or to give the right to require something from other parties".[12]

Proceeding from the above-mentioned article of the Law on Entrepreneurs, intangible property benefit may be contributed as a form of payment to the capital of the enterprise.

In order to better analyze the matter, it is interesting to discuss, what type of contribution can be made to the enterprise, in accordance with the Legislation of Germany, and what the ways of their transfering are. This issue is regulated under the paragraph 27 of the Corporate Law of Germany. Only the property objects, value of which could be determined, are allowed for this purpose.[13]

The movable and immovable items are considered as ones having the capability to contribute, to which the joint stock company may obtain the proprietary right, the rights regarding land ownership, limited property rights (servitude, usufruct), share in the company, other rights for participation in the company, intangible proprietary rights, as the patent and copy rights, licenses, industrial designs, commercial marks, as the firmname, trade mark, know-how, unity of items and rights, clientele, goodwill and others.[14]

The intellectual property law objects occupy the biggest place in the listing. It appears that using intellectual property objects is permitted in the form of contribution in Germany.

The proprietary, i.e. exclusive rights existing on intellectual property are of absolute nature. These rights bear independent economic value.[15]

In general, the economic essence of rights on intangible property objects means involvement in economic cycle of these objects.[16]

There is no doubt that exercise of a right in the form of contribution represents one of the cases of involvement in the economic cycle.

The approach, established under the Legislation of Germany, is not unusual for Georgian Legislation. Proceeding from the fact that implementation of intangible property benefit, as contribution, is permitted under the Georgian Legislation, and the rights on intellectual property objects definitely belong to such benefit, it follows that it is easily possible to implement the property rights, existing on the intellectual property objects, as contribution.

4. General Description of Intellectual Property Objects

In the course of discussion of features of implementation of proprietary rights existing on intellectual property objects, as contribution, first of all, it is expedient to analyze the specific features of these objects.

[11] Civil Code of Georgia, (In Georgian), <https://matsne.gov.ge/index.php?option=com_ldmssearch&view=docView&id=31702&lang=ge>, [20.02.2014].

[12] Civil Code of Georgia (In Georgian), <https://matsne.gov.ge/index.php?option=com_ldmssearch&view=docView&id=31702&lang=ge>,[20.02.2014], (In Georgian).

[13] *Eisenhardt U.*, Gesellschaftsrecht, München, 2002, 277 (In German).

[14] *Schmidt K.*, *Lutter M.,* AktG, Köln, 2008, 404 (In German).

[15] *Калятин В.О.*, Интеллектуальная Собственность (Исключительные Права), М., 2000, 8.

[16] Ibid, 4.

The concept of "intellectual property object" is typical for countries of continental Europe (for post socialist countries among them). The countries with the system of common law avoid using this concept. However, they use the term "subject matter" – which is translated as subject. The term – object – is inherent to Georgia.[17]

The list of intellectual property objects is given in article 2[18] of Convention founding the World Intellectual Property Organization. In accordance with mentioned article, the object for intellectual property law protection may be represented by any creation, created by a human being, which is the consequence of intellectual (mental - creative) activity. The objects, not requiring the creative activity (for example trade marks), belong to intellectual property. Actually, two categories of intellectual property objects are given in WIPO (World Intellectual Property Organization) listing – objects, which are formed the first time and require creative (author's) activity (creations – writing, invention, scientific discovery and etc.) and the objects, which have to be protected because their using for specific purpose is connected with activity of entrepreneurial – applied nature and, in most of cases, facilitates economic benefit for the first category objects (performance of work, phonogram, broadcast transmission, trade and service mark, firm name, other trade marks).[19]

Intellectual Law is divided into two sections: Copyright Law and Industrial Property Law. These two directions are mainly differentiated from each other by the objects, which represent the subject for protection of the copyright or industrial property law.[20]

The copy rights are divided into two categories: personal nonproprietary and proprietary rights. The list of mentioned rights is given in Georgian Law "on Copyright and Related Rights".[21]

The fundamental principle of copyright law is as follows: The author enjoys the exclusive right to personally implement economic use of work or give the rights to third person to do so. The mentioned right creates the opportunity for author to determine the conditions for using of work and get the property benefit.[22]

The owner of copyright enjoys the exclusive right to use the work in any form.[23]

The owners of objects protected by the Industrial Property Law also have the opportunity to obtain the property benefits. In accordance with the second sentence of article 2 of Paris Convention on the Protection of Industrial Property, the objects of protection of industrial property are: patents for invention, utility models, industrial designs, trademarks, service marks, company names, marks of origination or appellation of origin and prevention of unfair competition.[24]

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17 *Dzamukashvili D.,* Intellectual Rights, Tb., 2006, 13 (In Georgian).

18 The Convention Establishing the World Intellectual Property Organization, (WIPO), Stockholm, July 14, 1967, <http://www.wipo.int/treaties/en/convention/trtdocs_wo029.html>, [25.02.2014].

19 *Dzamukashvili D.,* Intellectual Property Rights, Tb., 2006, 11 (In Georgian).

20 Ibid, 30.

21 Articles 17 and 18 of Law of Georgia on "Copyright and Neighboring Rights" (In Georgian) , <https://matsne.gov.ge/index.php?option=com_ldmssearch&view=docView&id=16198&lang=ge>, [20.02.2014].

22 *Липцик Д.*, Авторское право и смежные права, Русское издание, UNESCO1997, Научно-издательский центр «Ладомир» Издательство ЮНЕСКО, 2002, 45.

23 Comment of Law of Georgia on "Copyright and Neighboring Rights", editor, *Chanturia L.,* Tb., 2003, 123 (In Georgian).

24 Paris Convention for the Protection of Industrial Property, Paris, 1883, <http://www.wipo.int/treaties/en/ip/paris/trtdocs_wo020.html>, [12.02.2014].

The relations, connected with industrial property law objects, are regulated by the special laws in Georgia. Consequently, the rights of owners of mentioned objects are enhanced by these laws.

In accordance with the Patent Law of Georgia the patent is issued for invention and utility model.[25] There is personal nonproprietary and proprietary, i. e. exclusive patent rights provided in the Patent Law. The patent property rights, such as copyright, are disposable. The special rights of the patent owner are regulated under the article 48 of the Patent Law of Georgia; and the issue of transferring of mentioned rights is regulated under the article 60 1 of the same law.

The relations concerning the trade and service marks are regulated under the Law of Georgia on Trade Marks.[26] The trade mark is a word or a symbol, which is used on the product for marking its commercial origination.[27]

The trade mark, as any other commercial mark is the outcome of industrial (commercial) activity and generates only the property rights. The exclusive rights concerning the trade mark is of the same content as the copy right and patent rights.[28]

The article 6 of Law of Georgia on Trade Marks regulates the rights originated from registered trade marks. Transfer of the mentioned rights is regulated under the chapter III of the same law.

The relations concerning the firm name are regulated under the article 6 of Georgian Law on Entrepreneurs, according to which the company name, i.e. the company, is the name, under which the entrepreneurial entity implements its activities.[29] Bearing of a name, accordingly the firm name represents not only the right of a legal entity, but also the liability. The legal entity can not operate without the name (firm name).[30]

The purpose of the firm name is identification of enterprise and its activity, as well as its differentiation from other enterprises, without necessity of indication of goods and services sold at the market by the latter. It characterizes the reputation and goodwill of the enterprise.[31]

The rights of the owner of the firm name are not specified in the article 6 of Georgian Law on Entrepreneurs. In accordance with the Paris Convention for the Protection of Industrial Property, the firm name is protected in union member states without the liability of submission of application or registration, regardless of the fact that it is part of trade mark or not.[32] Georgia is the state participating in the Paris Convention; however, legal entities of Private Law are given the right for firm name only following registration.

As for the objects, provided in the Paris Convention listing, such as marking of origination and appellation of origin, the relations concerning those objects are regulated by the Georgian Law on Appellation of Origin of Goods and Geographical Indicators.[33]

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25 Patent Law of Georgia (In Georgian), <https://matsne.gov.ge/index.php?option=com_ldmssearch&view=docView&id=11470&lang=ge>, [12.02.2014] (In Georgian).

26 Ibid.

27 *Nims H.D.*, The Law of Unfair Competition and Trademarks with Chapters on Goodwill, Trade Secrets..., New York, 1947, 81.

28 *Dzamukashvili D.,* Intellectual Rights Law, Tb., 2012, 275 (In Georgian).

29 Georgian Law on Entrepreneurs (In Georgian), <https://matsne.gov.ge/index.php?option=com_ldmssearch&view=docView&id=28408&lang=ge>, [12.02.2014] (In Georgian).

30 *Chanturia L.,* General Part of Civil Law, Tb., 2011, 222 (In Georgian).

31 Intellectual property, Book I, *Gabunia D. (ed.)*, Tb., 2001, 16 (In Georgian).

32 Paris Convention for the Protection of Industrial Property (In Georgian), <http://sakpatenti.org.ge/index.php?lang_id=GEO&sec_id=131>, [12.02.2014].

33 Georgian Law "on Appellation of Origin and Geographical Indications of Goods " (In Georgian), <https://matsne.gov.ge/index.php?option=com_ldmssearch&view=docView&id=16186&lang=ge>, [12.02.2014].

The geographical indication show the source of product origination. However, unlike the trade mark, which indicates the commercial origin of a product, the geographical indication shows geographical origination. Similar to the trade marks, the geographical indicators grant the legal users with exclusive right to use distinguishing indications. However, the main distinguishing factor is that geographical indicators represent the description sign for real place; all the entrepreneurs, operating in the given territory, enjoy the right to use it for the goods, which are originated from appropriate geographical place. As for the trade mark, it differentiates the goods and services of specific competitor from goods and services of other competitors.[34]

It can be stated that prevention of unfair competition, as the intellectual property object, is protected nowadays, under the Georgian Legislation; however, the Georgian Law on Competition is too much of a general nature. It is indicated in sub-paragraph "b", paragraph 4, article 1 of the Law that this Law does not regulate the relations concerning intellectual property rights, except the cases, when those rights are used to restrict and prevent the competition.[35] It would be expedient to specify under the Law unfair competitive actions.

In accordance with the article 2 of model provisions on protection against unfair competition, elaborated by the International Bureau of the World Intellectual Property Organization (WIPO), any action or activity implemented in the course of entrepreneurial or commercial activities, which causes and/or may cause disorder of other enterprise's activities, especially related to the products and services, offered to the consumer by this enterprise, represents the unfair competitive activity.[36]

The mentioned definition of prevention of unfair competition clarifies that it is impossible to use given object of industrial property in the form of contribution.

The appellation of origin and geographical indication cannot perform the function of contribution.

The firm name may be entered to the company's capital only together with the enterprise.[37] The firm name cannot be used as an independent contribution.

The trade mark is the object with contribution capability. In accordance with paragraph 2, article 25 of Georgian Law on Trade Marks, the trade mark is transferred to another party together with the enterprise or without it. It follows that utilization of trade mark as a contribution may take place without enterprise.

Patent and copy rights may be easily used in the form of contribution.

5. Requirements that Have to be Met by Contribution

In general, the property contribution has to meet specific requirements. First of all, the property contribution shall have defined (determined) economic value; it means that setting of real price must be possible.[38]

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34 *Resinek N.*, Geographical Indications and Trademarks: Coexistence or "First in Time, First in Right Principle", European Intellectual Property Review 29(11), 2007, 448.

35 Georgian Law "on Competition" (In Georgian), <https://matsne.gov.ge/index.php?option=com_ldmssearch&view=docView&id=1659450&lang=ge>, [12.02.2014].

36 Model Provisions on Protection against Unfair Competition, WIPO Pub. №725 (E), Geneva, WIPO, 1994.

37 *Chanturia l., Ninidze T.,* comment of Law on Entrepreneurs, third edition, Tb., 2002, 51 (In Georgian)..

38 *Burduli I.,* the Basics of Law of Associations, T. I, Tb., 2010, 200 (In Georgian).

Before transferring nonmonetary contribution to the company, it is required to set the economic value of nonmonetary contribution.[39] The Georgian Corporate Law makes the defining of contribution rules totally dependent upon the partners' agreement. However, this does not mean that the partners will define the economic value of such contribution. They undertake the liability to get the service of auditing company or the auditor, which provides the competent report on economic (market) value of one or another object.[40]

It is self evident that defining of value is required even in case of using the intellectual property object as a contribution.

Evaluation of intellectual property is the complex of measures of economic, organizational – technical and legal nature. It is used for the purpose of defining the price of intellectual property, as the subject of evaluation.[41]

Contribution capability of intellectual property object is definitely connected with determining its price. For the purpose of its illustration the decision made by the Federal Supreme Court of Austria can be useful, which had to reply to the following question: was it possible to consider as nonmonetary contribution, for example, the operetta of yet unknown composer. The court indicated: as this work belongs more to the category of future performance and at present (during formation of company) it does not have a real value, it cannot be considered as property contribution, even if it really represents wonderful piece of art, with opportunity to achieve big success and obtain sufficient value in future.[42]

It follows that, with mentioned decision, the court did not prohibit implementation of existing property rights on operetta, as contribution, but considered the impossibility of setting of work value as rationale for refusal, by that moment.

It can be said based on the above mentioned decision made by Austrian Court, that any object of Copyright Law can't be used as contribution until it is introduced to the society. Publicity element plays the most important role for solving this issue. After the society becomes familiar with the work, it will be possible to determine how much it deserves endorsement, what are the sales indicators, and etc. Taking into consideration this and other circumstances, the value of work can be determined and only following that the work becomes capable to contribute. Accordingly, the owner of copy rights will be able to use the work in the form of contribution.

Similar to Copyright Law objects, industrial property law objects can also be used as contribution only when defining of their value becomes possible. The patents and trade marks may give much more economic benefit than it is previously calculated.[43] However, not any previous or further calculation makes the intellectual property object capable to contribute, if it, in the moment of making contribution, does not have determined value.

The property contribution, together with the possibility to determine the value, shall meet one more important requirement. In particular, the company shall be able to easily dispose the contribution.[44]

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39 *Makharoblishvili G.,* Positive and Negative Content of Defining of Objects with Contribution Capability, "Justice and Law", 2012, No. 1, 106 (In Georgian).

40 Ibid, 107.

41 *Chiladze G.,* Methodology for Evaluation of Intangible Assets, "Business and Legislation", 2010 (In Georgian), <http://b-k.ge/templates/Jordan/pdf/biznesi%20seqt-2010.pdf>, [12.03.2014].

42 OGH, Judikatur, 2189, 304, 1979, OGH B1, indicated: *Burduli I.,* Property relation in joint stock company, Tb., 2008, 129 (In Georgian).

43 *Chiladze G.,* the methodology for evaluation of intangible assets, "Business and Legislation", 2010 (In Georgian), <http://b-k.ge/templates/Jordan/pdf/biznesi%20seqt-2010.pdf>, [13.02.2014].

44 *Kindler P.*, Grundkurs Handels-und Gesellchaftsrecht, München, 2008, 323 (In German).

What does the capacity to easily dispose the contribution means, when the matter concerns the object of intellectual property law?

The proprietary rights originated on the intellectual property objects give to their owner the possibility to use specific object. The owner of proprietary right is authorized to allow or prohibit the third person to use the intellectual property object. The form of use may be of various types, depending on which object is considered and what purpose is it used for.

In case if intellectual property object is submitted to the enterprise, in the form of contribution, the enterprise is authorized to use this object. However, it is interesting to clarify, in what volume may enterprise use intellectual property object?

First of all, it is worth to mention that during utilization of intellectual property object as contribution it is required to conclude the agreement on transferring the proprietary rights. The scope of use of intellectual property object shall be precisely determined under the mentioned agreement. The fact that intellectual property object is transferred into the ownership of enterprise does not mean that all generated proprietary rights are transferred to the enterprise. For example, it is directly indicated in paragraph 1, article 7 of the Georgian Law "on Copyright and Neighboring Rights" that "copy right does not directly depend on the material object property right, in which the work is expressed."[45]

Transfer of material object can not automatically cause the transfer of copyright In addition, if an author or other owner of copyright expresses the will and third person agrees, transferring of material object is not required for transferring of copyright.[46]

In case if enterprise is interested in obtaining the copyright on Copyright Law object, then the copyright agreement between the person making the contribution and enterprise shall be concluded, in which it shall be determined in what volume an author or owner of copyrights transfers the proprietary (exclusive) rights to the enterprise. An author or owner of copy rights may transfer all proprietary rights or part of it to the successor. An imperative requirement of the law is to conclude the agreement on transferring of copy rights in written form.[47]

The same rule, related to the form of agreement, applies in Industrial Property Law. In accordance with the article 60^1 of Patent Law of Georgia, the agreement on transferring of exclusive rights is concluded in written form. From the same article it follows that alienation of exclusive patent rights shall be registered in industrial property registry at the National Intellectual Property Center ("Saqpatenti"); otherwise the transfer has no power towards the third persons.[48]

Transferring of exclusive rights existing on trade mark is related to particular formal procedures. In accordance with the article 25 of the Law of Georgia on Trade Marks, the agreement on transfer of trade mark is concluded in writing. The changes concerning the trade mark are made in the industrial property registry. New owner of trade mark can not use the rights against third persons without entering the changes to the register.[49]

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45 Law of Georgia on "Copyright and Neighboring Rights" (In Georgian), <https://matsne.gov.ge/index.php?option=com_ldmssearch&view=docView&id=16198&lang=ge>, [20.02.2014].

46 Comment of the Law of Georgia on "Copyright and Neighboring Rights", *Chanturia L.* (ed.), Tb., 2003, 56 (In Georgian).

47 Article 42 of Law of Georgia on "Copyright and Neighboring Rights" (In Georgian), <https://matsne.gov.ge/index.php?option=com_ldmssearch&view=docView&id=16198&lang=ge>, [20.02.2014].

48 *Dzamukashvili D.,* Intellectual Rights Law, Tb., 2012, 291 (In Georgian).

49 "Trademark Law of Georgia "(In Georgian), <https://matsne.gov.ge/index.php?option=com_ldmssearch&view=docView&id=11482&lang=ge>, [22.02.2014].

Proceeding from the above mentioned, it can be said that, in case of acceptance of industrial property law objects by enterprise as a contribution, the exclusive rights are originated only in case if the fact of transferring of these rights is registered in the industrial property registry, together with the agreement concluded in writing.

6. Conclusion

The majority of intellectual property objects are capable to contribute, which means that proprietary rights, originated on these objects, may be used in the form of contribution.

However, the attention should be paid to the fact that capability of contribution of intellectual property object depends whether it is possible to determine the value of specific object, or not. The main point is that the intellectual property object must have the determinable value; otherwise the object cannot be used as contribution. After the intellectual property object obtains the value it becomes possible to use it as a contribution. When defining of value of intellectual property object is impossible, the future growth prospects of value are not important. In the moment of utilization as contribution, it is crucial to determine whether the intellectual property object has determinable value by that moment, or not.

During the implementation of property rights on intellectual property objects as a contribution, it is required to conclude the agreement on transferring of mentioned rights between the enterprise and the person implementing contribution. It has to be determined under the agreement, what conditions apply for the use of the mentioned object by the enterprise. The scope of utilization of intellectual property object, implemented in the form of contribution, may be of different type in each specific case. The owner of proprietary rights on intellectual property object having the contribution capability, may not desire to fully transfer the rights. In such cases, the volume of rights to be transferred to the enterprise shall be clearly indicated in the agreement.

In case of liquidation of enterprise, the proprietary rights existing on the intellectual property object are returned to the original owner of the object, i.e. to the person, who has transferred the proprietary rights to the enterprise. Accordingly, original owner is authorized to use the object at his discretion, for which he enjoys the intellectual property rights.

Lela Janashvili*

Legal Security as the Key Function of the Law and Most Significant Principle of the Law - Governed State

1. Introduction

Interrelations between two traditional elements of legal order–progress and safety[1] – is of great significance in today's jurisprudence.

Law changes with time and is subject to the relevant progress, while legal safety implies its stability. Legal safety, in classic legal literature is considered as fundamental guarantee of unified legal system, fundamental human rights and freedoms and social integration.

Legal safety is provided in the legal system through legal norms and its purpose is providing and protection of the social-legal system and legal order.

Legal safety, regarding its contents, is very wide and all-embracing and due to its contents it should be regarded as the main function of the law and as a constitutional principle.

Legal security changes with time and situation and it could be identified only based on the reality.[2] It was an object of scientific researches many times due to its changing nature and variety of its directions. In the Roman law, the debates related to *iuscertum, PaxRomana,* or*Pax, Securitas y libertas* were not properly developed because of a the casuistic nature of law and absence of the relevant state institutes.[3]

In 16th century *certitude iuris*meant the attempt of rationalization of the legal knowledge. In 18th and early 19th century the trend of codification became apparent,ontended for adoption of the exact laws. In late 19th and early 20th centuries, after many centuries of deficiency, the issues of legal security appeared on the legal norms.[4]

This work is intended to present the substance of the key spheres of legal security, its theoretical and practical aspects.

2. Legal Security as the Key Function of the Law

In discussion of the most significant issue of the theory of law – the functions of the law, we see two contradicting theories. On one hand, in the opinion of one group of the authors, the functions of the law comprise innovation in the contemporary doctrine of the law and on the other hand, the entire tradition of ius philosophy was oriented towards studying of this issue.

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1 *Burdeau G.,* Essai sur l'evolution de la notion de loi en droit français, archivees de Philosophie du Droit, 1939, 48.

2 *Ávila H.,* Teoría de la Seguridad Jurídica, Marcial Pons, Madrid, Barcelona, Buenos Aires, 2012, 35.

3 Ibid.

4 F.C. Fon Savigny (1814, 1840), Meyer (1851), von Mohl (1855), Holleuffer (1864), Bendix (1914), Rumelin(1924), Germann(1935, Scholz (1955) and others.

Term "function" has many meanings. After Rudolf Carnap,[5] Bertrand Russell[6] and other logical schools, the conception of functions acquired the nature of contemporary philosophical language. In the philosophy of law, discussion of functionality includes the projections of sociological nature, where the goals and events are unified. Adding of such "action" to the norm, in many cases, the techniques for solving of the conflicts, their prevention and avoiding are achieved and the mentioned, as the dynamic aspect of legal realism emphasizes use of the term "functions" in contemporary legal-philosophical language.[7]

Doctrinal meaning of the term "functions" in the science was accumulated in the jurisprudence as well. "Law function", according to the classical definition, implies the key directions of juridical impact on the legal relations and the substance of the law and its social purpose are revealed in this.

Doctrine of the law functions allows expanding legal thinking beyond the formalism and sociologism,[8] though discussing the functions of the law, it is identified with the social control, security and justice.[9] Among many models of systematization, Angel Sanchez de la Toree, law sociologist, distinguishes the following groups: a) law functions directed towards the society; b) law functions directed towards the state; and c) law functions directed towards each individual,[10] regarding that the legal order has social, political and juridical nature.

Professor George Khubua classifies the law functions into the following three groups: regulatory, order and anthropological-personal functions of the law, where legal security is considered within the group of the ordering functions of the law.

Security is a very wide concept, though, in any respect, It implies an individual's freedom, right. An individual's opportunity to enjoy various rights. As in many cases with the law conceptions and concepts, definition of the legal security concept comes from its contents.

According to the dictionary of Spanish language of the Royal Academy of Spain, legal security is defined as the characteristic of the law order implying stability of the legal norms and lawfulness of their application.[11]

Regarding meaning of the "concepts in the theory of the law, as well as the difficulties of its formulation, one could say that the lexicographical definition of "legal security" coincides with its contents to certain extent, particularly where the accuracy and authenticity of the legal norms is discussed.

In the law family of the continental Europe and particularly in the group of countries with Roman law (Italy, Spain), in discussing legal security the authenticity, reasonability, accuracy and validity of the norm is emphasized.[12]

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5 *Rudolf Carnap,* follower of logical positivism, representative of the philosophers' group Wiener Kreis established in 1922. The group operated up to 1936. Group terminated its active scientific activities as a result of spreading of Nazi ideology in Austria, when in 1936, the Nazi student killed the founder of the group, founder of logical empiricism, Moritz Schlick.

6 *Bertrand Russell,* philosopher, mathematician and logician, awardee of Nobel Prize in literature, representative of subjective idealism, English neorealism and neopositivism, his significant contribution to the philosophy of language is "theory of description" considered in the essay On denoting published in Journal of Mind Philosophy in 1905.

7 *Sánchez de la Toree A.,* Sociolgia del derecho, Editrial Tecnos, S.A., 1987, Madrid, 76.

8 Ibid, 81.

9 *Vilajosana, J. M.,* Funciones del Derecho: un marco conceptual, Analisi e diritti, Ricerche di giuruspudebza analitica, 2006, 278, < http://www.upf.edu/filosofiadeldret/es/professors/permanents/vilajosana.html>.

10 *Sánchez de la la Toree,* A., Sociolgia del derecho, Editrial Tecnos, S.A., 1987, Madrid, 82.

11 DRAE – Diccionario de la Lengua Española de la Real Academia Española", 22 edición.

12 Royal Academy of Jurisprudence and Legislation, report by Avila Alsina on 8 February 1999 on "Legal Security and Science of Law" discussing work by Lopes de Oniate "Precision of the Law" published in Rome in 1842.

Legal security is the fact. The very characteristic feature making valid and actual the legal norm and also all legal relations and all institutions, as long as the law science shows that the legal security implies not only norms but also the other legal events and legal realities.[13]

Legal security in modern juridical science is considered as clarity, stability, vision, inherent givenness. If the legal norms and legal institutes are not known, precise and stable, if they contain "secrets" and are formed unclearly, in such case, the law is unable to perform its functions.

"Clarity is one of the most significant requirements of legal security. According to this requirement the laws and legal acts relying on them should be sufficiently clear and unambiguous. If the legal norms are contradicting and unclear, the addressee would be unable to orient his/her actions on these norms… The principle of maintenance of trust is one of the significant elements of legal security, together with clarity. This principle serves to strengthening of the trust of citizens to the law. A citizen's trust to the law could be undermined where the law is unexpectedly and fundamentally changed. In such cases a citizen should have the opportunity to orient towards the new legal norm. This problem appears particularly in cases of retroactive operation of the law.[14]

Principle of the law-governed state excludes the possibility of application of the retroactive operation of the law to already implemented factual circumstances for the detriment of a person.[15]

Giving retroactive effect to the laws declaring some action as punishable or making the punishment stricter by the judge or legislator is unacceptable (nullapoena sine legepraevia).[16]

Legal security is regarded as one of the most functions of the law as it comprises the synthesis of numerous components, the justice, its development and progress could not be imagine without it. Legal security ensures social peace.[17]

3. Legal Security as the Principle of the Law – Governed State

The legal security has also the nature of the "principle" in the law. Definition of the law principles includes the substance of law, the fundamentals of its application. General principles of the law are based on the traditions, social cohabitation, scientific thought, legal doctrine, like law-governed state, power distribution, integrity, equality before the law, lawfulness etc. and provide preconditions for formation of the new principles.[18]

And, as, regarding its inherent nature, the legal security is not merely a simple characteristic feature of the legal norms and legal institutes but rather it is the basis, its fundament, it could be regarded as the principle of the law.

Legal security, as a constitutional principle, is embedded into the main law of each country. For example, according to Section 3. Article 9 of the Constitution of Spain, hierarchy of the norms and publication of the norms is guaranteed. Legal security, as associated with the hierarchy of the norms, could not be imagined without its publicity.

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13 *Amorós Dorada F.J.,* Seguridad Jurídica, Fundación Sociedad de la Información – SOCINFO, seminario „Seguridad Jurídica y Administración electrónica", Madrid, 9 de mayo de 2012, 3.

14 *Izoria L.,* Contemporary State, Contemporary Administration, Publiching House "Siesta", Tb., 2009, 200-201.

15 *Wesels I. Bolke V.,* General Part of Criminal Law, Crime and its Structure, Publishing Office of Tbilisi State University, Tb., 2010, 20.

16 Ibid.

17 *Delgado G.,* Derecho, Gráficas Hergon, Madrid, 1971.

18 *Amorós Dorada F.J.,* Seguridad Jurídica, Fundación Sociedad de la Información – SOCINFO, seminario „Seguridad Jurídica y Administración electrónica", Madrid, 9 de mayo de 2012, 3-4.

Theory of hierarchical law formulated by Hans Kelsen and Adolf Merckle implies presence of the basic norm on the top of pyramid. Thus, constitution, as normanormarum and its contents, including the principles of legal security is supreme and shall be recognized as such by the norms of lower ranking.[19]

As for publicity in legal security, it implies that: "each citizen shall have the opportunity of being informed about the contents of the law. Therefore, all legal norms are subject to publication. Regarding increasing complexity of legal system, it is difficult for the citizens to promptly find all types of legal norms and properly understand them. This obligates the state to address two issues: on one hand, it should simplify search of legal norms for the citizens, among them, through modern technical means and on the other hand, it should ensure improvement of the legal advice and service quality for the citizens to allow them better understanding of the laws".[20]

4. Characteristics (Components) of Legal Security

Legal security includes number several significant aspects and we should emphasize the following:

1. Law and the language–clear formulation of the text of the legal norms, the laws; informing of the norms' addressees;

2. Stability of the law;

3. State as the guarantor of legal security.

4.1. Law and the Language

As we have noted, the principle of legal security requires that the text of the law was formulated clearly and unambiguously. Precise formulation of the law text, primarily, is required for uniform interpretation and application of the norms.

The mentioned aspect of legal security is fully ensured by the legislation theory, containing, in interdisciplinary respect, the social and political factors, together with the legal ones. The law, which indeed is not the result of the legislator's fantasy, should reflect all possible preconditions in a complex manner.

One of the most significant guarantees of legal security is the proper legal language. Coincidence of the legal language with the everyday one is of particular significance. Legal language should be precise, versatile and original[21] *(Berger)*.

In addition, discussing the legal language, one should bear in mind that it is highly developed professional language including different language levels: 1. the language of law; 1. scientific (review) language; 3) language of the verdicts and decisions; 4) language of the office workers.[22]

Legal language is of particular significance at the lawmaking and law application stages requiring synergies of the knowledge of the lawyers, philosophers, grammar professionals and linguists.[23] Numerous studies were conducted to research this issue, though Jean-Louis Bergel pays attention to legal

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19 *Amorós Dorada F.J.,* Seguridad Jurídica, Fundación Sociedad de la Información – SOCINFO, seminario „Seguridad Jurídica y Administración electrónica", Madrid, 9 de mayo de 2012, 4.

20 *Izoria L.,* Contemporary State, Contemporary Administration, Publishing House "Siesta", Tb., 2009, 202.

21 *Bergel J.L.,* General Theory of Law, Nota Bene, M., 2002, 386-387.

22 *Khubua G.,* Theory of Law Publishing House "Meridian", Tb., 2004, 124.

23 *Bergel J.L.,* General Theory of Law, Nota Bene, M., 2002, 386-387.

terminology and phraseology. He defines terminology as the set of specific norms characteristic for one or another discipline and states that use of the precise terminology is of great significance and precision is the necessary element. The legislator, judge, practitioner must use the exact and adequate terminology. In addition, it is necessary that the words corresponded to the substance. It is significant that each legal idea had proper definition and was determined by the specific term. And in this case the definition of the idea becomes the meaning of the word. Thus, the legal terms, the sense, concept of which is defined, should fulfill the functions of the "label" or "algebraic sign".[24]

Improvement of the language of law implies not making it closer to the everyday language but linking of the everyday language and the legal language with one another. Reform of the legal language should address the issue of mutual approach of the precision and sense.[25] Language precision means freeing of the juridical provisions from the linguistic structures allowing different interpretations. Due to this difficulty, in the exact sciences they attempt to develop the formalized, artificial languages with fully presented logical structures, while the contents, i.e. the semantic aspect is unambiguous and accurate. The language of the jurisprudence and particularly the one of the laws strives for formalization and standardization and this could be seen in its official and functional nature.[26]

One of the most significant issues related to legal security is clear formulation of the text of legal norms, the laws and awareness of the nor addressees – a citizen shall have the opportunity to plan his/her behavior in advance. Moreover, he/she should be aware in advance, what would be the outcomes.

Number of issues are related to the mentioned statement:

1. Legal norm must be clearly formulated. If the requirement of the norm is an individual's compliance with the said norm and following of the norm's requirements, proportionally, the norm should be formulated very clearly and in addition, in the relevant language, i.e. the language corresponding to the legal sphere to which the said norm is applicable;[27]

2. Legal norm must be known by the norm's addressee in advance. Expectations of the norm's addressees, with respect of the proposed behavior model, must be stable–an individual should know in advance, what is required by the legal norm from him/her.[28] Legal security could not be even discussed if the specified condition is not fulfilled. The only way to avoid the said is the public nature of the norm excluding existence of the secret norms covered for the subjects of law. Of course, not all subjects of law should know all norms, this is actually unachievable. We discuss only the opportunity of getting familiar with the contents of the norms, no one should be prohibited and deprived of such opportunity. In addition, innorantiajuris non excusat (unawareness in the law shall not mean non-compliance with it) – was assessed by some authors as negation of the legal security.

3. The message of the norm should be adequately perceived by the addressee. "Adequacy" comes from number of problems like ambiguous, unclear the norms and this frequently characterizes the legal language. Though, we should take into consideration that there may exist absolutely unclearly formulated rules of behavior.[29]

4. In addition, "the text of the law should maximally adequately reflect the laws of social reality. The text of the law should contain as much legal reality as needed and the text should be as clear as

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24 *Bergel J.L.,* General Theory of Law, Nota Bene, M., 2002, 388.

25 *Khubua G.,* Theory of Law, Publishing House "Meridian", Tb., 2004, 127.

26 Ibid, 125.

27 <http://www.upf.edu/filosofiadeldret/_pdf/vilajosana-funciones_del_derecho.pdf>.

28 *Khubua G.,* Theory of Law, Publishing House "Meridian", Tb., 2004, 48.

29 <http://www.upf.edu/filosofiadeldret/_pdf/vilajosana-funciones_del_derecho.pdf)>.

possible. There is no ideal solution of this problem. This is like squaring the circle - theoretically hopeless and practically possible".[30]

4.2. Stability of the Law

Stability is the Latin word (*stabilitas – atis*) and means permanence, unchanged, continued in time. Philological definition of "stability" provide the first elements, which could be considered under the "stability" as legal term.

Law, as live organism, is at the stage of permanent development. This implies change of the legal norms with social reality. In the opinion of Hans Kelsen, "contents of the norms is oriented towards the behavior of people and develops in the time and space".[31]

One of the main functions of legal order is regulation of the various spheres of public life. Does this endanger the legal stability?

Well organized society requires stability".[32]

Undoubtedly, the law should be stable. In addition, it must adequately reflect the social reality. What could be the outcomes of frequent changes of legislation? This, primarily, causes determining the desired scale of behavior by the addressees in advance and this would negatively impact the general condition with respect of the legal order. Only stable legislation can be the guarantor of compliance with the requirements of law. In addition, it should be taken into consideration that "the law should be stable and in additional, evolutionary, as security includes also recognition of the changing situations".[33]

Thus, the law should be stable and evolutionary, in addition as security adapts to the changing situations. And this is the goal of the contemporary law-governed states: finding of the golden mean between the changes and stability. The state should be always ready to achieve thsuch equilibrium.

4.3. State as the Guarantor of Legal Security and Protection of the Key Rights

"Law, primarily, is the security. Contemporary state should always be the law-governed state. All institutions of the law-governed state share the idea of law-governed state".[34]

The term "law-governed state" used by Robert von Mohl in late nineteenth century for the first time became the synonym of the modern state with time. "Discussing the legal security, as one of the main goals of the state, primarily the social security is implied and it includes two conceptions: first, security of a person and his/her rights and second – legal security, value unifying generation of various types of security".[35]

Hierarchy of the legal norms regarded as one of the key characteristics of the law-governed state, is defined as the guarantee of protection of the rights of individuals through which the supremacy of law

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30 *Khubua G.,* Theory of Law, Publishing house "Meridian", Tb., 2004, 127.

31 *Kelsen H.,* Compendio de Teoría General del Estado, trad. Luis Recasens y Justino de Azcárate, 2.a ed., Bosch, Barcelona, 1934, 149.

32 *Rawls J.,* Justicia como equidad, Tecnos, Madrid, 1986, 103.

33 *Rovira Flórez De Quiñones M. C.,* «Seguridad y Estado de Derecho», en Anales de la Cátedra Francisco Suárez, 11-1, 1971, 74.

34 *Recaséns Sichesl L.,* Panorama del Pensamiento Jurídico en el Siglo XX, Tomo I. Ed. Porrúa, México, 1963, 506.

35 See <http://www.cinder.info/wp-content/uploads/file/DocumentosFortaleza/Castellano.pdf>.

is achieved. The law effectiveness and goals, meaning and substance comprise the legal security. No freedom, democracy and justice exist without security. Society can not develop without security.[36] Hence, security is the main function of the state.

According to the demoliberal doctrine of the law-governed state, the constitution, as the basic law, ensures the key rights, fair trial and legal security.

The state, governmental authorities play the particular role in providing legal security to ensure protection of the law system. Though the legal security does not imply only government's activities for ensuring this function. "Legal security excludes unlawful actions of the state – law is equally binding for both, the citizens and the government".[37] Legal security is considered as a value[38] to ensure protection by the state and from the state as well as the political history knows many such examples.

Legal security is proportionally correlated with protection of the fundamental rights as in includes such content criteria as universally recognized human values (life, dignity, property and other rights).[39]

Professor BesarionZoidze identifies the legal order with security and considers it with respect of the fundamental rights. In his opinion, "protection of fundamental rights is impossible of no general order of the laws exist ... Any order should be the expression of constitutional order and should be based on the values recognized by the law. Such order is a necessary condition of the society's legal security."[40] It compares correlation between legal security and fundamental rights with the building and its foundation: "correlation of legal order with the fundamental rights is similar to the one of the building foundation and the building".[41]

5. Definitions of the Legal Security by the Constitutional Courts

The role of constitutional courts in fostering of the law principles and new values is indeed very significant.

In 1970, German Federal Constitutional Court defined legal security as constitutional principle and equalized it with the principle of legality in the hierarchy.[42]

Legal security is discussed in decision No: 2/3/522,553 of 27 December 2013 of the Constitutional Court of Georgia on case "GrishaAshordia" Ltd. V. Parliament of Georgia. The subject of dispute was compliance of Section 1, Article 7^3 and the words "from 1 January 2012, the legal entity of private law loses the right of recognition of the property tights on the land in lawful ownership (use)" in Article 7^4 of Georgian Law on Recognition of the Land Parcels in Ownership (Use) of Natural Persons and Legal Entities of Private Law to the Constitution of Georgia and in particular, to articles 14 and 21 thereof.

By its decision the court did not satisfy the constitutional claim ("GrishaAshordia" Ltd v. Parliament of Georgia) on Section 1, Article 7^3 and the words "from 1 January 2012, the legal entity of private law

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36 *Borja Cevallos, R.,* Enciclopedia de la Política, <http://www.enciclopediadelapolitica.org>.

37 *Khubua G.,* Theory of Law Publishing House "Meridian", Tb., 2004, 48.

38 <http://www.cinder.info/wp-content/uploads/file/DocumentosFortaleza/Castellano.pdf>.

39 *Khubua G.,* Theory of Law Publishing house "Meridian", Tb., 2004, 48.

40 *Zoidze B.*, Constitutional Control and Order of Values in Georgia, Society of Technical Cooperation of Germany, 2007, Tb., 45.

41 Ibid.

42 *Ávila H.*, Teoría de la Seguridad Jurídica, Marcial Pons, Madrid, Barcelona, Buenos Aires, 2012, 20.

loses the right of recognition of the property tights on the land in lawful ownership (use)" in Article $7^4$of Georgian Law on Recognition of the Land Parcels in Ownership (Use) of Natural Persons and Legal Entities of Private Law to the Constitution of Georgia and in particular, to articles 14 and 21 thereof.

With respect of the case under consideration the court regarded that "Article 21 of the Constitution should be interpreted with regard of the principle of legal security. Legal security principle comes from the principle of the law-governed state. Many decisions of the constitution court provided explanation of one of the most significant elements of legal security – principle of determination, strengthening the guarantees of predictability of legislation. One more significant component of legal security is the principle of legal trust.

Principle of legal trust serves to improvement of the citizens' trust to the court. Undermining of the trust of addressees of the law by unreasonable and frequent changes of the rights provided by the law is unacceptable. A citizen should have the trust with respect of the privileges provided for by the law. Legislation should fulfill the functions of ensuring personal freedom. Individuals should have opportunity to conduct personal, professional and economic activities within the stable legal scopes. Improper legal development, substantially undetermined and unreasonable causes sense of uncertainty delaying personal development of an individual. Legal security is a significant precondition for personal freedom".

Court decision states that "regarding the principle of legal security, the legitimate expectations to which the individuals trust should be protected. The degree of individuals' trust to the rights provided by the law is very high. Unreasonable undermining of the mentioned trust would negatively impact the trust to the law and legal security.

Article 21 of the Constitution of Georgia protects only legitimate expectations arisen on the lawful basis. To regard the expectation as legitimate and hence, protected by Article 21 of the Constitution of Georgia, it should have th lawful basis and should comprise the claim arisen from specific legal relations. Article 21 of the Constitution of Georgia does not create the right of unconditional claiming material benefits from the state. Here the case where the claiming of material benefit is based on specific, valid legal basis is implied".

Court regarded that "the disputed norms were adopted for achievement of certain public goals. In addition, regulation provided for by the norms is logically related to the goals to be achieved and comprises the means for their achievement. It should be taken into consideration that the legal entities of private law had the reasonable opportunity to enjoy the rights granted by the state from 2007 to 2012. Regulation established by the disputed norms could not be regarded as contradicting to the principle of trust and do not comprise unreasonable unjustified restriction of legitimate expection of property acquisition. Hence, there is no contradiction with Article 21 of the Constitution of Georgia".[43]

Decisions of the Constitutional Court of Spain with respect of legal security issues are of significance as well. In particular, according to the decision of 20 July 1981 of the Constitutional Court, "legal security is unity of legality and precision, unacceptability of retroactivity, hierarchy of the norms and publications", but it does not include necessity of historically formed existing regime, what would cause stagnation of law order".[44]

"Legislator should take into consideration clarity of the legal norms and not normative ambiguity, addressees of the legal norms, legal entities and citizens should be informed about proposed model of

[43] See <www.http://constcourt.ge>.

[44] STC 227/1988.

behavior… they should not allow manipulation with the norms leading to uncertainty", states the decisions of the Constitutional Court of Spain.[45]

6. Conclusion

In discussing legal security, finding out its significance as the function of the law, we can say that it is ore than function of the law. Similarly we can conclude in discussing it as the principle of the law – legal security is more than principle of law.

Legal security could not be identified with the public interests. Legal security is the basis of the interests of the entire society (private and common), existence of the state as such. This order is binding for all.[46]

[45] STC 46/1990; STC 146/1993.

[46] *Zoidze B.,* Constitutional Control and Order of Values in Georgia, Society of Technical Cooperation of Germany, 2007, Tb., 46.

Giga Gabrichidze*

Private Enforcement of Georgian Competition Law: Perspectives for the Future

1. Introduction

In the legal basis of Georgia the term "enforcement", as a rule, is perceived as a fulfillment of the court ruling (including that of criminal case related decision) and does not contain that stage, where a private entity appeals to court for their legal rights protection. In the international practice of competition law, the term of "private enforcement", private legal enforcement in Georgian, regards specifically cases like these. In the article presented here, the term "enforcement" implies the case when the carrying out competition law is performed regarding particular person. Due to the damages caused by the violation of the competition related law and the restitution of the damages in view, Georgian population was given the possibility to sue in court first on May 8, 2012 when the amendment of the law about the competition and free trade was first introduced into the Georgian legal code. (On March 27, 2014 known as the amendment regarding the competition law). In addition, according to the new law, the aggrieved party has no legal resource to apply to the competition agency and hence, has the only one way to apply directly to court. Therefore, ruling the cases of competition took upon a special importance.

The goal of this article is to determine the importance, which is give the enforcement of the law the new legal body is empowered with – the competition agency and whether the agency's role in relation to the violators and aggrieved party regulatory process be considerably simplified. In addition, whether the enforcement of the competition law serves the same interests of both the agency and those considered to be aggrieved. Another issue is whether the enforcement of the law be considered as an alternative of the civil act. Special attention will be paid at paragraph $33^{1}$of cooperation and resolving the conflict emerged among private entities, as well as the prospects of execution of the independent legal practice at the competition agency. Besides, the advantages and disadvantages of private and public legal enforcement practices will evaluated. The article also briefly delineates the USA example, which enjoys rich experience of damage restitution for violations of the competition and free trade related laws.

2. Modern Trends: Contribution of the State to Competition Related Legal Enforcement by the Private Entities

To enhance the enforcement of the legal enforcement of the competition related law by the private entities, many steps had been made throughout the last two decades. On May 8 2012, Georgia also shared the practice: the law had been accepted "of free trade and competition (with amendment of March 27, 2014 known as "Competition Law"). The last step made by European commission in this direction

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was the issuance of so-called "white book" (on April 3), which concerned the restitution of the damage caused by the violation of the competition law. According to the White Book, European commission recommended the enhancement of the law through private entities. The body of European commission certifies the fact by stating that state involvement in this process is not sufficient while the subjects, who had born the damages caused by particular economic agents by violating the competition related law, are compensated in extremely rare cases[1].

On May 8, 2012, the acceptance of the competition law, which first in the history of Georgian competition law made it possible for the private individuals to execute the competition related ruling, yielded the following questions: whether the market role of the state diminishes with the introduction of the competition law, so that it can protect the healthy competition. Whether the jurisdiction made it as a legal transfer from the state to the private entities. In this way, except for the European legislature, the US experience is of extremely high interest, where the private enforcement of the law was historically an issue and it practical application was fully performed two centuries ago.

2.1 The Import of "Private Enforcement" from the US. Will it Work in Georgia?

The possibility at privates to demand the restitution for the damages caused by violation of competition law existed in the USA back in 1890 and onwards (Sherman Act, chapter 7). However, the quantity of this appeal has considerably risen since 1960s. This statistics also implies the cases when competition law was enforced based on "follow-on" actions, which is when the claim was satisfied after the violator was revealed through the "private means". It means the suits like that served in US rather additional sanctions and hence, partly, it would be exaggeration to assume that the execution of the law this was had diminished the role of government in resolving the cases of the kind[2]. At the same time, one should consider as well that the success of such a scale from the private entities in the US was caused by the preconditions, which in relation to enforcement of the competition law have not existed in Georgia. Therefore, the following aspects the following aspects are to be taken in view:

The possibility of three-fold restitution of the damages caused by the violation of the competition law. Because regulation of the kind exercises negative influence in the US for the "Leniency Program", for the economic agent, who will cooperate with the investigation proper, there might be an exception allowed, namely the damage caused by him/her can be restituted only one-fold.

According to the US legislature, the claimant, in case the claim is not satisfied, does not pay the fees the defendant has raised. The result: the claimant has their legal expenditures considerably decreased.

The simplified rule for pre-trial discovery makes it easier for the private entities to ease the burden ensued from violation of the competition law.

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1 Weissbuch der Kommission, Schadenersatzklagen wegen Verletzung des EG-Wettbewerbsrechts, KOM (2008), 165 endg., 2 (in German), <http://ec.europa.eu/competition/antitrust/actionsdamages/files_white_paper/whitepaper_de.pdf>, [02.05.2014].

2 *Möschel W.*, Behördliche oder privatrechtliche Durchsetzung des Kartellrechts? Wirtschaft und Wettbewerb 2007, 483, (486) (in German).

2.2. The Law of 2012: What Special Steps Have Been Made to Contribute to the Work of Private Entities to Enforce the Law?

Georgian legislators foresaw a number of norms for the law of May 8, 2012, which unambiguously point to the fact that the special role in resolving the competition related legal issues should be attributed to the private entities. The question remains, whether the rigidity of the legal mechanisms conform to the will of the legislature when executed in practice. At the head of this article, those amendments will be analyzed, which should contribute to the legal enforcement of the law from the private entities entailed.

2.2.1 The Pre-trial Stage of the Competition Agency

According to paragraph 18, point 1, minute "a" of the competition law, the competition agency is empowered to investigate the case according to the claim received or/ and the suit proceeded (also according to their discretional initiative). According paragraph 3, points "n" and "o" of the same law outline who the claimant of declarant can be:

"Declarant is a person how owns the information or evidence regarding the sever violation of the Georgian competition law. However, the person is not the one exposed to the direct damage (highlighted by the author, for what the person appropriately applies to the competition agency. The claimant – economic agent is the one who considers themselves as an aggrieved party for the damages caused through the violation of the law, for what the one appeals to the competition agency."

Therefore, the law grants the possibility to the economic agent, aggrieved by the violation, appeal to the agency with claim. At the same time, the same law does not apply for the physical entity. In case of the physical entity, material damage should not be revealed so as the party could claim the damage at the agency. Hence, the third paragraph of the law ("o" minute) does not allow the physical entities, damaged by the violation of the competition law, apply to the agency. With this legal norm, the legislature does not leave the physical entities the legal choice rather than to "transmit" them directly to the private party solutions.

2.2.2. Appealing to the Court Avoiding the Agency

Because of the violation of the competition law, the possibility to avoid the agency is delineated by the paragraph 28, point 1 of the same law:

"The person has the right to appeal to the court without first appealing to the agency".

The second point determines the authorized court as the body – "Tbilisi regional court that tries the case".

Therefore, Georgian legislature through accepting the law about "competition" partly increased the legal authority of physical entities to pursue their cases by the private means and the motivation proper. However, compared to American court, Georgian law is less attractive to the oneswho are considered as damaged by the actions violating the competition law. The question remains how possible it is the physical entities execute the competition law independently in practice. This question will be analyzed in the chapter to come.

3. The Efficiency of the Private Claims in the Process of Damage Restitution Related to the Competition Law

3.1 Private Claims for the Damage Restitution against the Cartel Agreements

Among economic agents, detection of the cartel agreements on practice is one of the hardest task for any claimant ever. The setting has not been considerably changed even after the passing of the competition law. Hence, the logical question emerges - how should the private enforcement be enhanced so that the private claimant is able to prove the violation of the competition rule when he or she has no any access to the documents of the enterprise in view. Even for the competition agency, which compared to the private individuals enjoys far more advantage for case examination, finds it extremely hard to prove any specific agreement between various economic agents.

Nor paragraph 102 of Georgian procedural code, which regulates the burden of proof and proof acceptability, takes in consideration the simplification of the proof burden for any particular individual as it clearly indicates that "proving can be performed by the party (third person) clarification, witness testimonies, formulation of the facts and materials, written or tangible evidences or expert reports". Cartel agreements, as a rule, are concluded orally and even if agreed in a written form, the claimant will not be able to retrieve the evidence or present it to the court trial as such.

Therefore, the competition law does not own any real mechanisms aiming at easing the process of testimony retrieval and producing it at court trial for the parties involved. The only tool for the ease, when the law steps into power, is the "follow-on" claim. That is the claim made by individual and maintained by the agency ruling where the testimony of the violation of the competition law is certified by the ruling of the agency (proving the act of violence committed by the economic agent in view).

Unlike the cartel agreement, economic agents, as a rule, experience less of that information deficit sufficient for proving the abuse of the dominating position. Regarding the mentioned, the prospects for the private entities to execute the competition law seemed to be more viable with regard of the dominating position of those agents who would abuse it (paragraph 6 of the competition law). The answer to this issue will be given in detail in the following chapter.

3.2. The Claim for Abusing the Dominating Position

As a rule, economic agents have better information regarding those markets in which they operate (compared to the competition agency). Thus, unlike the cartel agreements, private entities enjoy more possibilities here to clarify their claims in court. Meanwhile, the current trend should also be considered according to which there is the practice of legal enforcement known as "more economic approach", thus when the case of the market abuse is being examined, it calls for more accuracy while, in some cases, the action of any particular enterprise could otherwise have had positive effects on the market overall. This means the bodies responsible for competition protection are ready to show a blind eye to the "domineering case" abuse if it exercises general good for consumer interests and the market in all[3]. Besides, economists address the agencies responsible for commitment to the competition rule stating

[3] *Schmidt A., Voigt S.,* Der „more aconomic approach" in der Missbrauchsaufsicht, Wirtschaft und Wettbewerb 2006, 1097, (1103) (in German).

that their interference to the market with the purpose of the price reduction in some cases may cause damages to the competition itself[4]. Thus, the private entity practice of the competition law with regard of the abuse of the dominating market power acquires the special importance.

In this regard, the cases when the well-known brand producer might refuse the economic agent to sell some of its items can be of additional interest. In these cases, the manufacturers try to maximize the policy prohibited by the competition law[5]. Thus, the private enforcement of the competition law in this case would have been left without alternative means.

The competition law analysis indicates that the future of the private enforcement of the law exists only in case of the abuse of the dominating position. In case of the cartel agreement, its possibilities are only limited by the "follow-on" practice.

3.3. Proposals of European Commissions according to the "White Book"

The European Commission issued the "White Book" on April 3, 2008 concerning the restitution of the damages caused by the violation of the competition law[6]. From those proposals, three ones are of particular concern:

Collective legal protection. In case of violations, as a rule, the damage caused to one particular person is extremely small. However, regarding the fact that the overall number of those exposed is considerably large, the damage is large as well. From the viewpoint of each individual, it would be economically unprofitable to sue the case. This fact could free the violator from the legal proceedings. Thus, European Commission introduces the following proposal so that the governments contribute to particular unions or groups of individuals to bring the matter to court. Particular claims will be unified in one, collective claim[7]. This fact will enhance the legal processing of the case, as the claim will be prepared by competitive institutions[8].

The simplified way to construe the evidence. The defendant should be made responsible to produce "specifically notified, important evidence[9]". At the same time, the European Commission signifies that the Leniency Program does not lose its importance[10].

Responsibility for the violation of the competition law regardless nature of the guilt[11]. According to existing law, in case of cartel agreement, the claim issue is less important when the most stress is

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4 *KuhnT.,* Preishöhenmissbrauch (excessive pricing) im deutschen und europäischen Kartellrecht, Wirtschaft und Wettbewerb 2006, 578, (579) (In German).

5 *Möschel W.*, Behördliche oder privatrechtliche Durchsetzung des Kartellrechts? Wirtschaft und Wettbewerb 2007, 483, (485) (In German).

6 Weissbuch der Kommission, Schadenersatzklagen wegen Verletzung des EG-Wettbewerbsrechts, KOM (2008), 165 endg., 2 (In German).

7 Weissbuch der Kommission, Schadenersatzklagen wegen Verletzung des EG-Wettbewerbsrechts, KOM (2008), 165 endg., 5 (In German).

8 *Ritter J-S.,* Private Durchsetzung des Kartellrecht, Wirtschaft und Wettbewerb 2008, 762 (767) (in German).

9 Weissbuch der Kommission, Schadenersatzklagen wegen Verletzung des EG-Wettbewerbsrechts, KOM (2008), 165 endg., 5 (In German).

10 Weissbuch der Kommission, Schadenersatzklagen wegen Verletzung des EG-Wettbewerbsrechts, KOM (2008), 165 endg., 12 (In German).

11 Weissbuch der Kommission, Schadenersatzklagen wegen Verletzung des EG-Wettbewerbsrechts, KOM (2008), 165 endg., 7 (In German).

made on proving the case regarding the abuse of dominating economic position. This proposal prepared by European Commission is partly problematic while, in future, if in case of the violation the nature of the guilt will not be taken in regard, this fact might cause the limitation of economically profitable innovations[12].

Although the White Book issued by the European Commission tries to lift up the barriers to execute the law by private entities and by these means and improve conditions for legal enforcement, these proposals do not give enough space for considerable improvements.

4. Cooperation Program – the Conflict between the Public and Private Enforcement of the Competition Law

4.1. The Issue

The cooperation program, regarded by paragraph 33^1 of the competition law disagrees with the private enforcement of the law. The attractive character of the program considerably diminishes when the economic agent, after the corresponding agency's ruling, has to restitute the damages caused to all individuals exposed. To avoid this scenario, in the USA, the economic agent, in case like this, may have be given the possibility to restitute the damage only one-fold (instead of three-fold) and not held responsible collectively.

Therefore, paragraph 33^1, the program, is confronted by the private enforcement of the competition law. A private entity enjoys the right use the information concerning the restitution of the damage, receivedin the framework of the collective program, to clarify the advanced claim. Hence, the question is raised, whether the program may lose its lucrative character especially for the fear of the "follow-on" claims.

The cooperation program introduced by Georgian legislature represents the method proved by international practice aimed at the cartel agreement. The participant of the program (economic agent) is freed from sanctions (fully or partially). However, it does not spread on private legal responsibilities. It means that the economic agent, who may have an idea to cooperate with the competition agency, will have to consider the private claims for the restitution of the damage advanced against him in court. This primarily concerns the economic agent, who does not anticipate the full elimination of the sanctions. The participant of this category may be considered as the first addressee of the "follow on" claim[13]. Besides, unlike the USA, the agent – according to Georgian legislature – may be held accountable for the restitution of collective damage and the program, therefore, can absolutely lose interest for him (her).

The economic agent, participant of this program, is liable to provide the competition agency with the information concerning not only his (her) private involvement, but that of other agents involved. The information for the cartel agreement is especially precious for the aggrieved party. Thus, if the party will have access to it and they claim the restitution by the private legal means, the collective program may be seriously questioned[14].

As a result, the efficiency of the program in Georgia, will partly depend on protection level of the information provided by the economic agent so as it is not used for the satisfaction of the private claims.

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12 *Ritter J-S.,* Private Durchsetzung des Kartellrecht, Wirtschaft und Wettbewerb 2008, 762 (770) (In German).

13 *Jüntgen D-A*., Zur Verwertung von Kronzeugenerklärungen in Zivilprozessen, Wirtschaft und Wettbewerb 2007, 128, (128) (In German).

14 Ibid, 128, (129) (In German).

4.2. Protection of the "Confession" made by Economic Agent

Along with the right contribution to the legal enforcement of the competition law by private claims, the European Commission attaches much importance to the fact according to which the collective program does not (and should not) lose its lucrative character. The purpose of the European Commission is not to see the participant of the program in a worse situation compared to the other economic agents[15]. It means the participant of the program does not receive the immunity against the private claims but cannot find himself or herself in a worse situation compared to the other agents, victims of the cartel agreement. However, the European Commission does no exclude the fact according to which the restitution of the damage on behalf of participants of the program be limited to the partners of direct and indirect agreement[16].

4.3. Access to the Documents by Private Entities

a. Documents Owned by the Competition Agency

To ensure the efficient operation of the cooperation program, the competition agency should apply efforts to protect "confessions" made by economic agent from access to the private entities. The legal foundation, according to which the private entities could have been empowered to appeal to the data, does not exist. Besides, the competition agency should be careful so as when made to publish, the name of the economic agent, participant of the program, and especially exact contents of "confession" is not available for the public. On its own, the European Commission calls on appropriate agencies make ready to receive "confessions" in a verbal form.

b. The Documents Owned by Participants of the Cooperation Program

The documents owned by economic agents who are participants of the cooperation program are less protected against private entities compared to those at the competition agency. Hence, the economic agents try (or will try) not to store potentially "dangerous" documents in their offices.

Therefore, the enhancement of the competition law enforcement by private means contradicts the efficiency guaranteed by the cooperation program. However, the threat for "confessions" to be made publicly available currently is no so high so that economic agents abstain from cooperation with the competition agency.

5. Private of Public Legal Enforcement?

Since the competition law has advanced, the private enforcement raised a question: private or public legal enforcement. The answer to this question is not easy to find while both of them have positive and negative sides. Those are to be considered below.

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15 Weissbuch der Kommission, Schadenersatzklagen wegen Verletzung des EG-Wettbewerbsrechts, KOM (2008), 165 endg., 13 (In German).

16 Ibid.

5.1. Public Legal Enforcement of the Competition Law

Advantages of the public legal enforcement of the competition law may represent the following issues[17]:

The competition agency holds public authority. It gives the agency additional administrative resource to launch investigation and apply sanctions in case some legal norms are violated. Sanctioning in view of the competition law violation is extremely important.

Public enforcement of the competition law is less expensive than the private one. It is explained by specialization of the competition agency.

There is less possibility the competition agency abuse its authority.

The disadvantage of the public legal enforcement may be considered politically biased decision. It particularly appeals to the concentration norms regulated by paragraph 11 as well as subsequent ones. The competition agency may serve as an impeding mechanism of the purchase of the Georgian enterprise by the foreign one. For example, when making a decision, the agency may take in consideration criteria having no connection with competition. Therefore, the independent character of the agency is crucial when the competition law related issues are to be resolved.

5.2. Private Legal Enforcement

When specific market is the issue, quite often a private claimant seems to be more competent than the agency staff. In addition, the liabilities ensued for the restitution of thedamage by private enforcement means represent additional sanctions on behalf of the violators. However, this advantage in view, the legal execution in this form is bound with numerous negative circumstances. The following needs to be noticed:

The competition law comprises numerous, not fully defined legal terms, the interpretation of which by the agency might be performed individually.

The claimant's costs are quite high in case the one loses the trial: the one is held responsible to pay not only his and her own, but the costs of the defendant.

One of the main weaknesses of the private legal enforcement is the danger of the very right, which can be improperly used[18]. This happens when the economic agent, who is not able to proceed healthy competition with the competitors, tries to impede them "resorting" to the legal means.

5.3. Emerging Interests at Private and Public Legal Enforcement

In the end, the question should be answered: whether public and private enforcements have the same objectives. Is an individual physically able to fulfill the function of the state with regard of the healthy competition?

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17 *Wils W.P.,* Should Private Antitrust Enforcement be encouraged in Europa?, World Competition, 2003, 473-488.

18 *Möschel W.,* Behördliche oder privatrechtliche Durchsetzung des Kartellrechts? Wirtschaftund Wettbewerb 2007, 483, (483) (In German).

a. Public Enforcement

The competition agency represents the mechanism for the public interest protection. The state delegated the legal authority so as it guarantees healthy, productive competition.

b. Private Enforcement

Private entities, as a rule, are driven by their private interests. Therefore, the private enforcement of the competition law can be possibly viewed as the means filling in the function of the public enforcement.

Thus, both private and public enforcements have different goals. By enhancing private legal enforcement, the work to be carried out by the competition agency cannot be marginalized because without the investigation carried out by it, for the private entities, it will be extremely hard to prove the violation of the competition law in court.

Public interest, so that the competition related laws are strictly abided, do exist. As a result, it is appropriate the supervision for the legal conformity is delegated to the independent agency. However, one should also note that competitors have full information about the violation of the law as well and surely have strong interest so that the justice is carefully maintained.

6. Conclusion

Regarding the practice of the private enforcement of the law, the very circumstance according to which the legislature has not offered the norm easing the proof burden for the private entity whenever his claim is not preceded by the agency ruling concerning the specific violations of the norms of the competition law, is to be considered as a fault.

If Georgian legislature relied on the private enforcement of the law, then it would be natural to increase the responsibility of joint stockmanagement. It means introducing the possibility according to which the owner of the joint stock had the chance to advance the claim against the joint stock managers in case the competition principles are violated. The allegations of such a character may entail sanctioning and preparation of the private claims aimed at restitution of the damages caused. Therefore, the joint stock should have the possibility to ask the CEO or whoever responsible in the management, compensate the costs raised by incurred damage restitution. The foundation for the cause would have been the violation of the credibility the CEO is empowered by the joint stock he or she represents.

The research has shown that the private legal enforcement has future only in case of the dominating economic situations to be improperly used. In case of specific agreements, they can be limited by follow-on claim. At the same time, the success of the cooperation program depends on the protection level of the economic agent "confessions" from the public claimants. In addition, whether those participating in the cooperation program are not in a worse situation compared to the rest is the issue of the equal concern. In this regard, the collective accountability of those in the program will cause negative results. Besides, whether they have the so-called "passing-on-defense" is of no least importance.

In the end, the private and public legal enforcements have different tasks and objectives. Hence, they cannot replace each other. As a result, even in case of enhancement of the private enforcement practice of the competition law, the role of the competition law for the maintenance of the healthy, productive competition could not be diminished.

Giorgi Amiranashvili*

Mistake as to the Identity of a Contracting Party – Historical Origins and Contemporary Expressions

To Err is Human"[1]

1. Introduction

The reforms of Georgian law guaranteed the private autonomy of the parties[2], which gives hand for the civil participants to perform any action non-restricted by law, including those, which are not directly foreseen by law.

The party agreement is the most prevalent means for autonomy implementation[3]. Any agreement relies on mutual consent. However, sometimes there are some cases when exterior will does not coincide with the internal readiness or the will of the parties, – caused by various exterior factors and their influence proper. Therefore, this is the vivid example of insufficient will.[4] Based on insufficient will, the agreement designed in such a framework is called a "disputed agreement".

The basis for such an agreement might be the contractor taken by mistake. According to the general explanation, this kind of a mistake is vivid when the actual contractor (the one to be authorized to be as one of the parties) is a different person and not the one to be considered as the truly willing one[5].

The mistake is not an alien phenomenon even in the criminal law[6]. Specifically, in the course of action, they speak about the mistake, when the wrong concept originated in the perpetrator's mind concerns the object of the action or appropriate identifiable (or related) specifications. At this time, it is important to determine whether the criminal act could have taken different legal qualification had the concept originated in the perpetrator's mind have been appropriate to reality.[7]

In the code of Georgian Law in 1964 (of Georgian Soviet Republic at that time), – later Soviet

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1 Errare Humanum Est – this well-known Latin phrase belongs to *Hieronymus*: *Kapanadze N.*, *Kvachadze M.* (Comps.), Georgian-Latin Dictionary, Tb., 2008, 29 (In Georgian).

2 *Zoidze B.*, Reception of European Private Law in Georgia, Tb., 2005, 284 (In Georgian).

3 *Chanturia L.*, General Part of the Civil Law, Tb., 2011, 290 (In Georgian).

4 See ibid. 360; at the same time see *Zoidze B.*, Commentary on Georgian Civil Code, Vol.1, General Provisions of Georgian Civil Code, Article 50, Tb., 1999, 166 (In Georgian).

5 *Khubua G., Totladze L.* (Eds.), Comprehensive Legal Vocabulary, Berliner Wissenschafts-Verlag Publishers, Berlin, 2012, 575 (In Georgian).

6 Regarding the concept of the mistake in current Georgian Criminal Law, see *Turava M.*, Criminal Law, General Part, Vol.1, The Essence of the Crime, Tb., 2011, 512-514 (In Georgian); also – the Criminal Law (of the same author), The Review of the General Part, 9th ed., Tb., 2013, 156-157 (In Georgian); *Gamkrelidze O.*, The Interpretation of Georgian Criminal Law (as of February 5, 2013), 3rd Rev. Ed., in: The Problems of the Criminal Law, Vol.3, Tb., 2013, 331 (In Georgian).

7 See *Vessel J., BoilkeV.*, General Part of the Criminal Law: The Crime and its Structure; Tbilisi University Press, Tb., 2010, 140- 141 (In Georgian).

Code – agreement designed mistakenly was dedicated only one legal norm (paragraph 55), in which they spoke about the agreement designed according to the misleading circumstance, its cancelation and the legal impact that followed. What about the very circumstance in which the mistakenly chosen person could have been indicated, and who acted in the mode of this discrepancy, the code chose to indicate nothing. We cannot say the same about the Georgian Civil Code of 1997 (later – active code), which paid considerable attention the cases (agreements) designed by mistake and possible legal ways to fix it. Particularly, it would thoroughly list those cases of mistake, which give the person the right to dispute the contract. This is signified by the fact according to which Georgian legislature had the possibility to consider those successful cases achieved by legislature of foreign countries.

Truly, the cancelation of a disputed contract was not given in such a nice legal clarity as in the current, legal code of Georgia. Particularly it concerns the issues of mistakenly taken parties[8]. As it looks from the preparatory documents, the law itself was based on the gains of comparative law and found its own style[9]. During the codification of the disputed contracts, the commission applied to various levels of legislature, including the Anglo-Saxon Law[10].

The goal of the article is to consider the mistake relevant to contractors through the historical background and show this freedom, which is inherent to the current law regulating the issue concerned.

2. Mistake as to the Identity of a Contracting Party, as the *Basis* of *Voidability* according to the Roman Law

The Roman law saw the mistake (error[11]) as the discrepancy [12]between the human concepts and reality, his will and the representation of the one.

True, Romans did not have the error related theory, but still they could recognize the legal impact of such a mistake, namely the recognized the agreement either as disputed or canceled.[13]

According to the Roman law, the factual mistake related to the contractor's mistake, his personality or qualities (error in persona[14]). This mistake was given the meaning only in cases when, based on the general character of the contract, personal qualities of the party mattered. For example, if the mistake was considered the personal quality related to the installment related payments, it was considered as

8 *Zoidze B.*, Reception of European Private Law in Georgia, Tb., 2005, 237 (In Georgian).

9 *Knieper R.*, Methods of Codification and Concepts of the Transitory Period Societies (Regarding the Case that of Georgia), in: The Legal Reform in Georgia, Materials of International Conference Held in Tbilisi on May 23-25 in 1994, Tb., 1994, 185 (In Georgian).

10 *Zoidze B.*, Reception of European Private Law in Georgia, Tb., 2005, 348-349 (In Georgian). The norms of Anglo-Saxon Law regarding agreements are part of Law of Contract. Whatever the case, the jurisprudence of those counties recognizes the importance of the mentioned institution: *Chanturia L.*, Introduction to the General Part of the Civil Law (Comparative-Legal Research Regarding Certain Specifications of the Post-Soviet Law), "Statute" Publishers, MSK, 2006, 229 (In Russian).

11 Interpretation of the Latin term see*DumesnilJ.B.G.*,Latin synonyms, with their different significations, and examples taken from the best Latin authors, Printed for G. B. Whittaker etc., London,1819, 227, <http://ia600502.us.archive.org/19/items/latinsynonymswit00garduoft/latinsynonymswit00garduoft.pdf>, [28.03.13].

12 See *Yakovlev B.H.*, Roman Private Law and Modern Civil Code of Russia, "Wolters Kluwer" Publishers, MSK, 2010, 429 (In Russian).

13 See *Yakovlev B.H.*, Roman Private Law and Modern Civil Code of Russia, "Wolters Kluwer" Publishers, MSK, 2010, 429 (In Russian); review of the contract mistakenly designed – according to the Roman Law, see *Chanturia L.*, Introduction to the General Part of Georgian Civil Code, Tb., 1997, 368 (In Georgian).

14 See *Sanfilippo C.*, A Course of Roman Private Law, "Beck" Publishers, MSK, 2002, 67 (In Russian).

minor once the payment was performed in cash. In the other case, the agreement was considered valid regardless the errors present in the party's personality. In the first case, the seller had the right to dispute.[15]

It should be noted that according to the Ulpian's comments, all traditional categories of mistakes are represented (except for the "err in persona"). However, this omission is quite normal because during the purchase this mistake is rarely heeded[16]. What about case, which is considered as a mistake by the modern lawyers ("inter praesentes" – direct meeting of the parties), it is not mentioned at all. According to Bookland, "The existence of a mistake in human personality is out of question at the moment when the parties directly design the agreement". "Truly, it is quite suspicious that when agreed with Balbus about the purchase, I can cancel the contract only if I thought him be Titus (who I was recommended[17])". During any agreements regarding the purchase, it does not matter whether the agreement was designed directly or by distance, the purchase-agreements, which yield the problems related to identity, are quite rare.[18]

Therefore, if the party was not caused any harm and she received the amount (gain) agreed by the contract, little attention had been paid whether the very person participated as the other party, who could have been initially thought to be the one. Mostly, it concerned the minor trade. On the other hand, the mistake could not have been totally excluded, just like the possible negative impact and the cancelation of the contract.[19]

3. Regulation of Contracts Designed by the Mistaken Identity in the Soviet Code

As mentioned in the introduction, there was only one norm in the Soviet Law dedicated to the correction of this mistake. Specifically, it was paragraph 55, according to which "agreement designed and influenced by substantial discrepancy, could be considered as invalid by the party who was acting under the very influence of this discrepancy". What about the fact, specifically what this discrepancy could be, the law have no further clarification about it. Thus, the mistake in the contractor's personality represented as the ground for the legal qualification, was not represented as such. However, for the practice the cancelation of such contracts could not be considered as uncommon.

The term "discrepancy" (or error) had been used in different meanings in Soviet Code. If a person knew several issues (facts) based on which he (she) had to design a contract, made unwise or unreasonable decisions, people in this case used to say that the person "made a mistake" (that another action would have been more appropriate). This kind of mistake had nothing to do with the error or discrepancy, which had been indicated in the appropriate paragraph of the Soviet Law. Discrepancy, as

15 *Novitski I.B.*, Roman Law, "Wolters Kluwer" Publishers, MSK, 2009, 161 (In Russian). Regarding this issue, see also *Baron I.,* System of Roman Civil Law, Book One, "Legal Centre Press" Publishers, St. Petersburg, 2005, 160 (In Russian); *Dozhdev D.V.*, Roman Private Law, "Infra-M"; "Norma" Publishers, MSK, 1996, 139 (In Russian).

16 *Zulueta F. De*, The Roman Law of Sale, Clarendon Press, Oxford, 1957, 25,as cited in: *MacMillan C.,* Mistakes in Contract Law, Hart Publishing, Oxford, 2010, 17.

17 *Buckland W.W.*, A Textbook of Roman Law from Augustus to Justinian, Cambridge University Press 3rd ed. , Cambridge, 1963, as cited in: *MacMillan C.,* Mistakes in Contract Law, Hart Publishing, Oxford, 2010,17.

18 *MacMillan C.*, Mistakes in Contract Law, Hart Publishing, Oxford, 2010, 17.

19 See *McKeag E.C.*, Mistake in Contract: A Study in Comparative Jurisprudence, Studies in History, Economics and Public Law, Vol. XXIII,No. 2, The Columbia University Press, New York, 1905, 167, <http://archive.org/download/mistakeincontrac00mckerich/mistakeincontrac00mckerich.pdf>, [28.03.13].

a technical term, which used to present one of the reasons for dispute (or claim to cancel it) meant that while implementing it, the party was guided or mislead by the wrong circumstances, not related to the reality proper. Thus, the lack of knowledge for the real circumstances was considered along with the party's wrong perception.[20]

In its narrow meaning, "discrepancy" meant the situation, when a person (without any intention or influence (contrary by the contract designed through fraud) developed wrong perceptions or when certain circumstance was unknown to him (her) and the one, based on this misperception, used to display the will, which would not have been displayed had such kind of circumstance have not existed at all. The discrepancy of this kind could have been related, for example, to the contractor's personality.[21]

As the law considered discrepancy as the bases for the cancelation of the contract, and this approach on the other hand should the foundations of firm business relations, the term "discrepancy" should have been outlined by legal framework. Discrepancy could have been claimed as the true reason for the contract cancelation only in special cases. However, the code did not indicate which these cases could have been, which gave the court the possibility to qualify each case according to the individual specifications given. According to the doctrine, the most appropriate approach should be developed from the fact that in the Soviet Law the scrupulous regulation of particular cases was not given at all. However, it was never denied that some general, guiding regulations dedicated to the issue could have been quite useful and would help the court to meet the facing challenges.[22]

The issue of these norms translated into the fact according to which a person could have been given the possibility withdraw from the contract designed by mistake but at the same time the interests of another party kept heeded because the other one did not and could not have known that the first one was guided by misconceived circumstances.[23]

If one of the parties was guided by erroneous circumstances but the second one could notice it but for the reasons of bias did not reveal them to the one and tried to gain on it so as the opportunity had not been missed, in this case there would be not foundation to protect the interests of such a party while the cancelation of the contract could not have been a surprising fact for him (her). The party who could notice the mistake but still came up with the readiness to design this agreement, should have known from the very start that sooner or later the discrepancy would have been exposed to the light and the issue of the cancelation of the contract would have been raised. Thus, the person who could notice the mistake but did not reveal him (her) the true state of affairs, was considered as dishonest (perpetrator of the fraud) for what the one could not be considered worthy for the legal protection once the agreement hailed to be canceled.[24]

While determining the discrepancy, the issue for some criteria to be defined was actual. Specifically, whether some criteria or requirements were due to be followed or whether the ruling be maintained on certain circumstances, which were the bases for the contract agreement, were those to be considered.[25]

When discrepancy was the case, specifically how honest of a concrete contract related behavior, the Soviet Law mostly tended to the principle according to which certain behavior from one the parties

[20] *Novitski I.B.,* Transactions, Limitation, "Gosizdat" Publishers, MSK, 1954, 102 (In Russian).
[21] See ibid. 103.
[22] See ibid. 103-104.
[23] See ibid. 104.
[24] See ibid. 104-105.
[25] See ibid. 105.

should have been considered, for example how the person could have acted; what circumstance should have been mostly paid attention to; what could have been considered as substantial, etc. The overall evaluation of the case should have been fully based on objective (and not abstract) criteria, however, certain specifications of the case should have necessarily considered as a must.[26]

While applying a norm, the very discrepancy should have been considered, what for the concrete circumstance and for the specific person had a critical role – not according to her whim, specific taste, but because of concomitant circumstances. Thus, the issue of discrepancy should have been ruled based on specific circumstances of the case, the evaluation of which should have been carried out honestly and wisely. At the same time, wide differentiation was not to be excluded; quite contrary, the status and appropriate specification of the party should have been paid attention to, the character of her activity, the nature of dispute, etc.[27]

4. Voidable Contracts Regulated by the Current Law

According to the current law the norms regulating the contract, influenced by the German law, were allocated to the general part subjugated to the logic by which primarily expressed will should have been set and then determined in the ongoing legal circumstances.[28]

A party without expressing the will is not able to receive the legal result[29]. As expressing the will carries such a meaning, certain criterion should be maintained so as it stays valid while legal relationship is being analyzed, changed or announced as suspended. The quality by which the will is expressed in such a way is called the validity of the will expression.[30] The valid expression of the will depends on various circumstances called the legal terms of the contract.[31] In case of the disputed contract the term of agreement validity is threatened, which should have been guaranteed by the principle according to which the parties' interests should have been protected[32]. Therefore, with the appropriate legal foundation present, the expression of the will can be questioned and held as canceled.[33] One of the reasons can be called the lack of the will.

The contract designed based on the lack of the will can be qualified differently by the current law. One group of such contract is considered as canceled from the very start and does not yield legal results, while the other group encompasses disputed agreements, the cancelation of which depends on the level of dispute from the authorized parties.[34] The agreement designed by mistake, along with those contracted by threat of fraud, are parts of this second group. They represent the most prevalent disputed

26 *Novitski I.B.,* Transactions, Limitation, "Gosizdat" Publishers, MSK, 1954, 106 (In Russian).
27 See ibid.
28 See *Zoidze B.,* Reception of European Private Law in Georgia, Tb., 2005, 235-236 (In Georgian).
29 *Zoidze B.*, Commentary on Georgian Civil Code, Vol. 1, General Provisions of Georgian Civil Code, Article 50, Tb., 1999, 166 (In Georgian).
30 *Chanturia L.*, General Part of the Civil Law, Tb., 2011, 292 (In Georgian).
31 See ibid, 293.
32 *Zoidze B.*, Commentary on Georgian Civil Code, Vol. 1, General Provisions of Georgian Civil Code, Article 50, Tb., 1999, 196 (In Georgian).
33 See ibid, Article 50, 166.
34 *Chanturia L.*, General Part of the Civil Law, Tb., 2011, 360 (In Georgian).

contracts; therefore, so much attention is paid from the legislature, which result in a separate chapter of the code.[35]

Generally, the principle of free agreement design means the fact according to which a party can freely choose the most appropriate contractor. This is another representation of the will. The existing law guarantees representation of the free representation of the real will from the subject.[36] The free character of the contract exists in the legal framework of the contract proper. Therefore, the law protects the party who contracted the agreement being herself the victim of fraud, threats, enforcement and other influences of the kind.[37] Thus, the right for dispute can be viewed as representation of the private autonomy.[38]

5. Place of the Mistakenly Contracted Agreements in the Framework of Existent Law

During the codification of the contract, made by mistake, the commission did not imitate those countries in whose civil codes the foundation for dispute is considered along with the law related to the agreements proper.[39] If we consider the fact, by which the main body enjoys considerable advantage in view of the fact, according to which the circumstances of the built-in principles need not be present at any other parts of the code,[40] it is made possible the norms to be applicable in any private legal case, which are maintained by the expression of the will [41] and which speaks about the fact that Georgian law in this regards better serves the rational approach.

In English law, there is an ongoing debate whether "the identity related mistake" represent one of the inherent element of the offer and acceptance.[42] I think this viewpoint should not be shared while in

35 See ibid, 394.

36 *Zoidze B.*, Reception of European Private Law in Georgia, Tb., 2005, 270 (In Georgian).

37 *Chanturia L.*, Commentary on Georgian Civil Code, Vol.3, Law of Obligations, General Part, Article 325, Tb., 2001, 80 (In Georgian).

38 *Todua M., Willems H.*, Law of Obligations, Georgian Young Lawyers' Association, Tb., 2006, 109 (In Georgian).

39 See *Kereselidze D.*, General Systemic Doctrines of Private Law, Tb., 2009, 318; *Todua M., Willems H.*, Law of Obligations, Tb., 2006, 109 (In Georgian).

40 Regarding main body for the values, see *Chanturia L.*, General Part of the Civil Law, Tb., 2011, 45-46 (In Georgian); at the same time of the same authorship: Freedom and Responsibility: Law and Jurisprudence of Post-Soviet Epoch, "Sani" Pubslishers, Tb., 2004, 32-33 (In Russian); *Zoidze B.*, From the History of Establishing Georgian Civil Law, Journal "Georgian Law Review", 6/2003-1, 110 (In Georgian).

41 *Chanturia L.*, General Part of the Civil Law, Tb., 2011, 293 (In Georgian). Norms for designing a contract are determined by the private law regarding various fields, including corporate law as well: see ibid. 46. For example, with the principal partner or the third person the contract can be designed at the moment when the organization is being established, its preparation, implementation, maintenance, - instead of salary pay. This contract, in most cases, is connected with the personal qualities, for example, with one of the community member, her legal education or economy related experience, what is necessary for establishment of the organization as such. *Burduli I.*, Estate Related Issues Concerning Joint Stock Company (Especially During the Establishment Process) Based on Georgian and Austrian Experience, Tb., 2008, 100 (In Georgian). At the contract agreement as such, if the mistaken identity error takes place, this issue will be regulated by general norm.

42 *Spark G.*, Vitiation of Contracts: International Contractual Principles and English Law, Cambridge University Press,New York, 2013, 115; *Buckland W.W.,* A Textbook of Roman Law From Augustus to Justinian 3rd Ed., Cambridge University Press, Cambridge, 1963, 288.

this case we have the will already accepted by the parties, which is the representation of the will, which, on its own, linked the contractors. Therefore, it should be held unreasonable according to which in the contract designed by mistake, the fact whether the mistaken circumstance had been addressed to the designated party before or after the contract had been concluded.[43]

As noted in introduction, the contract designed by mistake is not so thoroughly considered [44] in any of the Post-Soviet countries[45] like in this current law (code). During the project phase, the commission was studying the principles of general law, thus some norms experience slight influence of the Anglo-Saxon practice.[46] However, it is less of the case regarding the contract designed by mistake. Namely, in this case, the commission, along with German, used the norms of Swill and Italian law. The paragraphs 23 and 24 of the Swiss law regarding "Liabilities", where precise definitions and classification of the mistake is given, were fully incorporated into the current code. The same can be said regarding paragraph 26 (point 2) of the same Swill law, which deals with the legal aspects of those mistakes committed by blunder. Some of the doctrines had been elaborated according to paragraph 1110 of the French civil code. Thus, the commission did not rely on any particular legislature of one particular country.[47]

6. Mistake as to the Identity of a Contracting Party as One of the Types of Substantial Mistakes

Mistake means misconception regarding a specific case of phenomenon.[48] According to paragraph 72 of the civil code, the contract can be held disputed if the expression[49] of the will was caused by the mistakes in view[50]. While making the mistake, the concept regarding the case does not correspond to its real state of affairs; therefore, the mistake leave negative impact on the formation process of the will

43 *Mariamidze G.*, Civil Law, General Part, Book One, 1st Ed., Tb., 2011, 91 (In Georgian).

44 The general hallmark of the existing law and codification is to imply disputing character of the contract as part of the philosophy and is regulated within the while body: *Kereselidze D.*, General Systemic Doctrines of Private Law, Tb., 2009, 317 (In Georgian).

45 Azerbaijan Civil Code of December 28 of 1999 is an exception, paragraph 347 displays close similarity with that of Georgia (norms of Georgian Code – both structurally and in contents).

46 *Zoidze B.*, The Influence of Anglo-American Common Law on the Georgian Civil Code, Journal "Georgian Law Review", First and Second Quarters, 1999, 18 (In Georgian).

47 *Zoidze B.*, Reception of European Private Law in Georgia, Tb., 2005, 237 (In Georgian). Regarding this issue, see also *Kereselidze D.*, General Systemic Doctrines of Private Law, Institute of European and Comparative Law Press, Tb., 2009, 319 (In Georgian).

48 *Chanturia L.*, General Part of the Civil Law, Tb., 2011, 365 (In Georgian).

49 According to the concepts expressed in the correspondent literature, the statement – the contract can be made disputable – is not accurate enough. According to the author's guess, the legislature means that the contract "might be considered as disputable", what he wanted to express by the phrase "the contract can be represented as the subject of a dispute": *Kereselidze D.*, General Systemic Doctrines of Private Law, Tb., 2009, Ref. 1589, 318 (In Georgian). The author's position is mostly theorized, as the practical outcome seen through the issue he formulates does not seem to be viable. The logic of this legislature is quite clear. Namely, as the norms regulating the disputable case give a party the possibility to come up with the rightful claim, what is his right and not a liability, the formulation such as "a contract might be represented as a subject of a dispute" means it might not be such if the authorized person does not express the will in the legal deadlines given.

50 Regarding the interdependence of paragraphs 72 and 52, see *Zippelius R.*, Introduction to German Legal Methods, Tb., 2009, 65-66 (In Georgian).

and presents distorted reality towards what one of the parties strives.[51] Thus, the mistake (the same lack of the will) can cause the cancelation of the contract. However, if any mistake is to be considered as the foundation for contract suspension, social relationships can be drawn under threat. This is the sole reason why the legislature accentuates on the grave reasons existence of which the contract related circumstances might be questioned.[52]

The advantage of the current code resides in the fact according to which the details, which determine the discrepancy, are given with more legal accuracy compared with those of other country legislatures. These norms are based on huge court practice of various countries.[53]

Paragraph 72 of the current code authorizes of the contract parties to dispute the contract if the will is displayed based on misconception. The title of the paragraphs leaves expectations so as all kinds of mistakes will be listed in it, which the law initially recognizes as substantial. Though, the contents of paragraphs 74, 75 and 76 ("mistake is considered to be substantial if..., the mistake is of the crucial importance if..., mistake cannot be considered as substantial except for the cases when...) indicates that the legislature through paragraphs 73-76 offers the detailed categorization of the concept. Specifically, the law determines, what preconditions should exist so as the contract is to be considered as disputable; thus, we have here the case of the representation of the negative will as a necessary precondition for the validity of the issue.[54]

Thus, Georgian legislature, through paragraphs 73-76 solidifies seven substantial kinds of mistake:[55] first, mistake at choosing the type of agreement; second, mistake related to the contents of agreements; third, mistake at the basis of the agreement; fourth, mistake at the contractor personality; fifth, mistake related to the object properties; sixth, mistake at the right; seventh, mistake at the motive for the agreement.

The mistake regarding the contractor's personality is regulated by paragraph 74 of the existing law (part one). The substantial part of this case is regulated, for example, by the Swiss law about "liabilities" (paragraph 24; part one, point 2); paragraph 1429, part 3 of the Italian Civil Code; paragraph 119, part 2 of German civil code; General Civil Code of Austria, paragraph 873; paragraph 1110 of French Civil Code; paragraph 1266 of Spanish Civil Code, paragraph 1950 of Louisiana Civil Code and paragraph 1400 of Quebec Civil Code.

Azeri civil code represent exception from the Soviet Codification System, which foresees kinds of substantial mistakes. According to paragraph 178 (part one) of Russian Federation's Civil Code, the mistake is of substantial character only related to the type or the object of the contract.[56] It must be noted

[51] *Zoidze B.*, Commentary on Georgian Civil Code, Vol. 1, General Provisions of Georgian Civil Code, Article 72, Tb., 1999, 223 (In Georgian). Regarding this issue, see also *Tumanishvili G.G.*, Contracts (Legal Nature and Normative Regulations), Ilia State University Press, Tb., 2012, 54 (In Georgian).

[52] *Chanturia L.*, General Part of the Civil Law, Tb., 2011, 365 (In Georgian). Also see *Chechelashvili Z.*, Contract Law (Research Regarding Comparative Law Based on Georgian law), (2nd Rev. Ed.), Tb., 2010, 49 (In Georgian).

[53] *Chanturia L.*, Introduction to the General Part of the Civil Law, Tb., 1997, 370 (In Georgian).

[54] Comp. *Zippelius R.*, Introduction to German Legal Methods, Tb., 2009, 5-6 (In Georgian).

[55] Comp. *Jorbenadze S.*, Contract Related Mistakes According to Georgian Civil Code, in: *Roman Shengelia* – 70, Jubilee Collection, Problems of the Law, Tb., 2012, 401 (In Georgian).

[56] See *Sadikov O.N.*, Commentaryon Civil Code of Russian Federation, Part One, "Contract", "Infra-M" Publishers, 1997, 224 (In Russian); *Tolstoy Y.K.*, *Sergeev A.P.* (Eds.), Civil Code, Vol.1, "Prospect" Publishers, St. Petersburg, 1996, 213 (In Russian).

that recently many theses have been dedicated to the issue in Russian Federation,[57] the authors of which recommend that the resolution according to which the mistake regarding the contractor's personality and considered as substantial needs to be added to the norm.[58]

7. Conclusion

The discussion developed in the article gives us possibility to come up with certain inferences. As during the disputable contracts we deal with already designed agreements, it can be noted that the mistake regarding the party's personality cannot be considered as one of the elements of offer or acceptance.

According to the existing code, paragraph 72, the statement – "the contract can be hailed disputable" – indicated to the fact that the dispute is the right of the person and not her liability, which means that the agreement may not be made disputable at all unless the authorized party does not challenge it with the deadlines given.

By paragraphs 73-76, Georgian legislature offers the detailed categorization of the mistake, which is determines those conditions the existence of which determines the disputable character of the issue. Therefore, we can consider them as negative precondition for the expression of the validity of the legal will.

In the end, we can add that paragraphs 73-76 of the current law gives us the possibility to infer that the law regulates the seven kinds of the existing discrepancy (mistake), which are the mistake in choosing the type of agreements, the contents, the foundation, contractor's personality, main properties of the subject and the mistake regarding the motive of the agreement.

[57] The thesis defended on this issue dates back by 2008: <http://www.dissercat.com/content/zabluzhdenie-pri-sovershenii-sdelki-evropeiskaya-pravovaya-traditsiya-i-sovremennoe-rossiisk>, [28.03.13].

[58] Comp. *Savolainen A.N.*, Actual Problems Dealt with Contracts Designed by Influences of Error; Electronic Journal "Contemporary Legal Researches and Innovations", October, 2011, (In Russian), <http://web.snauka.ru/issues/2011/10/3016>, [28.03.13].

Ketevan Andguladze*

Contract Concluded by E-mail

"Electronic mail corresponds to the first class letter".[1]

1. Introduction

The purpose of the law is fair implementation of the individual's interests and peaceful regulation of the possible conflict of interests.[2] Contract is an integral part of everyday life and a mechanism, regulating relations between the subjects of law.[3] It's an essential necessity to adjust existing principles, related to conclusion of contract, with modern approaches.

The most widely spread method of concluding of contracts using modern technologies is use of electronic mail. From the first glance, concluding contracts by the Internet and facsimile or telex does not differ from concluding contract by electronic mail; or, it may be argued that, the rules existing in regard to common post, shall be applicable. Analysis of judicial practice, as the mechanism, determining the applicable law, is important for determining these issues.

With consideration of Georgian and present-day international trends, for the purpose of setting the relevant problem for demonstration of peculiarities of concluding a contract by e-mail, elaboration of a formulation conforming to international standards and proper development of further judicial practice, comparative-legal and analytical methods have been used in the paper.

The characteristics of functioning of e-mail is considered in the article; we will speak about the views of various conventions, systems and specific countries, individual issues, related to Georgian legislation and judicial practice will be analyzed and, finally, summarized assessments will be presented in the form of conclusions.

2. Electronic Mail

Contracts are generally based on promises and thus, the role of Contractual Law is maintaining stability of relations between the subjects of civil turnover. Making such promises using technologies is simplified, and it may prove to be simply unregulated.

One of the main methods/means, used in present- day communication technologies is an e-mail. Following the specificities of business-relations, as the participating parties have growing desire of fast performance of actions, concluding of contracts is performed just by e-mail.

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1 *Darrow J.J., Ferrera G.R.*, Who Owns a Decedent's E-mails: Inheritable Probate Assets or Property of the Network?, Journal of Legislation and Public Policy, Vol. 10:281, 2007, 281.

2 *Kereselidze D.,* Most General Systemic Notions of Private Law, Tb., 2009, 8.

3 *Tchanturia L.,* Common Part of Civil Law, Tb., 2011, 290- 298; Also see: *Kobakhidze A.,* Civil Law, Common Part, 2001, Tb., 298; *Tumanishvili G.,* Transactions (Legal Nature and Normative Regulation), Tb., 2012, 1-17.

2.1. Procedure of Functioning

There is an opinion that e-mail is the form of immediate communication, which requires confirmation of receipt in order to consider it valid.[4] Nevertheless, according to the dominating view, e-mail is an electronic equivalent of material letter. In spite of its speed, it is not instant and fully complies with the rules, existing for sending ordinary mail.[5]

E-mail, as an equivalent of a letter, and its improper perception, might be related to the invalidity of a transaction, as, even in the case of simple written form, transaction is considered null and void if the relevant requirements are not met.[6]

"Trip" of an e-mail could be described like this: after it is created by the sender, it primarily contacts the internet provider. Then, by pressing the button, e-mail is transferred to the international net of computers, till it reaches the receiver's internet- provider. And the receiver can download the message through the Internet.[7]

Although, according to some views, the rules, regulating other communication means shall apply to an e-mail, such views will probably be not acceptable. In particular, telex is considered as an instant form of communication, which can be used in certain cases of communication through the Internet, but e-mail does not ensure such instant communication.[8] Thus, the views existing in regard to technologies cannot apply to e-mail and for this very reason, the will, expressed by an e-mail shall be treated as the will, expressed with non-attending person.

2.2. Terms of Validity

In spite of existence of various legal acts, it is not regulated and shall be considered – whether expression of will can be treated as valid, if the relevant sentence, confirming the signature of the sender (e-mail signature) is not attached to the e-mail? Specifically, what information shall be contained by electronic communication for higher reliability and validity?

Questions arise not only in regard to the form, but in regard to the content as well. In regard to the terms of contract, even if the contract is clearly formulated, there are two important problems – 1. The parties shall accurately define which document, attached to the e-mail represents a contract and 2. How accurately the terms are formulated to allow their proper interpretation to the authority, considering the dispute.[9]

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4 *Christen S.,* Formation of Contracts by Email – Is it Just the Same as the Post?, Queensland university of Technology Law & Justice Journal, 2001, 32, <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&ved=0CDIQFjAB&url=https%3A%2F%2Flr.law.qut.edu.au%2Farticle%2Fdownload%2F58%2F57&ei=vpOLUuD7NMS2hQfii4HACg&usg=AFQjCNF5Jx_XHcbDqJ77YBm55CavMkZTuA&sig2=MJTUYh8JaO12_j_dhl261g&bvm=bv.56643336,d.bGE>, [19.10.2013].

5 *Murray A.*, Entering Into Contract Electronically: The Real W.W.W, Oxford, 2000, 1-2.

6 *Kobakhidze A.,* Civil Law, Common Part, 2001, Tb., 300.

7 *Ibrahim M.A., Ababneh A., Tahat H.*, The Postal Acceptance Rule in the Digital Age, Journal of International Commercial Law and Technology, Vol. 2, Issue 1, 2007.

8 *Christen S.*, Formation of Contracts by Email – Is it Just the Same as the Post?, Queensland University of Technology Law & Justice Journal, 2001, 33, <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&ved=0CDIQFjAB&url=https%3A%2F%2Flr.law.qut.edu.au%2Farticle%2Fdownload%2F58%2F57&ei=vpOLUuD7NMS2hQfii4HACg&usg=AFQjCNF5Jx_XHcbDqJ77YBm55CavMkZTuA&sig2=MJTUYh8JaO12_j_dhl261g&bvm=bv.56643336,d.bGE>, [19.10.2013].

9 *Murray A.*, Entering Into Contract Electronically: The Real W.W.W, Oxford, 2000, 9.

3. International Approaches

Internationally dominating opinion on the so-called flat-surface world[10], have established the view and reflected the reality that the open society, for which there are no borders, can exist in present-day environment. EU Directive[11] obliges the states to change the existing legislation, hampering electronic documentation turnover in regard to concluding of contracts.

Just with consideration of this trend, various, the below listed acts were created, providing legal assessment of modern technologies, including communication via e-mail.

3.1. UNCITRAL Model Law on Electronic Commerce

UNCITRAL Model Law on Electronic Commerce[12] regulates international standard specifically on when the contracts, concluded by electronic communication, including e-mail, can be considered concluded. The Article 11 of the Model Law rules:

"From the viewpoint of concluding of contract, unless otherwise agreed between the parties, offer and accept can be made by electronic communication. If the contract is concluded by electronic communication, such contract shall not be deemed null and void and its implementation shall not be impossible because electronic communication was used for concluding of contract ".

Thus, expressing of the will of the parties in electronic form is considered acceptable. Besides, it is mentioned that the electronic communication is considered to be initiated by the sender, is the communication is sent via informational system, programmed by the sender, in order to act automatically.[13]

In the case of use of electronic communication, it is often unclear how and where the data are transferred. Thus, the time and place of sending and receipt of the communication might be impossible to establish. If we judge based on the Article 15 of the Model Law, electronic communication is deemed sent at the moment of pressing the button by the sender, which is the reflection of the "mailbox rule"[14]. Such communication is deemed received, when it enters the defined[15] informational system of the communication is received/ obtained by the addressee.[16]

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10 *The Flat World Theory.*

11 The Directive provides for comparing of Continental and Anglo- American approaches: Electronic Commerce Directive, European Commission, 1998, <http://ec.europa.eu/internal_market/e-commerce/directive/index_en.htm>.

12 UNCITRAL Model Law on Electronic Commerce with Guide to Enactment (1996) with additional article 5 bis as adopted in 1998, <http://www.uncitral.org/pdf/english/texts/electcom/05-89450_Ebook.pdf>, [24.09.2013].

13 UNCITRAL Model Law on Electronic Commerce with Guide to Enactment (1996) with additional article 5 bis as adopted in 1998, Article 13 (2) (b), <http://www.uncitral.org/pdf/english/texts/electcom/05-89450_Ebook.pdf>, [24.09.2013].

14 *Glatt C.*, Comparative Issues in the Formation of Electronic Contracts, International Journal of Law and Information Tchnology, Vol. 6, No. 1, 1997, 59, <http://ecommercelaw.ru/sites/default/files/comparative%20issues%20in%20formation%20of%20electronic%20contracts.pdf>, [23.10.2013].

15 The case, when the e-mail address is simply indicated on the letter form, shall not be implied in this word, "defined". The parties shall clearly specfy this or that system for communication: *Glatt C.*, Comparative Issues in the Formation of Electronic Contracts, International Journal of Law and Information Technology, Vol. 6, No. 1, 1997, 60, <http://ecommercelaw.ru/sites/default/files/comparative%20issues%20in%20formation%20of%20electronic%20contracts.pdf>, [23.10.2013].

16 UNCITRAL Model Law on Electronic Commerce with Guide to Enactment (1996) with additional article

From the viewpoint of identification of the place of receipt, the Model Law tries to relate it to the location of the parties as much as possible. Actuality of this issue is conditioned by the difference of jurisdictions in international relations.[17] The regulation unambiguously indicates that although the system has received the communication, is the receiver has no factual possibility to see it, the communication will not be deemed received for the purposes of the Model Law.[18]

3.2. Vienna Convention

Vienna Convention,[19] created for strong legal environment and support of international trade, is one of the influential document, considering its ratification scale and quality.[20] Although the Convention remains unchanged in regard to concluding of contract in written and does not directly regulate concluding of computer- based contracts, it could be easily be determined by its explanation that e0mail meets the requirements, set by the Convention.[21] In accordance with the article 24 of the Convention, „..Offer, accept or any manifestation of will "reaches" the addressee, when it is performed verbally with the addressee or is received by him/her personally by any other means, to his/ her working place or postal address, or, if he/she doesn't have working place or postal address, to the place of his/ her residence".

According to this formulation, e-mail will "reach" the addressee, when it comes to the mailbox of the person and is ready for being read.[22]

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5 bis as adopted in 1998, 54-55, <http://www.uncitral.org/pdf/english/texts/electcom/05-89450_Ebook.pdf>, [24.09.2013]; *Ibrahim M.A., Ababneh A., Tahat H.*, The Postal Acceptance Rule in the Digital Age, Journal of International Commercial Law and Technology, Vol. 2, Issue 1, 2007, 51.

17 In regard to the mentioned, see: *Johnson K.D.*, Measuring Minimum Contracts over the Internet: How Courts Analyze Internet Communications to Acquire Personal Jurisdiction over the Out-of-state Person, University of Louisville Law Review, Vol. 46, 2008.

18 UNCITRAL Model Law on Electronic Commerce with Guide to Enactment (1996) with additional article 5 bis as adopted in 1998, 56, <http://www.uncitral.org/pdf/english/texts/electcom/05-89450_Ebook.pdf>, [24.09.2013].

19 United Nations Convention on Contracts for the International Sale of Goods, 1980, Art. 24, "...an offer, declaration of acceptance or any other indication of intention "reaches" the addressee when it is made orally to him or delivered by any other means to him personally, to his place of business or mailing address or, if he does not have a place of business or mailing address, to his habitual residence".

20 Introduction and exact reflection of the position of the Convention is very important, as, in the relevant case, in the case of its incorrect interpretation, the basic principles, which conditioned its creation, will be infringed. In details about this issue please see: *Grbic K.,* Putting the CISG Where It Belongs: In the Uniform Commercial Code, Touro L. Rev., 2012, 174, etc.

21 In particular, Article 31 of the Convention mentions only telegram and telex, as the written form types, required for conclusion of a contract. In regard to the abovementioned, see: *Hill J.E.*, The Future of Electronic Contracts in International Sales: Gaps and Natural Remedies under the United Nations Convention on Contracts for the International Sale of Goods, Northwestern Journal of Technology and Intellectual Property, Vol. 2, 2003, 3, 21-22.

22 *Christen S.*, Formation of Contracts by Email – Is it Just the Same as the Post? Queensland University of Technology Law & Justice Journal, 2001, 35, <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&ved=0CDIQFjAB&url=https%3A%2F%2Flr.law.qut.edu.au%2Farticle%2Fdownload%2F58%2F57&ei=vpOLUuD7NMS2hQfii4HACg&usg=AFQjCNF5Jx_XHcbDqJ77YBm55CavMkZTuA&sig2=MJTUYh8JaO12_j_dhl261g&bvm=bv.56643336,d.bGE>, [19.10.2013].

3.3. Regulations under German Legislation

The will of the person, acting in the implementation of legal relations is the basic concept of the Civil Code of Germany.[23] Contract, as the main example of legal relations, is concluded only because the parties have such desire and, consequently, its terms completely depend on the will of the parties. The will can either be clearly expressed or follow from the actions.[24]

The basic principle of the offer (binding will of the party) and accept, as the form of expression of will, in regard to validity, is that they, whether they are directed towards the attending[25] or non-attending person, shall transfer into the "receiver's scope of authorities"[26] and really knowledge of their content it's not necessary; but it shall also be taken into account that there shall be an expectation in regard to its receipt.[27]

If we put the above mentioned into compliance with the electronic mail, we will receive almost identical rule. Receipt and saving of an electronic communication is performed via the mailbox of the receiver's computer. Exchange of electronic communications is possible either directly[28] or using the system of "receipt and forwarding". The latter implies exchange of data by electronic mail.

Formulation of a contract, as it was mentioned above repeatedly, is performed through expression of the will of the parties. At the same time, it has well known that in the case of concluding of contract in electronic form, any condition of a contract can be performed by equipment. Like any action, response performed by the equipment is finally related to the will of specific natural person, certain judicial practice has already established that the "will of equipment" creates legal consequences.[29]

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23 *Glatt C.*, Comparative Issues in the Formation of Electronic Contracts, International Journal of Law and Information Technology, Vol. 6, No. 1, 1997, 38, <http://ecommercelaw.ru/sites/default/files/comparative%20issues%20in%20formation%20of%20electronic%20contracts.pdf>, [23.10.2013].

24 Ibid.

25 E.g. when the letter, containing the offer, is handed personally to the acceptor, and in this case, for the validity of the offer itself, it's not important whether the acceptor really knew about the offer, decribed in the letter. See: *Glatt C.*, Comparative Issues in the Formation of Electronic Contracts, International Journal of Law and Information Technology, Vol. 6 No. 1, 1997, 39, <http://ecommercelaw.ru/sites/default/files/comparative%20issues%20in%20formation%20of%20electronic%20contracts.pdf>, [23.10.2013].

26 *Kereselidze D.,* The Most General System Notions of Law, Tb., 2009, 247.

27 *Glatt C.*, Comparative Issues in the Formation of Electronic Contracts, International Journal of Law and Information Technology, Vol. 6, No. 1, 1997, 39-40, <http://ecommercelaw.ru/sites/default/files/comparative%20issues%20in%20formation%20of%20electronic%20contracts.pdf>, [23.10.2013].

28 EDI – electronic data exchange – includes sending of data from one computer to the other electronically. Such communications are sent via various networks, which often also means that the communication, sent to the neighboring room, may reach the addressee after having travelled through different countries, *Christen S.*, Formation of Contracts by Email – Is it Just the Same as the Post?, Queensland university of Technology Law & Justice Journal, 2001, 32-33, <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&ved=0CDIQFjAB&url=https%3A%2F%2Flr.law.qut.edu.au%2Farticle%2Fdownload%2F58%2F57&ei=vpOLUuD7NMS2hQfii4HACg&usg=AFQjCNF5Jx_XHcbDqJ77YBm55CavMkZTuA&sig2=MJTUYh8JaO12_j_dhl261g&bvm=bv.56643336,d.bGE>, [19.10.2013]; *Glatt C.*, Comparative Issues in the Formation of Electronic Contracts, International Journal of Law and Information Tchnology, Vol. 6 No. 1, 1997, 37, <http://ecommercelaw.ru/sites/default/files/comparative%20issues%20in%20formation%20of%20electronic%20contracts.pdf>, [23.10.2013].

29 *Glatt C.*, Comparative Issues in the Formation of Electronic Contracts, International Journal of Law and Information Technology, Vol. 6 No. 1, 1997, 45, <http://ecommercelaw.ru/sites/default/files/comparative%20issues%20in%20formation%20of%20electronic%20contracts.pdf>, [23.10.2013].

In Germany, the contract, concluded using e-mail belongs to the category of contracts, concluded with non-attending persons. The only thing that need to be proven is – how much the basic provisions of the contract are reflected and how much the electronic communication contains the will of the party to be bound by his/ her own offer.[30] In addition to the fact that the expressed will shall be placed in the scope of the receiver's authority, it is necessary to prove that the addressee had a real change to download/ view the communication, received by e-mail. Different law apply to natural persons and legal entities[31] - the legal entity is required to check the electronic mailing address during office hours and it is deemed that it will see the communication the same day, whereas for natural person it's reasonable to check the e-mail once per day and thus, the communication shall be deemed received in his/ her scope of authority the next day after it was sent.

3.4. Common Law Approach

Electronic mail can be described as non-instant communication form lice ordinary mail, which goes to the addressee through certain medium, which, according to the opinion, existing in the countries with common law, indicates to the advantage of usage of a mailbox rule. The most important moment in the process of formation of a contract is the receipt of an accept, through which the contract is concluded; usage of mailbox rule implies, that the accept is valid as soon as it is sent and not when it is received.[32]

Besides, they specify the following circumstance as an advantage of usage of the mailbox rule: as electronic mail is often not received in timely manner, the risk shall reside not within the receiver, but on within the sender, like sending ordinary mail. Besides, as it was already specified above, it is impossible to establish specific time of receipt and even if the sender of an offer requires sending of confirmation, it will still be resultless, if this communication was not delivered to the acceptor at all.[33]

On the other hand, the purpose of establishing mailbox rule was to ensure convincingness for business when communication through post required several weeks. According to the expressed opinion, use of this rule in regard to electronic mail, as the form of fast communication, will add inconvincingness to modern business and contractual relations.[34] Use of such rule is also associated with the problem of selection of applicable law.

Thus, the scientists of common law are inclined towards application of general rule in regard to electronic mail; specifically, the acceptance, sent via e-mail, will be valid at the moment of its receipt.[35]

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30 *Glatt C.*, Comparative Issues in the Formation of Electronic Contracts, International Journal of Law and Information Technology, Vol. 6 No. 1, 1997, 47-49, <http://ecommercelaw.ru/sites/default/files/comparative%20issues%20in%20formation%20of%20electronic%20contracts.pdf>, [23.10.2013].

31 Ibid.

32 *Murray A.*, Entering Into Contract Electronically: The Real W.W.W, Oxford, 2000, 4 etc.; In addition, see: *Ibrahim M.A., Ababneh A., Tahat H.*, The Postal Acceptance Rule in the Digital Age, Journal of International Commercial Law and Technology, 2007, 47.

33 *Christen S.*, Formation of Contracts by Email – Is it Just the Same as the Post?, Queensland university of Technology Law & Justice Journal, 2001, 33-34, <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&ved=0CDIQFjAB&url=https%3A%2F%2Flr.law.qut.edu.au%2Farticle%2Fdownload%2F58%2F57&ei=vpOLUuD7NMS2hQfii4HACg&usg=AFQjCNF5Jx_XHcbDqJ77YBm55CavMkZTuA&sig2=MJTUYh8JaO12_j_dhl261g&bvm=bv.56643336,d.bGE>, [19.10.2013].

34 Ibid.

35 On the example of England, it was determined by the court decision that it shall necessarily be transferred to the sphere of the receiver's authority.

The time of receipt implies the time when the relevant notification was delivered to the acceptor's internet provider, or when it was received by the acceptor's computer, or when the acceptor himself read the message.[36] Does it mean that in such case it's impossible to determine the exact time of receipt?

4. The Regulations Existing in Georgia

Adoption of the Civil Code managed to lay foundation for the civil society in Georgian legislative history.[37] However, together with the world development, for civil law, and thus, most of all, for the Civil Code, it became actual to consider the issue of validity of contracts, concluded via modern communication technologies, its adjustment to the existing regulations and system analysis of the related problems.

4.1. Legislation

The first question, related to the formulation of contractual relations in electronic form, is how much such relations are regulated by the existing legislation. If they are regulated, specifically when and in which circumstances can the contract be deemed concluded? As far as formal requirements exist in regard to contracts, e.g. signing by the parties, or its further registration in certain authority, it is interesting to consider how electronic document will meet formal requirements.

Facilitation of sending and receipt of message through electronic mail is reflected in the recommendation intended for Georgian courts as well.[38] The above mentioned proves that electronic mail can be perceived as a substitute of common mail service.[39]

Alongside with consideration of the rules, regulated by the Civil Code of Georgia (hereinafter – CCG), analysis of modern approached is necessary. Although there might be no direct formulation, explanation of specific article may lead us to the perception of the issue according to present-day approaches. The more so, is we take into account the case with France, when the dead norm was interpreted with absolutely new vision 200 years later.[40] Thus, new vision could be formed in regard to concluding a contract via electronic mail as well.

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36 *Christen S.*, Formation of Contracts by Email – Is it Just the Same as the Post?, Queensland university of Technology Law & Justice Journal, 2001, 33, <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&ved=0CDIQFjAB&url=https%3A%2F%2Flr.law.qut.edu.au%2Farticle%2Fdownload%2F58%2F57&ei=vpOLUuD7NMS2hQfii4HACg&usg=AFQjCNF5Jx_XHcbDqJ77YBm55CavMkZTuA&sig2=MJTUYh8JaO12_j_dhl261g&bvm=bv.56643336,d.bGE>, [19.10.2013].

37 *Tchanturia L.,* Introduction to the General Section of the Civil Code of Georgia, Tb., 2000, 3.

38 *Supreme Court of Georgia,* Recommendations on Problematic Issues of Judicial Practice of Civil Law, Tb., 2007, 50, <http://www.supremecourt.ge/files/upload-file/pdf/samoqrek.pdf>, [04.11.2013].

39 Court uses electronicmail very effectively, see, e.g. decision of the Supreme Court on the case: №as-1633-1623-2011, December 26, 2011, <http://prg.supremecourt.ge/DetailViewCivil.aspx>, [04.11.2013].

40 Judicial norm may not function in its primary form, as, e.f. the relevant article of the Civil Code of France, which didn't have independent function, and further, almost 100 years later, it became the most important basis for assessment of certain legal relations, see: *Kereselidze D.,* the Most General System Notions of Private Law, Tb., 2009, 59.

4.1.1. Elements of a Contract

CCG establishes general elements of a contract with binding power, but does not require specific method or form of concluding of a contract. It is accepted that a contract can be concluded using different methods[41], e.g.:

1) In oral form with the attending person or on telephone;
2) In written form, defined by the law or the parties, through exchange of correspondence, mail, telex or facsimile or blanket signature;
3) Notary form;
4) And finally, electronic form.

For the contract to be concluded[42], existence of two moments is necessary – offering of proposal and its acceptance; it will express the will of the parties to conclude a contract for the relevant legal result to come.[43] The Article 51 of the Civil Code is related to expressing the will and thus, relates to the contract. From the theories, existing in regard to expressing the will, the mentioned article shares the theory of the acceptance of expression of the will.[44]

Communication through e-mail between the parties is a common event in present-day world. If we equal the contract, concluded in electronic form, with the ordinary contract, concluded in written in traditional sense, amendments in the document, signed by the parties, could be introduced using e-mail.[45]

4.1.2. Arrival of Manifestation of Will

a) General Rule

The most widely spread method of regulation of human relation within the private autonomy is a transaction.[46] As the Article 50 of the CCG formulates, "Transaction is a manifestation of unilateral, bilateral or multilateral will". Manifestation of will itself shall be directed towards formation of legal results and satisfy certain pre-conditions. Just in the case of its validity, we can consider that the manifested will is valid.[47]

CCG does not provide for the norms, regulating arrival of the manifested will to the attending or non-attending persons, i.e. its validity and thus again the Article 51 is used for its explanation.[48] The will is considered arrived when is appears in the sphere of the receiver's ownership, so that he/ she can perceive it.[49]

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41 *Tchanturia L.,* General Section of the Civil Code of Georgia, Tb., 2011, 339 - 348.

42 Article 327 – I of CCG.

43 *Akhvlediani Z.,* Obligatory Law, 1999, 14.

44 *Jorbenadze S., Akhvlediani Z., Besarion Z., Ninidze T., Tchanturia L.,* Comments to the Civil Code of Georgia, Vol. I, 2002. 170.

45 In regard to this opinion, see details in: *Holmes S.*, Stevens V. Publicis: The Rise of "No E-Mail Modificaton" Clauses?, Washingto Journal of Law, Technology& Arts, Vol. 6, Issue 1, 2010.

46 *Tchanturia L.,* Introduction to the General Part of the Civil Code of Georgia, Tb., 2000, 311.

47 Ibid, 312-313; *Mariamidze G.,* Concise Guidebook for Lawyers, Civil Law, General Part, P. 1., Tb., 2011, 51 an further.

48 *Mariamidze G.,* Concise Guidebook for Lawyers, Civil Law, General Part, P. 1., Tb., 2011, 92.

49 *Kenntnis nehmen* – Understanding, Reading, Seeing, etc. *Mariamidze G.,* Concise Guidebook for Lawyers, Civil Law, General Part, P. 1., Tb., 2011, 92.

For arrival of the will to the addressee, the will shall necessarily appear in the sphere of territorial ownership of the receiver. And the communication, sent to the e-mail address will be considered as appeared in the sphere of territorial ownership, when the receiver is able to open it in the electronic mailbox.[50] In regard to the mentioned issue, we shall define the cases, when establishment of the fact of receipt of electronic communication is Unser the question, provided by the existence of such system itself. Thus, although checking a mailbox is permanently possible, until it is determined, how really the person could receive the manifested will, it will be deemed not received.[51]

The Article 51 of the Civil Code is a dispositional norm, which means that the parties can establish different rules of arrival of the will as their own discretion.

Late arrival or no arrival of the manifestation of the will to the addressee could be caused by the absence or defect of the equipment, required for receipt.[52] It should be asked – what would happen, when, from the point of view of concluding a contract with non-attending person, the electronic communication of the manifestor of the will was sent or received by a juvenile and the real receiver has never seen it.[53]

Formally, all requirements will be observed for concluding a contract. Such cases contain great risk, as even the honest party will find it difficult to prove the circumstances, contradicting the formal requirements. This case could be considered as a transaction, concluded with violation of manifestation of will, which was concluded without manifestation of the free will of the party at all;[54] The more so, considering that when concluding a contract in electronic form, the parties may not know each other, an, moreover, they may never meet each other in the future, even in the case of arising of a dispute, as arbitration proceedings nowadays can be implemented in electronic form as well.

An accept, as receipt, manifestation of obligatory will, becomes valid only from the moment of arrival to the offerer. Till the moment of arrival to the offerer, the acceptor can refuse it any time.[55]

b) Time and Place

Knowledge of the exact time of concluding a contract is very important, as establishment of the provision of the contract and starting of their implementation is connected with this very moment.[56] Like the time of concluding a contract, the place of concluding is also very important, as in the case of international contractual relations, the issue of future/ required court judgment, and consequently, the applicable law, depends on it.[57] Like ordinary mail, it is impossible to read the communication until it is opened by the receiver.[58]

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50 *Mariamidze G.,* Concise Guidebook for Lawyers, Civil Law, General Part, P. 1., Tb., 2011, 93.

51 Ibid, 95-96.

52 Ibid, 105.

53 Discussion on the mentioned issue see: *Darrow J. J., Ferrera G. R.*, Who Owns a Decedent's E-mails: Inheritable Probate Assets or Property of the Network?, Journal of Legislation and Public Policy, Vol. 10:281, 2007.

54 *Kobakhidze A.,* Civil Law, General Part, 2001, Tb., 298.

55 Article 51 – II of CCG.

56 E.g. the price ofpurchase may depend on the period of concluding a contract, when it comes to the purchase of shares, *Hill S. W. B.*, Email Contracts – When is the Contract Formed?, Journal of Law and Information Science, Vol. 12, No 1, 2001, 48-49.

57 *Hill S. W. B.*, Email Contracts – When Is the Contract Formed?, Journal of Law and Information Science, Vol. 12, No 1, 2001, 49.

58 Ibid, 50.

It still shall be asked – when and in which form the contract, concluded in electronic form, will be considered concluded. There is neither exact legislative regulation nor detailed explanation by court of, at least, the existing legislation so far.

In accordance with the existing opinion, the place of receipt of e-mail shall be construed not by its physical receipt/opening, but functional understanding.[59] As far as the e-mail can be received anywhere and it is difficult to determine where the contract was concluded, the most acceptable is the viewpoint that provides for the receipt of email since the moment when it reached the receiver's electronic data storage. Besides, the difficulty, related to the place and time of receipt, shall be mentioned. If the receiver does not have physical chance of access, how reasonable the receipt of mail could be considered?[60] Or how to determine the place of receipt in each specific case?

c) Form

As it is well known, the validity of manifestation of the will is not sufficient for appearance of a legal result. Certain form, established by the law, or pre-conditions, like representation, incapacity or limited capacity[61], etc. shall also be observed. In its turn, manifestation of the will and content-based coincidence of bilateral and multilateral transaction is the basis for validity of a contract.[62]

The will can be expressed in different forms[63], including modern communication technologies. As it was already mentioned, one of the most widely- spread forms in communication technologies, boundless in the world for maintenance of business relations, us e-mail. And the will, expressed through the e-mail, in the form of an offer and accept, ensures pre-conditions of concluding of a contract.

Manifestation of will through the e-mail and the position, shared by the Civil Code, in regard to silence, is identical – silence, as a rule, means refusal to conclude a contract.[64] Considering the specificity of communication in electronic form, it shall be discussed how the parties may agree on using the silence as a form of consent. Nevertheless, it is acceptable to consider the will, manifested but the parties, by implicative action, which will not give the dishonest party a chance to refuse the validity of the contract, existing between them.

In accordance with the second sentence of the Article 68 of the Civil Code, the parties can determine the form of transaction themselves, with the exception of the case when the law directly provides for such mandatory form, and thus, CCG strengthens the principle of freedom of transition form.[65] Following the similar freedom, if the parties agree that manifestation of will by them will take place by e-mail, the issue of validity can be addressed without any problem. The following case shall be taken into account – how the validity of the transaction, for which additional form is determined, shall

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59 *Hahnkamper W.*, Acceptance of an Offer in Light of Electronic Communications, Journal of Law and Commerce, Vol. 25:147, 2006, 150.

60 E.g. if the mail will never be accessible for the receiver for the simple reason that due to technical failure, the e-mail "was eaten" by the system, see: *Bindman J. C.*, The Spam Filter Ate My E-mail: When Are Electronic Records Received?, William Mitchell Law Review, Vol. 39:4, 2013, 1296-1297.

61 CCG regulation related to the disadvantage of revelation of the will.

62 *Tchanturia L.,* Introduction to the General Part of the Civil Code of Georgia, Tb., 2000, 319.

63 Details of the mentioned issue see: *Tchanturia L.,* Introduction to the General Part of the Civil Code of Georgia, Tb., 2000, 329 and further.

64 *Tchanturia L.,* Introduction to the General Part of the Civil Code of Georgia, Tb., 2000, 342-343.

65 Ibid, 346, 352.

be proven. E.g. for immovable property or leasing registration moment, if the party can present only e-mail communication, as the complicated form is already cancelled and he/ she hasn't the obligation of presentation of the document, signed by the parties. For this very reason, for the purpose of ensuring of stability of civil turnover, the Public Register requires a contract, authenticated by a notary or performance of signing there. With the changes, introduced in the Civil Code, many transactions were excluded from the list of mandatory-form transaction. And the above-mentioned circumstance, most probably, will facilitate concluding of contract using electronic form.

The Article 69 of the CCG regulates the issue of validity of a transaction, concluded in simple written form, whereas only the existence of signatures of the parties is sufficient to consider the transaction valid. As signature implies the existence of a document,[66] for the purpose of discussing the present topic, the question arises – how far it is possible to prove a signature on a document by the signature, existing on the e-mail and whether it find reflection on the validity of manifestation of the will.

4.1.3. Detailed Regulation

Although the rule of drawing up of an electronic signature and document is established by the legislation, it shall be clarified can the e-mail be accepted as the method of proving the manifestation of the will and whether it meets the requirements of the existing legislation.

Specially designed law[67], aiming at regulation of information, transmitted through the computer, plays important role in the similar sphere regulating exact vision in regard, at least, to formation of a contract. Creation of such type of legislation will probably be the most favorable, considering that Georgia is involved, for a long time, and is getting even more involved in international electronic commerce.

Besides, in regard to e-mail, the norm, regulating the obligation of honesty can be used. And if we judge based on the Article 8 of the CCG, all above-mentioned issues may follow from this Aand fill it.

It shall also be discussed how much or how the standard terms can be applied to the contract, concluded by e-mail, if mothing was mentioned about it in the correspondence of the parties and the party was not familiarized with it, or other cases?

4.1.4. Serious Perception of the Will

A question arises in regard to e-mail: how seriously we can perceive the will, received by communication means, so that the relevant legal result, concluding of a contract, follows it. Time is changing, the stages of development of society and its requirements change, and explanation of the relevant provision might be possible in another context.[68]

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66 *Tchanturia L.,* Introduction to the General Part of the Civil Code of Georgia, Tb., 2000, 350.

67 E.g. such as UCITA – The Uniform Computer Information Transactions Act, <http://www.ucitaonline.com>, [02.11.2013].

68 See the Article 57 of CCG on invalidity of transaction due to unseriousness of manifestation of the will: "1. Manifestation of will, performed unseriously (as a joke) is invalid, presuming that the lack of seriosness would be recognized. 2. The damage of the receiver of the will, resulting from his trust into seriousness of manifestation of the will, if he/ she didn't know and couldn't know about the lack of seriousness." For proper resolution and explanation of this issue it would be important to define – how seriously perceptible the message, received by this or that type of e-mail shall be.

In regard to communication in electronic form, we may raise an issue – how perceivable is the will, manifested vie the e-mail, for the other party. Invalidity of a contract may be caused by manifestation of the will, which is performed as a joke, unseriously, presuming that the receiver would understand lack of seriousness of the will.[69] Probably is can be assumed that in this case there may be difference in regard to the subject. If an electronic communication is sent via the e-mail of a company, more probably, the party will treat it seriously and will not perceive the joke, unlike the will, manifested by a natural person via e-mail, where the assumption that the will might be unserious, is bigger. The burden of proof – when such transaction may be deemed invalid – may depend on each specific case – when such transaction may be deemed invalid.

4.2. Judicial Practice

Judicial practice related to legal assessment of e-mail is very scarce, and, at the same time, not strongly reasoned in Georgia, as we will clearly see by analysis of several decisions, considered below. E.g. correspondence by e-mail, as a written notification on holding of the meeting of the Board of Supervisors, was attached the power of proof, although the court did not provide any legal assessment in regard to manifestation of the will.[70]

Incorrect explanations are provided in regard to e-mail in the following case,[71] where recognition of e-mail, as a document is hardly provided, with reference to the Articles 4 and 5 of the Law of Georgia "On Electronic Signature and Electronic Document". In particular, confirmation of the receipt of an e-mail with additional signature was deemed as a necessary criterion, which will significantly impede communication via e-mail in business relations, as dishonest party will always be able to refuse to confirm the above mentioned.

Georgia has not provided judgment in accordance with p. 5 of the Article 3, which establishes that the court cannot refuse to admit an electronic document as an evidence only because it is presented in electronic form.

The circumstance that the statutes of the company didn't provide for notification of a partner about holding a general meeting by e-mail also proved to be important for the court. However, it is not explained why and for what purpose it is important.

The mentioned case would be ideal for the development of judicial practice, but it is the fact that the mentioned case was resolved in conformity with this very practice, but with incorrect explanation of the law.

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69 E.g. when the offer is made in regard to the item which the seller has never had, see *Kobakhidze A.,* Civil Law, General Part, 2001, Tb., 299.

70 Evaluation was performed only in regard to electronic correspondence, as a proof, see the Decision of the Supreme Court on the case # as-712-675-2013, October 7, 2013, <http://prg.supremecourt.ge/DetailViewCivil.aspx>; like the mentioned Decision, assessment of electronic letter was not performed on the cases # as-1179-1044-10, December, 23 2010 <http://prg.supremecourt.ge/DetailViewCivil.aspx>; #as-882-1094-08, January 13, 2009, <http://www.supremecourt.ge/files/upload-file/pdf/kr20101.pdf>.

71 Decision of the Supreme Court on the case # as--683-644-2011, June 27, 2011, <http://prg.supremecourt.ge/DetailViewCivil.aspx>.

5. Conclusion

In the present paper, for the purpose of creation of a complete picture in regard to concluding a contract by e-mail, international acts and opinions were analyzed and compared with Georgian legislation and judicial practice. The core problems of the mentioned issue and its importance were demonstrated.

The law shall achieve its goal properly and with consideration of an individual's interests. It requires creation of the relevant space and its development. As Georgia is actively involved and makes progress in the development of international electronic commerce, it is the urgent need to reflect the international approaches to the e-mail in the existing legislation, be it introduction of amendment into the old law or creation of new legislative act specially regulating this issue. Improper understanding, analysis of the standards established by international acts, will be harmful for Georgian legal space.

Maybe legislative space does not consider the norms, regulating e-mail word for word, but following its goals and the history of creation, links can be established among them. However, naturally, it would be better to develop special normative act, which would regulate this issue in conformity with the international standards. Until legislatively regulating the conclusion of a contract by e-mail, the problems related to it shall be solved based on specific cases.

Finally, the advantages of usage of e-mail shall be stressed: message can be sent any time, from any place; sending is easy and convenient without any additional procedures;[72] information on whether the relevant message was sent and received can be obtained any time and thus, honest party is always protected from the viewpoint of obtaining/ maintaining of evidence.

However, it shall be taken into account that contracts are mainly based on promises and thus, the role of Contractual Law is maintaining of stability of relations between the subjects of civil turnover. Making such promises is simpler by using technologies and they might prove not to be easily regulated; and an e-mail, as the equivalent of a letter, and its improper perception might be related with the invalidity of a transaction, as, even in the case of simple written form, if the relevant requirements are not met, the transaction will be deemed bull and void.

According to the international standards, each state is obliged to change the legislation immediately if it impedes electronic document turnover in regard to concluding a contract. UNCITRAL model law, Vienna Convention, German Regulation, approach of common law reflects – if a contract is concluded using electronic communication, such contract shall not be deemed invalid and its fulfillment shall not be impossible only because electronic communication was used for the purpose of concluding the contract.

Communication of the documents and the will, manifested by the parties, in electronic form may not cause problems, radically different from material document,[73] but many issues arise in regard to validity of manifestation of the will by e-mail, e.g. where and when the manifestation of such will is considered received, when it will be considered that the received message appears in the sphere of the

[72] Internet Electronic Mail: A Last Bastion for the Mailbox Rule, Hofstra Law Review, Vol. 25:971, 1997, 991.

[73] *Smith S.E.*, The United Nations Convention on the Use of Electronic Communication in International Contracts (Cuecic): Why It Should Be Adopted and How It Will Affect International E-Contracting, SMU Science and Technology Law Review, Vol. 11, 2008, 137, etc.

receiver's influence, whether "the will, expressed by equipment" is associated with the will, manifested by natural person, what rule shall be used in regard to checking of e-mail by a natural person and a legal entity, what requirements of form shall be met by the manifested will in order to be deemed valid, etc.

Based on the analysis of judicial practice it could be said that it's time to provide detailed legal assessment of manifestation of the will in electronic form and develop proper practice without creating impeding circumstances for communication between the parties in such form.

Tamar Lakerbaia *

The Right of Withdrawal in European Consumer Protection Law

1. Introduction

Notion of consumer is comparably new in the science of private law. The growth in economic relations, extending its scale and development of civil turnover during the last hundred years along with other important issues raised the need for the protection of consumers. Since the second half of the last century protection of consumer rights has become one of the priorities for the whole civilized world. First of all, the interest to the issue was the result of fight against the business monopoly, secondly, protection of consumers from wilfulness of entrepreneurs in unequal market relations. Moreover, consumers were considered as a week party of transactions.

Protection of consumer rights became even more relevant under the modern society, as the economic relations of individuals as well as legal entities participating in the turnover crossed the national borders and acquired the international nature. It became necessary to adopt cross-border regulations on the protection of consumer rights. In this regard the efforts of the European Community member states for the creation of integrated European law area must be noted. For granting strong guarantees to consumers and protection of their rights the European Community has adopted number of directives, based on which the European standards for the protection of consumer rights have been established.

The important guaranty for consumers is granting them the Right of Withdrawal as well establishment of legal framework for the implementation of the above mentioned right. Moreover, such right of consumer is subject to numerous discussions in the various European doctrines as well as court practices. It has to be noted that the issue on the withdrawal of will granted to the consumer has not been studied in the private law of Georgia at a relevant level. The limited regulation, considered under the Civil Code of Georgia for the agreements concluded in the street, does not comply with the European standards regulating the above right, creating the need for the deeper research of the issue.

The objective of the present research is to review the legal nature and preconditions for the implementation of the right of withdrawal as established by the EU directives in the consumer protection law. However, the article is not based on the comparative legal study. It demonstrates the European standard of the cancelation right, which must be considered in the process of regulation of the same right in Georgian consumer law.

2. Consumer Right as the Benefit Protected by the Law

In the modern society the consumer's right is acknowledged as the integral part of the worthwhile existence of the human being. Consumerism[1] – is a relatively new movement in the law science. Its objective is to protect the interests of the buyer of goods and services. The consumer right is the collective

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1 Protection of Consumer Rights.

notion and comprises the right of the individual participating in the economic relations to receive high quality and safe goods or services. All information related to such goods or services. In case of breaches such duties the right to request reimbursement of the loss caused by the negligence of such liabilities by the businesses.[2]

Initial interest towards the consumer rights can be traced back to the beginning of 20Th century, in the United States. For the regulation of strong monopolist and oligopolistic market in 1914 the special agency – Federal Trade Commission was established. One of the directions of the organisation activities was protection of consumers from the entrepreneurs holding the absolute forces. Further measures in this regard were introduced in 1930-ies; however such measures did not have significant results.[3]

The strong monopolist market was a serious problem on the European continent too. It was considered that the creation of common European market and effective control mechanisms for the market was one of the means for overcoming the here mentioned problem. All the above was the basis for the creation of European economic union in 1957. However, creation of single market would not be possible without protection of consumer rights, as they were considered as integral parts of such market.[4] Issue on the protection of consumer rights with its modern context, became relevant since 1960-ies, within the general trend of acknowledgement and protection of human being's rights characteristic for the period.[5]

"Consumer by definition includes us all"

These are opening words of a message of President of the United States, Kennedy directed towards the United States congress in 1962. The statement included the indication on four fundamental consumer rights: the right to be informed; the right to choose; the right to safety; and the right heard (represented)[6]. Starting from this moment protection of consumer rights has become the priority in the whole world including European continent.

2.1. Acknowledgement of Consumer Right in Europe

In 1970-ies the idea of consumer rights' protection has also spread in Western Europe. The national associations for consumer protection were created; number of legal instruments for the protection of consumer rights was developed. In 1973 the European Community approved the chertier on the consumers, and in 1975 the European Community in its resolution on the consumer rights and interests, first time acknowledged the relevance of consumer rights to the general market goals. However for that period the European Community did not have special competence in the area of consumer right protection.[7] In 1975

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 >, [04.04.2014].

3 *Antoniolli L.,* Consumer Law as an Inatance of the Law of Diversity, Vermont Law Review, Vol. 30:855, 2006, 857, <http://lawreview.vermontlaw.edu/files/2012/02/antoniolli.pdf>, [3.05.2014].

4 *Chirita A. D.,* The Impact of Directive 2011/83/EU on Consumer Rights, Ius Commune Law Series, Keirse, *Samoy I., Loos M.* (eds.), Intersentia, 2012, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1998993>, [12.13.2013].

5 *Antoniolli L.,* Consumer Law as an Inatance of the Law of Diversity, Vermont Law Review, Vol. 30:855, 2006, 857, <http://lawreview.vermontlaw.edu/files/2012/02/antoniolli.pdf>, [3.05.2014].

6 *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>, [04.04.2014].

7 *Antoniolli L.,* Consumer Law as an Inatance of the Law of Diversity, Vermont Law Review, Vol. 30:855, 2006, 857, <http://lawreview.vermontlaw.edu/files/2012/02/antoniolli.pdf>, [3.05.2014].

the European Union approved the preliminary program for the protection of consumer rights. Following the appeal of the President Kennedy, the Council of European Union named five basic consumer rights:

- the right to protection of health and safety;
- the right to protection of economic interests;
- the right to redress;
- the right to information and education;
- the right of representation (the right to be heard).[8]

Important changes in this field have been taken in 1980-ies by adoption of Common European Act. The Act changed all important provisions with regard to the internal market, which inter alia has stipulated commitment to protect consumers at high level. The above had impact over the consumer law but only indirectly.[9] Until 1991, regulations protecting consumer rights were mainly designated in the European Union agreements without any tangible results or real consequence.[10] Only at the end of 20th century the notion of consumer acquired its actual legal significance, and the protection of consumers became one of the main goals of the European Union.

The main changes in the field had commenced in 1990-ies, when, gradually, the attention from the market regulation was directed towards the closer economic and social collaboration within the European Community. The important move was made in 1992 by signing the Maastricht Treaty on the establishment of European Union. As a result economic union of Europe was transformed into the union of European states. The Treaty defined the competence of European Council in relation to the consumer rights and acknowledged liability for protection of the consumer rights at high level.[11] Later, in 1997 the Amsterdam Treaty was signed, by which the changes were made to the Maastricht Treaty on the establishment of European Union. The Amsterdam Treaty expanded the competence of Union in the area of protection of consumer rights. Moreover, the mandatory consideration of consumer rights and need for their horizontal integration was determined for all acts of the European Union.[12]

The liabilities of European Union on the protection of consumer rights were also reflected in European Union Chertier of Fundamental Rights, under which the policy of the European Union reinforces the high level of consumer protection. Moreover, European Commission is systematically publishing consumer policy strategy, which consists of several year plans concerning the Union's consumer policy. On 13 March 2007 the Commission presented new strategy for the consumer policy, including the main concept of the consumer policy for 2007 – 2013 years. The objective of a new strategy was strengthening of awareness level of consumers and competence, ensuring their safe and active moving across the European market.[13]

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8 European Commission 14 April 1975 resolution on the preliminary program for consumer protection, official journal of European Union, 1975, 92/1, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:1975:092:0002:0016:EN:PDF>, [24.03.2014].

9 *Antoniolli L.,* Consumer Law as an Inatance of the Law of Diversity, Vermont Law Review, Vol. 30:855, 2006, 863,<http://lawreview.vermontlaw.edu/files/2012/02/antoniolli.pdf>, [3.05.2014].

10 *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>, [04.04.2014].

11 *Erkvania T.,* European standards for consumer rights' protection in the area of electronic trade and Georgian legislation, "Justice and Law", 2011, #3, 11, 46 (In Georgian); *Antoniolli L.,* Consumer Law as an Inatance of the Law of Diversity, Vermont Law Review, Vol. 30:855, 2006, 864, <http://lawreview.vermontlaw.edu/files/2012/02/antoniolli.pdf>, [3.05.2014] (In Georgian).

12 Ibid, 866.

13 *Erkvania T.,* European standards for consumer rights' protection in the area of electronic trade and Georgian legislation, "Justice and Law", 2011, #3, 11, 46 (In Georgian).

Hence, creation of European Union supported the development of consumer law in Europe, transformation of its significance up to the transnational level. The primary objectives of the organisation are: control over the internal market, integration of member states and ensuring stability and prosperity. However, establishment of common single market would be possible through the provision about free movement of goods and services; by creation of conditions for the consumers to buy these goods and services within the national borders as well as in cross-border transactions.[14]

It has to be noted that the law proved to be quite inflexible in the acknowledgement consumer as a autonomous category. However the pressure of the economic and social requirements was so high, that it finally caused tangible changes. At present, law on protection of consumer rights is recognised as category and its sense is increasing day by day. The important feature of this field of the law is the inter-disciplinary approach. It covers legal, social, economic and political aspects, and combines rules characteristic to the various areas of law, such as constitutional, administrative, private and criminal law.[15]

2.2. Notion of Consumer According to the European Law

Term "consumer" is undoubtedly creation of the 20th century. It has to be mentioned that initially it was considered as the economic-social category.[16] Only following the Second World War it has acquired the legal meaning. Acknowledgement of consumer as the legal phenomena was preceded with the re-evaluation of values of the period – shift from the production-oriented society to the consumer-oriented society.[17] Concept of consumer has special importance in the private law, as it defines the scope of validity of the consumer law. However, there is no integral approach to the issue in the European law or the laws of member states.[18] It has to be noted that every act the "consumer" for its own purposes. It became necessary to develop uniform and consistent notion of the "consumer", which would establish minimal standards and set limits to the further interpretation.[19]

2.2.1. Then Who is a Consumer?

The first directive of the European Council on consumers defines consumer as naturalnatural person, who acts outside the scope of his/her trade or professional activities in the contracts envisaged

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14 *Antoniolli L.,* Consumer Law as an Inatance of the Law of Diversity, Vermont Law Review, Vol. 30:855, 2006, 864, <http://lawreview.vermontlaw.edu/files/2012/02/antoniolli.pdf>, [3.05.2014].

15 Ibid.

16 *Daunel-Lieb B. (Cologne),* A Special Private Law for B2C? Silver Bullet or Blind Alley? New Features in Contract Law, *Schulze R.* sd. pub. München, Sellier, European Law Publishers, 2007, 107-117.

17 The Concept of the European Consumer under the Spotlight – Development, Criticism and Opportunities, <http://www.jus.uio.no/forskning/nettverk/europarettsnettverket/arrangementer/europarettsforum/presentasjoner-forum/schuller-060510.pdf>, [12.04.2014].

18 *Schulte-Nolke H., Twigg-Fllesner CH., Ebers M.,* EC Soncumer Law Compedium, The Consumer Aquis and its Transposition in the Member States, Sellier, Münich, 2008, 454.

19 *Compare Rafal M.,* The Notion of "Consumer" in EU Law, Library Briefing, Library of the European Parliament, <http://www.europarl.europa.eu/RegData/bibliotheque/briefing/2013/130477/LDM_BRI(2013)130477_REV1_EN.pdf>, [27.03.2014].

under the given directive.[20] In accordance with the directives adopted later,[21] the notion of consumer was elaborated and one more condition was added to it. Finally the following definition was developed: consumer is a natural person, who is acting outside the scope of trade, business or professional activity[22]. Despite the various interpretation of consumer in the European Commission directives all of them include the indication on the following:

- First of all - Consumer is a natural person, and
- Interest of action – outside the scope of trade, business and professional activities.[23]

Above definition distinguishes two main issues. First – it considers the subjective criteria and defines that only natural person is considered as consumer, and the second feature – is based on the functional criteria and is expressed in the objective of such an action.[24] Despite the comprehensive definition, often in the legal systems of member states the notion of "consumer" implies much more than meaning defined under the EU law.[25]

2.2.2. Consumer in the Legislations of EU Member States

Majority of member states harmonised the notion of consumer established under the directives with the national legislations. However, often "consumer" is defined at a wider level compared with the initial definition. Some of the states use one overarching definition, which is common for all consumer agreements (for example: Austria, Germany, and Poland). Some states, depending on the context apply different definitions. In the legislation of several states the contents of the notion of consumer depends on the contents of the act itself.[26] French doctrine had a different position towards the above issue. Namely, there was no legislative definition for the notion of consumer. This issue was left up to the courts, which based on the specific case circumstances was defining the issue on the considering the person as the consumer.[27]

2.2.3. Legal Entities as Consumers

In accordance with the EU law the notion of consumer does not extend to legal entity, even if they act with non-business objectives (e.g. non-profit legal entities).[28] Moreover, European Court of Justice in

20 Directive of European Commission, dated 20 December 1985, No 85/577 on the Protection of consumer rights for the contracts concluded under informal circumstances.

21 Directives of European Commission No93/13, 97/7, 99/44, 2000/31 and 2002/65.

22 *Schulte-Nolke H., Twigg-Fllesner CH., Ebers M.,* EC Soncumer Law Compedium, The Consumer Aquis and its transposition in the Member States, sellier, European Law Publishers, Münich, 2008, 454.

23 *Howells G.,* Consumer Concepts for a European Code?, New Features in Contract Law, *R. Schulze* sd. pub. München, Sellier, European Law Publishers, 2007, 119-135.

24 *Ramishvili A.,* Private Law Mechanisms for the Protection of Consumer Rights in the Consumer Loan Agreement, Law Journal, #2, 2011, 117 (In Georgian).

25 *Compare, Rafal M.,* The Notion of "Consumer" in EU law, Library Briefing, Library of the European Parliament, <http://www.europarl.europa.eu/RegData/bibliotheque/briefing/2013/130477/LDM_BRI(2013)130477_REV1_EN.pdf>, [27.03.2014].

26 Ibid.

27 *Schulte-Nolke H., Twigg-Fllesner CH., Ebers M.,* EC Consumer Law Compedium, The Consumer Aquis and its Transposition in the Member States, sellier, European Law Publishers, Münich, 2008, 457.

28 *Hondius E.,* The Notion of Consumer: European Union versus Member States, Sidney Law Review, Vol. 28:29, 2006, 95, <http://sydney.edu.au/law/slr/slr28_1/Hondius.pdf>, [04.04.2014].

case "Patrick vs. Pinto" indicated that wide definition of consumer notion is not acceptable and it must be limited with the natural persons.[29] Vast majority of member states follow the above rule and consider only natural person under the consumer (Germany, Estonia, Lithuania, Italy and etc.).[30]

On contrary to the above decision several member states consider legal entities under the notion of consumer, if it purchases goods or services for non-business purposes (e.g. Austria, Czech Republic), or if acts for the final beneficiary (Greece, Spain). In France the notion of so called "non-professional" consumer is used for the protection from the large and strong companies.[31] Actually, court practice of France considers natural persons and legal entities acting not for their professional, business activities, as the consumer.[32]

2.2.4. Small and Medium-size Enterprises as Consumers

Under the EU law small and medium-sized enterprises are not treated as consumers, even in case of self-employed traders and family businesses. Despite the above some member state legal systems extend the rules regulating the consumer rights over the above enterprises. For example, in Netherlands, small enterprises (up to 49 employees) may rely on certain rules on the unfair conditions in the agreement on equal bases with the consumers. In France the court protects the self-employed trader in the same way as the consumer, when the agreement is not directly related to his/her business activities. In the United Kingdom companies may rely on the consumer protection norms in case of existence of unfair terms in purchase agreement or in the activities which are not usual for them.[33]

Due to limiting the consumer only with the natural person, small and medium-sized organisations are actually left without protection against the large companies. However, up to date it is still disputable

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29 Case C-361/89, Patrice Di Pinto, [1991] ECR, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61989CJ0361:EN:PDF>, [22.05.2014].

30 *Schulte-Nolke H., Twigg-Fllesner CH., Ebers M.,* EC Consumer Law Compedium, The Consumer Aquis and its Transposition in the Member States, Sellier, European Law Publishers, Münich, 2008, 457.

31 *Compare Rafal M.,* The Notion of "Consumer" in EU Law, Library Briefing, Library of the European Parliament. <http://www.europarl.europa.eu/RegData/bibliotheque/briefing/2013/130477/LDM_BRI(2013)130477_REV1_EN.pdf>, [27.03.2014].

32 *Schulte-Nolke H., Twigg-Fllesner CH., Ebers M,* EC Consumer Law Compedium, The Consumer Aquis and its Transposition in the Member States, Sellier, European Law Publishers, Münich, 2008, 458. In this regard, the decision of French cassation court, dated 28 April 1987 is considered as precedential resolution. According to the case materials, immovable asset company purchased alarm system for its office which was not working properly. According to the general rules of activities, buyer could not request termination of the contract as well as request reimbursement of damage. Based on the rationale of the cassation court, application of norms of French consumer code was still possible. As the subject of the contract did not have direct connection with the business activities, and the agency did not have technical experience related to the alarm system. Indicating to the above circumstances, the court noted, that in such cases the buyer shall be considered as consumer. In the resolution issued later, the court also noted that the main criteria for the application of consumer code is not the technical competence of the person who is acting outside the scope of profession, the criteria is the connection of implemented action with the business activities (Decision of French cassation court, dated 24 January 1995).

33 *Rafal M.,* The Notion of "Consumer" in EU Law, Library Briefing, Library of the European Parliament, <http://www.europarl.europa.eu/RegData/bibliotheque/briefing/2013/130477/LDM_BRI(2013)130477_REV1_EN.pdf>, [27.03.2014].

whether it is possible to treat associations, which have relevant experience and market force, as consumers. Perhaps for the above reasons, some member states treat such organisations as consumers and extend the relevant protection mechanisms over them as well (Austria, Belgium, France and etc.).[34]

2.2.5. Employee as a Consumer

One of the features of the German law is that it considers employee as consumer, if he/she acts within his/her profession framework (but not the self-employed). This of course, does not mean that all consumer law norms automatically apply to the employee. Mentioned issue was defined by the court practice. In particular, European Commission 93/13 Directive on Unfair Contract Terms could be used in case of labour agreements as a protective majeure against unfair terms in such contracts. However in case of an off-premises contracts for instance, the door-step contracts or contracts concluded away from business premises, in the street the norms regulating the withdrawal right will not be extended over such labour agreement. Based on the explanations provided by the Federal Labour Court of Germany such agreement does not come under the contents of the agreements signed at the door-step as it is not concluded for commercial purposes.[35]

2.2.6. Consumer in a Connected Contract

Up to date, definition of consumer is disputable in the contracts where the person acts with a dual purpose, for personal and professional needs. This generally occurs with self-employed, who buy multiple use goods. There are four main approached in terms of this type of agreements:

- They are not considered as consumer agreements;
- They are considered as consumer agreements only in case if the personal interest prevails;
- They are considered as consumer agreements only in case if the professional interest is disputable;
- They are always considered as consumer agreements.[36]

Hence, actually there is no common approach to such mixed agreements. The directive on product safety contains the exception, which concerns defective products and mainly used for personal purposes. In addition, directive on the consumer rights defines that if the purpose of the trade is so marginal that can't be considered as dominating under the given context, then the mixed purpose agreements shall be deemed as consumer agreements.[37]

At the initial stage the Court of Justice held that even minimal connection to the persons professional activities, excludes the effectiveness of the directive on the agreements concluded away from business

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34 *Schulte-Nolke H., Twigg-Fllesner CH., Ebers M.,* EC Consumer Law Compedium, The Consumer Aquis and its Transposition in the Member States, Sellier, European Law Publishers, Münich, 2008, 461.

35 Ibid, 462.

36 *Rafal M.,* The Notion of "Consumer" in EU Law, Library Briefing, Library of the European Parliament, <http://www.europarl.europa.eu/RegData/bibliotheque/briefing/2013/130477/LDM_BRI(2013)130477_REV1_EN.pdf>, [27.03.2014].

37 Ibid.

premises.[38] Later, the same court in the case Johann Gruber vs. Bay Ve Ayi" indicated that if the business purpose of the agreement was marginal in relation to the overall context of the deal then the person could use norms regulating the consumer rights. According to the same court decision, the person can't be apply to the fact that he/she is a consumer if carelessly (without proper attention) creates the impression that acted within his/her business interests (for example using the head letter of the company, printed name or address of the company on the post card).[39]

By this decision Court has even more limited the notion of consumer. Moreover, the Court explained the essence of the consumer agreement and indicated that the consumer agreement is the deal made by the natural person who acts, on the one hand, outside the scope of his/her professional activities and on the other hand, partially within the scope of his/her trade or business interests. It is important, that this definition contradicts with the notion of consumer provided in various directives adopted by the European Commission.[40] Vast majority of member states do not have specific rules for the mixed agreements. Despite the above, some countries consider it as the consumer agreement in case if the personal interests are prevailing (Germany, Scandinavian countries), or if the connection with the business activities is indirect (Poland). Legislation of Austria and Belgium fully excludes qualification of mixed agreements as consumer contracts.[41]

As a conclusion it can be noted that for the consideration of the deal as consumer agreement it is decisive to have a consumer as one of the parties to the agreement. Otherwise, it will be impossible to use norms protecting consumers, including the right of withdrawal. The important element of the consumer agreement is the fact that the other party must necessarily be the person acting for his/her own trade, professional or business purposes – entrepreneur. The mandatory rules protecting consumer rights are not extended to the other types of relationships.[42]

3. The Right to Withdraw in the Contract Law

It is clear that 21th century challenges made the consumer the important player of the contract law. Civilised world has unanimously acknowledged the need for special protection of contracts concluded with the participation of the consumer. It was mainly caused doe to the fact that consumer was considered as a "week party" in contract negotiations processes. In such, The Right to Withdrawal is considered as one of the important instruments protecting the consumer interests. This right of the consumer is relatively new for the private law and with its contents radically differs from the older rules on the withdrawal of will. According to the European legislators' right to reject the contract, on the one hand,

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38 Case C-45/96, Bayerische Hypotheken _ und Wechselbank AG, [1998] ECR, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61996CJ0045:EN:PDF>, [12.11.2013].

39 Case C-464/01, *Johann Gruber v Bay Wa AG, [2005] ECR,* <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62001CJ0464:EN:PDF>, [12.11.2013].

40 *Hondius E.,* The Notion of Consumer: European Union versus Member States, Sidney Law Review, Vol. 28:29, 2006, 95, <http://sydney.edu.au/law/slr/slr28_1/Hondius.pdf>, [04.04.2014].

41 *Rafal M.,* The Notion of "Consumer" in EU Law, Library Briefing, Library of the European Parliament, <http://www.europarl.europa.eu/RegData/bibliotheque/briefing/2013/130477/LDM_BRI(2013)130477_REV1_EN.pdf>, [27.03.2014].

42 *Hondius E.,* The Notion of Consumer: European Union versus Member States, Sidney Law Review, Vol. 28:29, 2006, 95, <http://sydney.edu.au/law/slr/slr28_1/Hondius.pdf>, [04.04.20134].

ensures protection of contractual freedom of the consumer, and on the other hand, is considered as simple way to leave a contract aside. It is not identical to the traditional institutions of termination of contract or to the other ways to release from the binding force of a contract. Moreover, this right could be used not for all types but only in specific contracts. Before discussing the legal nature of this exclusive right of the consumer, it is important to clarify some basic issues. First of all, it is interesting to know what does "weak party to the contract" mean or based on what is consumer deemed as such party. What causes granting the right of withdrawal to the consumer, as to the weak party to the contract?

3.3. Consumer as a "Weak Party" to the Contract

Innovative means for the conclusion of agreements, development of distance and electronic commerce, unprecedented progress of electronic media and internet created the need for the adaptation of economic and legal institution with the new technologies and trade rules.[43] Technological progress had also influence over the contract law. New means of contract conclusion created the need for strongly protection of consumers. It is true that under the modern understanding, "consumer" is considered as a self-confident and informed person, however quite often the process of contract conclusion itself, puts him/her under the unequal conditions against the experienced or/ and professional trader. Under such circumstances the right to withdraw the will is directed, on the one hand, towards the market stability and, on the other hand, towards the eradication of results of the market inefficiencies. First of all, consumer behaviour is considered as the systemic deficiency of the marketplace and is not always subject to the rational explanation. His/her choice often depends on decision making circumstances and is somehow stress-related to the consumer.[44]

Lack of information and experience, market force as well the aggressive trade techniques effects over the formation of the will of consumer and results in the unconscious consent to the contract terms.[45] In such situations we deal with so called "lock-in" position, when consumer is obviously wrong in his/her decision, has no idea about alternative producer or supplier, which is the result of the convincing and deceiving information on the uniqueness of offered goods or services provided by the producer.[46]

Recognition consumer as a "weak" party to the contract is based on the nature of will declaration towards conclusion a contract. It is considered that, due to the impact of various external factors, the consumer is limited in the selection of counteragent of the contract as well as in definition of contract

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43 *Katz A.W.,* Is Electronic Contracting Different? Contract Law in the Information Age, *Ökonomische Analyse des Sozialschutzprinzips im Zivilrecht* (Economic Analysis of the Social Protection Principle in Civil Law), ed. Hans-Bernd Schäfer and Claus Ott.Tübingen: Mohr Siebeck, 2004, 2-4, <http://www.columbia.edu/"ak472/papers/Electronic%20Contracting.pdf>, [12.03.2014].

44 *Haupt S.,* An Economic analysis of Consumer Protection In Contract Law, German Law Journal, Vol. 04, No.11, 1148, 2003, <http://www.germanlawjournal.com/pdfs/Vol04No11/PDF_Vol_04_No_11_1137-1164_Private_Haupt.pdf>, [12.04.2014].

45 *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 Bucutsit, 2013, 270, <http://cks.univnt.ro/download/100_e_book_final_.pdf >, [25.04.2014].

46 *Haupt S.,* An Economic analysis of Consumer Protection In Contract Law, German Law Journal, Vol. 04, No.11, 1148, <http://www.germanlawjournal.com/pdfs/Vol04No11/PDF_Vol_04_No_11_1137-1164_Private_Haupt.pdf>, [12.04.2014].

contents. The above, in the view of the researchers, limits the contractual freedom of the consumer and makes the consumer the object of special protection.[47]

3.4. Contractual Freedom of Consumer

Strengthening of status of consumer in the European contract law and under specific circumstances granting them the withdrawal right, is the result of directives adopted by the European Union at different times and implemented by the member states. Principle of Contractual freedom, which was considered as the "inevitable analogue" of the free entrepreneurship was placed under some limitations in the contracts with the consumer participation.[48]

The scale of protection of consumer rights had the similar impact over the contract law, as the technological and organizational innovation had in 18-19 centuries.[49] Principle of contract freedom which was developing in the context of continuous re-evaluation faced the new challenges.[50] In the classical terms, it considers equal rights of consumer and trader to conclude contract with any contents not prohibited by the law based on their responsibility and by free expression of the will.[51] On the other hand, it is logically connected with the idea of freedom of the will and self-responsibility.[52] It implies that every person participating in transaction acts reasonably, makes decisions independently and is ready to be responsible for the results.[53]

Acknowledgement of consumer as a subject of special protection in contract law, was followed by the mandatory consideration of such week parties interests in all contracts concluded with the participation of the consumer. This established double standards for the principle of freedom of contract. On the one hand, freedom of contract is considered as the driving and supporting factor of the market development, which means possibility to conclude any contract not prohibited by law and at the certain level reinforces the inequality of the parties.[54]

On the other hand, unlimited freedom bears the risk of economic exploitation. It is possible when one party of contract is in a privileged position or is stronger in economic or informational means and can take advantage of his/her inexperience and dependence. Unequal bargaining force of parties to the

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47 *Kessler F.,* Contract of Adhesion – Some Thoughts About Freedom Of Contract, Yale Law School Legal Scholarship Repository, 1-1-1943, HeinOnline, Colum. L. Rev., Vol. 43, 1943, 630, <http://digitalcommons.law.yale.edu/fss_papers/2731 630>, [28.02.2014].

48 Ibid.

49 *Katz A.W.,* Is Electronic Contracting Different? Contract Law in the Information Age, *Ökonomische Analyse des Sozials*chutzprinzips im Zivilrecht (Economic Analysis of the Social Protection Principle in Civil Law), ed. Hans-Bernd Schäfer and Claus Ott.Tübingen: Mohr Siebeck, 2004, 2-8, <http://www.columbia.edu/"ak472/papers/Electronic%20Contracting.pdf >, [12.03.2014].

50 *Zumbansen P.,* The Law of Contracts, *Reimann M., Zekoll J.,* Introduction to German Law, Kluwer Law International, 2005, 180.

51 *Zvaigert K., Kotz H.,* Introduction to the Comparative Law in the Area of Private Law, Vol., I, Tb., 2000, 16 (In Georgian).

52 *Chanturia L.,* General Section of the Civil Law, Tb., 2011, 90-94 (In Georgian).

53 Ibid.

54 Ibid; *Whittaker S.,* The Optional Instrument of European Contract Law and Freedom of Contract, European Review of Contract Law, Vol. 7, Issue 3, 371-398, <http://ec.europa.eu/justice/news/consulting_public/0052/contributions/333_en.pdf>, [03.05.2014].

contract often is favourable for the trader , who makes an offer more precisely, imposes to the other party such terms of the contract, consent to which is caused by the absence of the choice, due to attractive offer, unexpected situation and other marketing tricks.[55] The above mentioned created the need for the protection of interests of the consumer, as a weak party participating in the transaction. Achievement of this aim would not be possible without limitation of the principle of freedom of contract.

Hence, in the contracts concluded with the participation of consumer the level of legal protection depends on the status of parties involving into negotiations.[56] If one of the parties is the consumer, then protection of his/her freedom of contract is implemented by the limitation of contractual freedom of the other party. It can be said, that with the consideration of social and political views, the principle of freedom of contract in one case, is reviewed in a wider sense as the basis of the establishment of contractual relations for all parties participating in the transaction. In other case, its effect is led to the consideration of interests of the consumer, as relatively unprotected party to the specific relationships.[57] Moreover, the freedom of action of one party, in the discussed case, trader is restricted at the level required for ensuring interests of other persons, consumers. The purpose of such specification of the boundaries of action is protection of certain individuals and generally, the legal order from the unfair results.[58]

3.5. Binding Force of Contract

Acknowledgement of consumer as a "weak" party and granting him/her the right to cancel an agreement, had impact on such fundamental principles of the contract law as *pucta sunt servanda.* In particular, according to the general approach of the private law, the concluded contract must be executed, the above means that, contracting parties voluntarily and mutually give a promise that the contract will be performed, which is known by the name of self-binding force of the contract.[59]

Accordingly, if the person decides to conclude agreement and this intention is the subject of negotiations, the above creates other parties expectation protected by the law. This is the basis for the binding force of the agreement. After concluding the contract, the parties are not authorized reject it unilaterally by withdrawal the expressed will. It can be said, that contract's self-binding force is the price for contractual freedom[60]. If the parties to the contract had unconditional right for termination of contract, the whole idea of the execution of contract terms would lose sense and the contract law based on the above principle would be destroyed.[61]

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55 *Pokrovski N.A.,* Main Problems Related to Civil Law, Editorial House: Status, Msc., 1998, 263 (In Russian).

56 *Dzlierashvili Z., Tsertsvadze G., Robakidze I., Svanadze G., Tsertsvadze L., Janashia L.,* Contract Law, Tb., 2014, 29 (In Georgian).

57 *Whittaker S.,* The Optional Instrument of European Contract Law and Freedom of Contract, European Review of Contract Law, Vol. 7, Issue 3, 371-398, <http://ec.europa.eu/justice/news/consulting_public/0052/contributions/333_en.pdf>, [03.05.2014].

58 *Kereselidze D.,* The Widest Systemic Notions of Private Law, Tb., 2009, 261 (In Georgian).

59 *Chanturia L.,* Comments to the Civil Code of Georgia, Vol. III, Article 319, Tb., 2001, 57 (in Georgian).

60 *Zimmermann R.,* The Law of Obligations, Roman Foundations of the Civilian Tradition, set, printed and hound in the Republic of South Africa by the Rusticapress LTD, Ndabeni, Cape, 1992, 585; *Chanturia L.,* General section of Civil Law, Tb., 2011, 90-94 (In Georgian).

61 *Sir Markesinis B., Unberath H., Johnston A*., The German Law of Contract Hart Publishing, Oxford and Portland, Oregon, 2006, 263.

Approach to the binding force of contract was significantly changed in the contracts, where one party is trader and the other party is a consumer. Although, *pucta sunt servanda principle* is considered as one of the pillars of the contract law, however it does not always fulfil its function. The responsibility of parties on the fulfilment of given promise is void in cases, where such promise is not result of a free will[62]. It is important, that in Roman law, all agreements did not have absolutely binding force. Accordingly, the formal requirements of the contract were not always creating its binding effect.[63]

Theory of will, author of which is Frederic *Savigny,* relates the binding force of the contract with the personal autonomy. Obligatory nature of contract terms must be the result of voluntary decision, free will of parties. Deficiency of will expression weakens the authenticity of term and is considered as the basis for contract annulling.[64] Saving distinguishes three elements when discussing the authenticity of the will expression: the will, its declaration and their inter-compatibility. Deficiency of one of the three elements results in the absence or invalidity of will expression.[65]

Declaration of free will, its relevance with the real intention of an individual and possibility of its realization determines the equality of parties in the market relations. Any influence over the formation of the will is perceived as a defect of the contractual negotiation.[66] In one instance, this might be the breach of formal rules of the contract conclusion, in other, the infringement of procedural rules. Legal effect of the contract might be ineligible due to the subject matter of a contract, because of circumstances of concluding a contract through form in which the will is expressed, due to defect of will and deficiencies in its declaration, which might be connected with conscious or unintentional action.[67] Yet, several procedural standards can be considered as classical ground for contract annulling: contracts concluded by mistake, by deceit and under duress. However, since the second half of 20th century the new rule of releasing from the binding force of the contract emerges, which, on the one hand, protects consumer's freedom and, on the other hand, provides him/her with the possibility to withdraw from the contract.[68]

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62 *Sir Markesinis B., Unberath H., Johnston A*., The German Law of Contract Hart Publishing, Oxford and Portland, Oregon, 2006, 263.

63 *Zimmermann R.,* The Law of Obligations, Roman Foundations of the Civilian Tradition, set, printed and hound in the Republic of South Africa by the Rusticapress LTD, Ndabeni, Cape, 1992, 585.

64 *Sir Markesinis B., Unberath H., Johnston A.,* The German Law of Contract, Oxford and Portland, Oregon, 2006, 263.

65 *Kereselidze D.,* The Widest Systemic Notions of Private Law, Tb., 2009, 261 (In Georgian).

66 *Zvaigert K., Kotz H.,* Introduction to the Comparative Law in the Area of Private Law, Vol. I, Tb., 2000, 16 (In Georgian).

67 *Kereselidze D.,* The Widest Systemic Notions of Private Law, Tb., 2009, 262 (In Georgian).

68 *Sir Markesinis B., Unberath H., Johnston A.,* The German Law of Contract, Hart Publishing, Oxford and Portland, Oregon, 2006, 263.

4. Terminology and Subject Matter of the Withdrawal Right

4.1. Definition of the Term

European directives which are granting consumers the right to withdraw from the contract[69], use different terms for this right[70]. It is even more challenging to introduce the term into the Georgian legal system, as the term with its content and meaning does not coincide with any known legal term describing the termination of contract.

The only norm which partially resembles the regulation on the withdrawal of the will established in the European consumer law is the Article 336 of Civil Code of Georgia,[71] concerning the contracts concluded in the street. The comment on the indicated article refers to this right of the consumer as "rejection right".[72] In the relatively new literature devoted to the contract law the term "right to cancel the contract" is used in discussions about the above right.[73] Moreover, according to the Georgian translation of Civil Code of Germany the term depicting the withdrawal of the will by the consumer is represented as "the right of rescind the contract".[74]

It is important that today there is no common legislative act in Georgia on the protection of consumer rights,[75] which would regulate number of problematic issues related to the consumer. And first of all,

[69] European Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises;; Council Directive 90/619/EEC of 8 November 1990 on the coordination of laws, regulations and administrative provisions relating to direct life assurance, laying down provisions to facilitate the effective exercise of freedom to provide services and amending Directive 79/267/EEC; Directive 94/47/EC of the European Parliament and the Council of 26 October 1994 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis; Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts; Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC; Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC.

[70] The Right of Renunciation; The Right of Cancelation; The Right of Revocation; The Right of Rescind; The Right of Withdrawal. Principles of the Existing Ec conTract law (Acquis principles), Contract I, Pre-contractual obligations, Conclusion of Contracts, Unfair Trems, prepared by Research Group on the Existing EC Private Law, European Law Publishers, 2007, 156. Moreover, the following terms are used for the rights of consumer in the legislations of member states: in English -"*right of withdrawal",* in Grench - *"droit de retraction",* In German - *"widerrufsrecht",* in Italian - *"diritto di recesso".*

[71] In accordance with the article 336 of Civil Code of Georgia, the contracts concluded between the consumer and person trading inside his/her place of activity at the street, in front of the house and similar places are effective only if consumer does not reject the contract during the one week time in writing with the exception of cases, when the execution of contract is done immediately after its conclusion, Civil Code of Georgia, Parliament Bulletin, 31, 24/07/1997 (in Georgian).

[72] *Chanturia L.,* Comments to the Civil Code of Georgia, Vol. III, Article 336, Tb., 2001, 149-153 (In Georgian).

[73] *Dzlierashvili Z., Tsertsvadze G., Robakidze I., Svanadze G., Tsertsvadze L., Janashia L.,* Contract Law, Tb., 2014, 27-30 (In Georgian).

[74] Civil code of Germany (as of 10 March 2010), translated and edited by *Z. Chechelashvili,* Tb., 2010, 59-63 (In Georgian).

[75] The first attempt to ensure consumer rights was made in 1996 by the adoption of Law of Georgia on "Protection of consumer rights". Later, on 15 May 1997 the law of Georgia on "Consumer cooperation" was adopted.

would define the status of consumer and features of the contracts with the participation of such. It is even more difficult to talk in which way the right of withdrawal will be established in the Georgian consumer law. However, with the consideration of main characteristics of this right it is desirable for the legislators to establish the right to reject the contract by the consumer in the form of withdrawal of expressed will.

It has to be also mentioned that there is no one single terms of this right even in the European directives. Some directives refer to it in the form of withdrawal, other directives – as a right of cancellation of the contract, and some – right to reject the contract. It can be stated that all above listed definitions shall be considered as synonyms during the discussion of this right in general as well as for the purposes of the present article.

4.2. Concept of the Right of Withdrawal

Right to withdraw is not a new term for the private law of continental Europe, however the term was introduced with the completely different subject matter. Prior to the increased interest towards the consumer rights the issue of withdrawal of the will was considered mainly in the context of binding force of the offer, as the exceptional regulation.[76] For example, it is regulated by the article 130 of Civil Code of Germany and it is considered as the opportunity to withdraw the will, which has not reached the addressee; in this case the offeror is entitled to avoid the authenticity of expressed will by rejection of binding force of the offer.[77] According to the French law it is possible to withdraw the offer prior to its the acceptance by the addressee. The regulations in the Common Law also consider the same rule for the withdrawal of offer.[78] Similar to the traditions of the continental Europe, the withdrawal of will is regulated under the article 51, Civil Code of Georgia,[79] which also considers this right of withdraw in the context of binding force of the offer.[80]

The withdrawal of the will adopted in the consumer law is radically different from the rule on the release from the binding force of the offer.[81] This is right to reject acceptance rather than offer – right

The law of Georgia on "Code of product safety and free movement" was adopted in 2012, which annulled the 1996 law on "Protection of consumer rights". At the same time, for getting closer to the European Union legislation and standards, the committee for the European Integration, Parliament of Georgia was assigned to develop draft law on "Protection of consumer rights" which would be complying with the practices of European Union countries in the area. The works on the draft project has not been finalised yet (in Georgian).

76 *Jansen N., Zimmermann R.,* Contract Formation and Mistake in European Contract Law: A Genetic Comparison of Transnational Model Rules, Oxford Journal of Legal Studies Advance Access, 2011, 15-16, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1788882>, [10.04.2014].

77 *Rott P.,* Harmonizing Different Rights of Withdrawal: Can German Law Serve as an Example for EC Consumer Law?, Developments, German Law Journal, Vol. 07, No. 12, 2006, 1110, <http://heinonline.org/HOL/LandingPage?handle=hein.journals/germlajo2006&div=110&id=&page=>, [9.04.2014].

78 *Bagishvili E.,* Withdrawal of Will Expression (offer) in the Unified Private Law, "Review of Georgian legal system", Special Edition, 2007, 76-80 (In Georgian).

79 Civil Code of Georgia, Parliamentary Bulletin, 31, 24/04/1997 (In Georgian).

80 *Zoidze B.,* Comments to the Civil Code of Georgia, Vol. I, Article 51, Tb., 2002, 170-172. *Kereselidze D.,* The Widest Systemic Notions of Private Law, Tb., 2009, 248 and remaining pages (In Georgian).

81 *Rott P.,* Harmonizing Different Rights of Withdrawal: Can German Law Serve as an Example for EC Consumer Law?, Developments, German Law Journal, Vol. 07, No. 12, 2006, 1110, <http://heinonline.org/HOL/LandingPage?handle=hein.journals/germlajo2006&div=110&id=&page=>, [9.04.2014].

to reject the consent on the conclusion of contract, which was introduced to the continental Europe's contract law as a result of influence of the European Union law. In particular, norms regulating the right to withdraw are mainly provided in the European Union directives protecting consumer rights; the general concept of this right further implemented in the law of the member states is based on these directives. As a result right to withdraw is mainly related to the consumers and protects their interests.

The Right of withdrawal allows consumers to avoid consequences of unequal negotiations[82] and is considered as an exceptional form of irrevocable contracts.[83] Its purpose is to protect customer in cases, where he/she did not have opportunity to make essentially free and correct decision in the moment of declaration of will on the conclusion of contract.[84] In the Doctrine this right of consumer is considered as a possibility of unilaterally abolishment of legal effect of contract. Exercising of such right is allowed without any justification, motivation and responsibility. It could be realized within the pre-determined time (usually 14 days). The aim of the above right is to give additional time to the authorized person to make sure that will expressed on the conclusion of contract is relevant to his/her real intention .[85]

The right of withdrawal granted to the consumer includes several components. First of all, the right is backed with the special protection mechanism, which is not available for all consumers, but for only those who are buyers or service receivers under the contract. Moreover, this is a possibility to unilaterally annul the contract. In particular, release from the binding force of the contract is done unilaterally, by the withdrawal of expressed consent rather than by classical form of termination.[86] In this regard, consumer bears responsibility over the existence and effects of contract, without being required the consent of or agreement with the contracting party.[87]

Moreover, withdrawal of will, makes the contracts, for which exercise of such right is allowed, as voidable transactions, validity of which depend on the authorized persons decision to challenge the contract or not . In other words, the legal effect of the contract depends on the consumer's right to rescind rather than on the acceptance of the offer which is norml force for general cases.[88] In addition, the right to withdraw, places the parties at the initial stage of contract conclusion and ensures transformation of unexpected decision into the result oriented declaration of the will.[89]

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82 *Sir Markesinis B., Unberath H., Johnston A.,* The German Law of Contract, Hart Publishing, Oxford and Portland, Oregon, 2006, 263.

83 *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, 268, <http://cks.univnt.ro/download/100_e_book_final_.pdf>, [25.04.2014].

84 *Rott P.,* Harmonizing Different Rights of Withdrawal: Can German Law Serve as an Example for EC Consumer Law?, Developments, German Law Journal, Vol. 07, No. 12, 2006, 1110, <http://heinonline.org/HOL/LandingPage?handle=hein.journals/germlajo2006&div=110&id=&page=>, [9.04.2014].

85 Principles, Definitions and Model Rules of European Private Law Draft Common Frame of Reference (DCFR); Edited by *Ch. von Bar*, *E.Clive*, *H. Schulte-Nölke* and others, sellier, Munich, 2009, 201-204.

86 *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, 269, <http://cks.univnt.ro/download/100_e_book_final_.pdf>, [25.04.2014]..

87 Ibid.

88 *Chanturia L.,* Comments to the Civil Code of Georgia, Vol. III, Article 336, Tb., 2001, 150 (In Georgian).

89 *Haupt S.,* An Economic Analysis of Consumer Protection In Contract Law, German Law Journal, Vol. 04, No.11, 1148, <http://www.germanlawjournal.com/pdfs/Vol04No11/PDF_Vol_04_No_11_1137-1164_Private_Haupt.pdf>, [12.04.2014].

Accordingly, exercise of right to withdraw causes retroactive abolishment of the contract with the restitution consequences.[90] The effect of the above is the termination of obligations under the contract for the both parties. It releases both parties from the fulfilment of obligations undertaken under the contract. Any claim regarding the fulfilment of obligation loses its force as soon as authorized person uses his/her right of withdrawal.[91] And finally, the contract is considered as abolished, non-existent from the moment of its conclusion and the parties are assigned the liability to refund the benefits received from the contract.[92]

4.3. Difference of Right to Withdraw from other Types of Release from the Binding Force of Contract

The right of withdrawal introduced by European directives differs from other legal instruments for the release from binding force of contract. It has nothing to do with rules on mistake, deceit or duress regulated by the legislation. However, it can be stated, that the right of consumer to decline contract is backed with the general concept of the transaction abolishment.[93] Granting consumer the right "to change his/her mind" is based on two factors. First is protection against the pressure from the trader, and second – is avoiding the negative results of the erroneous information.[94] Both of them are related to the negative impact over the formation of consumer's will and accordingly, decision making process, which is not relevant to the real intention .

Traditionally, when declaration of will does not coincide with the real intention and is only outcome of various external factors, is referred to the defects of will in the private law.[95] Herewith, the classical forms of voidable transactions occur when declaration of will is a result of mistake, deceit or duress. The right to rescind such voidable transactions, enables individual to annul legal effect of will declarations which is against his/her real intention from the moment of conclusion such contract by new expression of will.[96]

Furthermore, there should be a special composition for the tentative abolishment. In case of erroneously concluded transaction, it may become voidable if the declaration of intent has been made on the basis of a substantial mistake. A mistake is deemed substantial when a person intended to make a different transaction than that to which he gave his consent, a person is mistaken with respect to

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90 *Loos M.,* Rights of Withdrawal, Centre for the Study of European Contract Law Working Paper Series No. 2009/04, 3, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1350224>, [12.1.2013].

91 Principles, Definitions and Model Rules of European Private Law Draft Common Frame of Reference (DCFR); Edited by *Ch. von Bar*, *E.Clive*, *H. Schulte-Nölke* and others, sellier, Munich, 2009, 201-204.

92 *Loos M.,* Rights of Withdrawal, Centre for the Study of European Contract Law Working Paper Series No. 2009/04, 3, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1350224>, [12.1.2014].

93 *Jansen N., Zimmermann R.,* Contract Formation and Mistake in European Contract Law: A Genetic Comparison of Transnational Model Rules, Oxford Journal of Legal Studies Advance Access, 2011, 33-35, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1788882>, [10.04.2014].

94 *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 No. 2001/01, 7, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1719104>, [21.11.2013].

95 *Chanturia L.,* Introduction to the General Section of Civil Law of Georgia, Tb., 1997, 365 (In Georgian).

96 *Kereselidze D.,* The Widest Systemic Notions of Private Law, Editorial House of Institute of European and Comparative Law, Tb., 2009, 317 (In Georgian).

the identity of a contracting party, mistake in subject matter, mistake with respect to a motive of a transaction etc.[97]

For determining transactions concluded due to deceit crucial is intentional, deliberate action of contracting party rather than assumptions of his/her counteragent about the subject matter of deal.[98] In turn, deceit takes place when contracting party keeps silent or hides the truth.[99] The most unacceptable and heavy form of influence over the will formation is duress, which is considered as an action against the free will. Furthermore, it differs from the deals concluded due to mistake or deception by the conscientious of the person. This is a case, when person knows that he/she concludes unwanted deal, but is forced to do so.[100]

All mentioned concepts on voidable transactions are integrated in the right of consumer to cenacle the contract. Only the element of forcing has relatively less sharpness. Duress in consumer contracts is revealed more in the psychological pressure, and not in the classical forms of threat, black-mailing or other illegal actions. Principle of action considers that the right of withdrawal terminates the contractual relationships without existence of any special compositions, which would be necessary for the voiding the contract. The only limitation related to exercising the above right is the time considered for its implementation.[101]

Moreover, right of withdrawal is considered as one of the best alternatives for the consumer. Consumer can request cancelation of contract, even when we have in place the contract concluded by mistake or by deception and could easily escape from the binding force of contract.[102] The advantage of the right is reflected in the fact that, during the cooling-off period consumer is authorised once more think about the relevance of the will on conclusion of contract with his/her real intention and make final decision on the validity of contract.[103]

In this regard, the main purpose of right to cancelation is to provide the consumer with additional time for further rethinking and for obtaining extra information, which is generally characteristic to the stage prior to the contract conclusion. In other words, determining the relevance of real intention with , expressed will is done not at the moment of entering into agreement, but after the contract is signed, during the time allocated for making his/her mind. That is why, the right withdrawal is considered as the right having the retroactive effect.

There is a possibility to have such development of events where we have in place all formal requirements for the withdrawal, however contract is valid or disputable for other reasons, such as disability,

97 *Chanturia L.,* Introduction to the general section of Civil Law of Georgia, Tb., 1997, 364-375 (In Georgian).

98 Ibid, 376-379.

99 *Kereselidze D.,* The Widest Systemic Notions of Private Law, Editorial House of Institute of European and Comparative Law, Tb., 2009, 343 (In Georgian).

100 *Chanturia L.,* Introduction to the General Section of Civil Law of Georgia, Tb., 1997, 379 (In Georgian). *Jorbenadze S.,* Mistake in the Deal, Parallels with other Legal Establishments, "Law Journal", No. 2, 2011, 210-211 (In Georgian).

101 Principles, Definitions and Model Rules of European Private Law Draft Common Frame of Reference (DCFR); Edited by *Ch. von Bar*, *E.Clive*, *H. Schulte-Nölke* and others, Sellier, Munich, 2009, 201-204.

102 *Gheorghe A.N., Spasici C.,* Consumer's Right To Withdraw, The International Conference CKS 2013,Challenges ofthe Knowledge Society; Bucharest, 17th -18th May 2013, 7th ed., Pro Univertitaria Bucursit, 2013, 268, <http://cks.univnt.ro/download/100_e_book_final_.pdf>, [25.04.2014].

103 *Loos M.,* Rights of Withdrawal, Centre for the Study of European Contract Law Working Paper Series No. 2009/04 , 3, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1350224>, [12.1.2013].

defect in authority and etc, or there are other grounds for the termination of contractual relationship, for example, violation of liabilities by contracting party. In this case, authorised person is not restricted with the indicated (other) grounds for the abolishment of contract, and is authorised to finish the contractual relations by withdrawal and get satisfaction with the accompanying results (restitution).[104] In addition to the above, exercising of cancelation right is allowed without breaching of undertaken liabilities by other party, which would be necessary in general situation to terminate the contract.[105]

The special right of consumer to abolish contract depends on the general approach of the contract fairness. Exercising this right may not at all be related to any discussed grounds or inequality of bargaining powers in the process of negotiations. Consumer can decline the contract even if expression of his/her will is based on the well comprehended and informed decision on concluding the contract. The only reason in this case is change of mind. Moreover, the assumption that consumer is not in position , where he can make well informed decision for some cases number of which increases daily – contradicts with the idea of free and self-responsible individual. So that , consumer is granted the right to withdraw not only taking in mind situation in which the contract is concluded, but based on the assumption that it would not be possible to perceive the nature of contract at the moment of its signing.[106] Herewith , party to the contract to whom the right of withdrawal is applied retains the right to demand performance of the contractual obligations until the expiry of rethinking time.. Such contract is valid despite the existence of right of withdrawal .[107]

4.4. Imperative Nature of Right of Withdrawal

The law on protection of consumer rights is characterised with the high number of imperative norms.[108] Right to withdraw is one of such norms and in the cases especially envisaged under the law is acknowledged as mandatory provision of contract . Moreover, it is considered in the doctrine as the exceptional regulation of irrevocable contracts, which provides additional guarantees and flexible mechanisms for the exercise of right.[109] With bearing in maind its protective function, it is not allowed to abolish such right by agreement. Implementation of right to withdraw into the national law shell be done in accordance with European directives. In addition, it is unacceptable to amendment the scope of this right against of authorised person's interests. However, in case if the contractual regulation of right to withdraw is wider than regulation considered under the directive or member state legislations, then it is allowed to define the subject matter of such right by the agreement [110]

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104 Principles, Definitions and Model Rules of European Private Law Draft Common Frame of Reference (DCFR); Edited by *Ch. von Bar*, *E.Clive*, *H. Schulte-Nölke* and others, sellier, Munich, 2009, 201-204.

105 Ibid.

106 *Sir Markesinis B., Unberath H., Johnston A.,* The German Law of Contract, Hart Publishing, Oxford and Portland, Oregon, 2006, 267.

107 Principles, Definitions and Model Rules of European Private Law Draft Common Frame of Reference (DCFR); Edited by *Ch. von Bar*, *E.Clive*, *H. Schulte-Nölke* and others, sellier, Munich, 2009, 201-204.

108 *Dzlierashvili Z., Tsertsvadze G., Robakidze I., Svanadze G., Tsertsvadze L., Janashia L.,* Contract Law, Tb., 2014, 29 (In Georgian).

109 *Gheorghe A.N., Spasici C.,* Consumer's Right To Withdraw, The International Conference CKS 2013,Challenges of the Knowledge Society; Bucharest, 17th -18th May 7th ed., Pro Univertitaria Bucursit, 2013, 269 <http://cks.univnt.ro/download/100_e_book_final_.pdf>, [25.04.2014].

110 Principles, Definitions and Model Rules of European Private Law Draft Common Frame of Reference (DCFR); Edited by *Ch. von Bar*, *E.Clive*, *H. Schulte-Nölke* and others, sellier, Munich, 2009, 201-204.

5. Scope of the Right of Withdraw

The law on the protection of consumer rights is characterised with the categorisation of protection means, directing them to one specific category of relations.[111] Based on the above, the possibility to cancelation of contract established for the protection of consumer rights is not unconditional. It is clear that right of withdrawal is exception from the general approach of contract law. However, this exceptional regulation does not have obligatory effect for all possible contracts; it is valid for cases, which are directly considered by the law. Its validity is restricted with the specific contracts, where formation of consumer will is related to some Peculiarities. Accordingly, for the discussion of legal nature of right of withdrawal granted to consumer, it is important to determine the scope of its validity.

5.1. Contracts Concluded in Away from Business Premises

Right of withdrawal, as the instrument protecting consumer, was first introduced by the directive 85/577 of European Commission, dated 20 December 1985. It concerns the protection of consumer interests in the terms of contract concluded in the informal atmosphere. This is a stage of development of entrepreneurial relationships, when carrying out contractual negotiations with the purpose to offer goods or/and services door-to-door, at the work office of consumer or at public places was one of the most spread forms of commerce. Therefore, the objective of European legislator at that time was protection of consumer in the circumstances where the conclusion of contract was a result of unfamiliar and unexpected factors.[112]

Mostly, the above concerns the cases when trades in order to convince potential consumers to enter into contract use offensive negotiation techniques which are harmless at a glance.[113] Since 1980-ies and up to date the contracts concluded in informal situation have not lost their relevance. On the contrary, in today's world, almost everything can be offered to the consumer outside the trader's business premises. It became normal, to encounter traders unexpectedly at the conferences, workshops, during the informal discussions held with colleagues or at other public places. Trading at "door-step" is more and more popular and accordingly, protection of consumer interests in such situations is still a priority. On the other hand, the need is generated due to the characteristics of formation of consumer will - in particular, by the unexpected effect of an offer.[114]

Generally, in case of contracts concluded in informal situation, consumer is in the unequal condition compared with the seller, who does not or cannot provide consumer with proper information. Seller can

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111 *Dzlierashvili Z., Tsertsvadze G., Robakidze I., Svanadze G., Tsertsvadze L., Janashia L.,* Contract Law, Tb., 2014, 29 (In Georgian).

112 Working Document of the Commission, Responses to the Consultation on the Council Directive 85/577/EEC of 20 December 1985 to Protect the Consumer in Respect of Contracts Negotiated away from Business Premises Summary of Responses, <http://ec.europa.eu/consumers/rights/docs/doorstepselling_responses.pdf>, [27.04.2014].

113 *Sir Markesinis B., Unberath H., Johnston A.,* The German Law of Contract, HART publishing, Oxford and Portland, Oregon, 2006, 263.

114 Working Document of the Commission, Responses to the Consultation on the Council Directive 85/577/EEC of 20 December 1985 to Protect the Consumer in Respect of Contracts Negotiated away from Business Premises Summary of Responses, <http://ec.europa.eu/consumers/rights/docs/doorstepselling_responses.pdf>, [27.04.2014].

easily influence on the formation of will of buyer (consumer), impose to enter into unwanted contract and convince consumer to make decision, which he would not make in other place or other time.[115] Hence, need for protection is caused by the accidental nature of will formation – consumer is not prepared, have no idea about the contract's subject matter, is not informed about prices for the similar goods and services at the market.[116]

However, all contracts concluded in the street cannot be considered as transactions done away from business premises. Moreover, the right of withdrawal cannot be exercised for all contracts concluded under such circumstances.[117] First of all, purchase of goods at the market place or at the open space in the street, at short notice is formally a contract concluded off-premises. But the main issue here is that, such places are allocated for trade purposes. Thus, normally consumers purchase goods with forethought [118]and therefore, aforesaid areas are not considered as informal atmosphere for traders and do not generate the right of withdrawal.[119]

European directive on consumer rights gives definition for contracts concluded in informal situation. Under the directive off-premises contract' means any contract between the trader and the consumer concluded in the simultaneous physical presence of the trader and the consumer, in a place which is not the business premises of the trader with the aim or effect of promoting and selling goods or services to the consumer.[120]

Contracts concluded under informal circumstances include the contracts where the visit of producer is initiated by the consumer by calling with the purpose to purchase specific goods or receive the service. However, for the consumer completely different product becomes the subject of contract about which consumer did not have any preliminary information. He does not have any idea on the similar goods or prices at the market; as for the consent on the conclusion of contract – it is a result of convincing and imposing contract terms provided by the trader.[121]

All the above discussed matters are characterised with one feature – effect of suddenness, which is the main strategy of trades marketing policy and determines the unequal position of consumer in these relations. In particular, under such conditions consumer is fascinated with the offered deal, feels self-satisfaction when he/she is under the individual attention, especially in the situation comfortable for consumer during the home visit. In this case the negative aspect of deal is out of attention: price

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115 *Loos M,* Rights of Withdrawal, Centre for the Study of European Contract Law Working Paper Series No. 2009/04 , 9, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1350224>, [12.1.2014].

116 *Chanturia L.,* Comments to the Civil Code of Georgia, Volume III, Article 336, Tb., 2001, 149-153 (In Georgian).

117 *Loos M.,* Rights of Withdrawal, 9, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1350224>, [12. 1. 2014]

118 *Chanturia L.,* Comments to the Civil Code of Georgia, Volume III, Article 336, Tb., 2001, 149-153 (In Georgian).

119 Ibid.

120 Working Document of the Commission, Responses to the Consultation on the Council Directive 85/577/EEC of 20 December 1985 to Protect the Consumer in Respect of Contracts Negotiated away from Business Premises Summary of Responses, <http://ec.europa.eu/consumers/rights/docs/doorstepselling_responses.pdf>, [27.04.2014]; *Kardava E*., Legal Review, Comparison with the European Standards for the Protection of Consumer Rights on the Example of Contracts Concluded in the Street, "Review of Georgian Legal System", Special Ed., 2007, 128.

121 Ibid.

of contract, which is generally, doubled in compared with market prices, and the quality of purchased good.[122] In view of these circumstances the legislator grants the right of withdrawal to the consumer as an easy way unilaterally release from the binding force of the contract.

5.2. Withdrawal of Will from Contracts Concluded by Distant Methods

In the modern world distance contracting gives possibility for offering goods and services in simplified manner. This form of contractual relationship creates unique opportunity for businesses as well as for consumers to freely participate in internal as well as cross-border trade relationships and satisfy their interests. With this in mind distance selling, became the integral part of contract law for the last decade. Hence, protection of one of the parties to this relationship, the consumer – was acknowledged as one of the priorities of modern civilisation.[123]

Technological progress had impact on the awareness of consumers. The trades also changed their attitude to commerce and gradually moved from the direct communication with contractual parties to the distance communication.[124] Accordingly, need for the adoption of norms regulating contracts concluded from distance has emerged. Based on the traditionally strict approach of Europe to the protection of consumer rights, in 1997 European Union and European Parliament adopted directive on the protection of consumer rights for distant selling,[125] which introduced several significant protection means for the distance trading, including the granting the right of withdrawal to the consumer.[126]

Priority of protection of consumers in contracts concluded at distance is caused by their unequal position in contrast to the trader. . The main feature of distance selling is that contractual parties are entering into agreement without face-to-face communication. Furthermore, in many cases consent to the offer is made by the clicking on the button "agree", which is enough for conclusion the contract and for self-binding. In this situation buyer is in relatively unfavourable position compared to face to face communication, for example at trader's premises.[127]

Goods offered by e-commerce often do not satisfy the interests of buyer. For example, purchased computer does not work as fast as was expected, bought clothes are of completely different size and quality compared with the one described, decorative good does not fit interior of the buyer, minor household devices (iron, blender and etc.) have much shorter guarantee cover or the capacity of the equipment does

122 *Kardava E*., Legal Review, Comparison with the European Standards for the Protection of Consumer Rights on the Example of Contracts Concluded in the Street, "Review of Georgian Legal System", Special Ed., 2007, 124.

123 *Twigg-Flesner C.,* A Cross-Border-Only Regulations for Consumer Transactions in the EU, 35-41, <http://www.springer.com/cda/content/document/cda_downloaddocument/9781461420460-c1.pdf?SGWID=0-0-45-1276573-p174250279>, [10.11.2013].

124 Working Document of the Commission, Responses to the consultation on the Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises Summary of Responses, <http://ec.europa.eu/consumers/rights/docs/doorstepselling_responses.pdf>, [27.04.2014].

125 Directive of European Parliament and European Commission No 97/7, dated 20 May, 1997 on the Protection of consumer rights for the contracts concluded from distance;

126 *Siegfried FINA,* The Consumer's Rights of Withdrawal Distance Selling in Europe, 32, <http://unternehmensrecht.univie.ac.at/fileadmin/user_upload/privat_fina/Fina_Beitrag_FS_Zehetner.pdf>, [10.04.2014].

127 Ibid.

not match the indicators provided on the web-site and etc. Generally, in such cases buyer tries to return received good. It is possible that the seller actually returns the good or replaces with the other. But in majority of cases the seller does not have legal obligation to accept back the goods from the unsatisfied buyer if this obligation is not straightforwardly considered under the contract or under the legislation regulating similar matters.[128]

At a glance, all the above could be deemed as the defect of purchase contract and could apply the relevant legal rules. However, under such circumstances the important issue is in psychological features of a consumer, which is manifested in two main matters. First is that – contracting party does not have possibility to agree essential terms of contract face-to-face. Secondly, – often consumer finds it difficult to comprehensively imagine purchased good or service. Moreover, precise assessment is possible only after receiving of good or service.[129]

European legislators have overcome all described inconveniences related to the distance contracts by the granting consumer the right to withdraw from the contract, which is manifested in the unilateral termination of the contract. Discussed cases are mostly resulted from the incorrectly provided information and are considered as systemic shortcomings of the distance contracts.[130] Therefore, the legislators have put the consumers in the position, which would exist in case of contracts concluded face-to-face by granting the right to withdraw from distance contracts. In particular, during the cooling-off period, consumer is provided with the opportunity to see the useful features of the good and check its quality. If the purchased good does not meet consumer's expectations, he/she is entitled to abolish contract without any justification.[131]

Hence, if the contract is concluded under the circumstances discussed above, this automatically generates the consumer's right to withdraw from the contract. Moreover, it is not necessary to have such situation as is a result of rough negotiation techniques or wrongful influence over the formation of the will or due to the fact that the consumer was easily drawn under the influence of the trader. As mentioned earlier, execution of the right does not require special motivation.[132]

6. Conclusion

The present research made it clear that right to withdraw from the contract is considered as one of the important guarantees for the protection of consumer rights. It is acknowledged by the European law and based on the directives adopted by the European Union, implemented in the national legislations of European countries. It is evident that right to withdraw is especially relevant for the contractual

128 *Ben-Shahar O., Posner E. A.,* The Right to Withdraw in Contract Law, Journal of legal studies, Vol. 40, 2011, 115, <http://www.jstor.org/stable/10.1086/658403>, [7.05.2014].

129 *Haupt S.,* An Economic Analysis of Consumer Protection In Contract Law, German Law Journal, Vol. 04, No.11, 1138, <http://www.germanlawjournal.com/pdfs/Vol04No11/PDF_Vol_04_No_11_1137-1164_Private_Haupt.pdf>, [12.04.2014].

130 *Fina S.,* The Consumer's Right of Withdrawal and Distance Selling in Europe, 32-35, <http://unternehmensrecht.univie.ac.at/fileadmin/user_upload/privat_fina/Fina_Beitrag_FS_Zehetner.pdf>, [09.05.2014].

131 *Rott P.,* Harmonizing Different Rights of Withdrawal: Can German Law Serve as an Example for EC Consumer Law?, Developments, German Law Journal, Vol. 07, No. 12, 2006, 1110, <http://heinonline.org/HOL/LandingPage?handle=hein.journals/germlajo2006&div=110&id=&page=>, [9.10.2012].

132 *Markesinis B., Unberath H., Johnston A.,* The German Law of Contract, HART Publishing, Oxford and Portland, Oregon, 2006, 274.

relationships of certain categories, such as contracts concluded under informal circumstances and distance contracts.

Moreover, number of issues related to this consumer right requires independent and in-depth research; especially considering the fact that this right is relatively new for the Georgian legal system. It is true, that article 336 of the Civil Code of Georgia covers the rules on the contracts concluded in the street, but it does not reflect the full subject matter of this right. According to the Georgian legislators, right to cancel the contract concerns the possibility of abolishment of contract, which has not been completed yet. In cases when the contract is implemented immediately after its signing, consumer is not able to use the right of withdrawal. Such regulation o contradicts with the main function of this right.

Furthermore, Civil Code of Georgia does not cover norms regulating distance contracts. Thus, for ensuring consumer rights in contracts concluded at distance general norms of private law are applied, which do not ensure full and effective protection of consumer in such relationships. The above shall be considered as a shortfall of Georgian legislation. Accordingly, in the process of working on the norms regulating consumer law, the legislators shall precisely regulate the right of withdrawal with the comprehensive list and description of all relationships, under existence of which consumer can exercise the right to withdraw.

Davit Maisuradze*

The Implementation of Defensive Measures Based on "Selective Equal Treatment" of Shareholders (Comparative-Legal Study Predominantly on the Example of Delaware and Georgian Corporate Law)

1. Introduction

Corporate legal defensive measures are one of the important issues of corporate law. Corporate legal defensive measures are especially topical in the process of mergers & acquisition, when corporations want to merge or one corporation wants to take control over the other corporation. In the first case the corporations can take measures for defending the merger agreement in order to prevent any other corporation from hindering their joining; in the second case the defensive measures carried out by the target corporation will be directed to defend the target company from the aggressor.

Carrying out corporate legal defensive measures is connected with many issues of corporate law, for example, participation of governing bodies, the directors' role, expressing the will of shareholders and etc. There are many kinds of corporate legal defensive measures and as it was mentioned before, they can be divided into two main categories: defensive measures defending the reorganization agreement and defensive measures, defending the target corporation.

As it is known shareholders, especially shareholders of the same class, share equal rights, though with implementing corporate legal defensive measures the aim of the target corporation is to defense, as there might be deviation from the principle of "equal treatment" and the principle of "selective equal treatment" might be inculcated.

The purpose of the present work is to give readers the perfect impression on juridical nature of the corporate legal defensive measures and kinds of these defensive measures which on the basis of the corporation's interests are creating the necessity of "selective equal treatment".

The work will be discussed on the basis of the comparative legal method. We will compare the corporate laws of Delaware and Georgia and try to state to what extent it is possible to carry out the principle of "selective equal treatment" of shareholders.

Corporate law of Delaware is one of the most important and well-known corporate legislation systems peculiarly in the USA and generally in the world.[1] In order to introduce more properly the juridical nature of the "selective equal treatment" of shareholders we will use examples of court practice of Delaware.

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

2. General Characteristic and Juridical Nature of the Corporate Legal Defensive Measures

For explaining defensive measures in the Delaware Corporate Law the following terms are used: "defensive measure"[2] or» defensive tactics",[3] also the term» take over defenses".[4] The named terms denote defensive measures taken by the target corporation to defense against hostile acquisition or defensive measures taken by two corporations participating in the merger agreement, the aim of which is to defende the reorganization from interference of the third corporation.

The object of the defensive measure is to protect corporation's interests. So it is obligatory to use the term "defensive" it is possible not to use the term "legal", as all the corporate defensive measures must be at the same time legal. . Finally the term is "corporate legal defensive measure" or "corporate defensive measure".

Corporate legal defensive measure can be defined as the corporation's defensive measure aiming at defending the best interests of the shareholders and other *stakeholders*[5] of the society. In one case the best interest of the *stakeholder* can be expressed in defending from hostile acquisition, but in the second case in defending the realization of the merger agreement. On using defensive measures when there is an attempt for the hostile acquisition, the acquiring company is considered as an "aggressor", and the company the "aggressor" is trying to acquire – as a "target company".[6] Generally the friendly acquisition is a case, when reorganization is done by participation of directors of the acquiring and the target corporations, but in hostile acquisition[7] the acquiring company is trying to acquire shares avoiding the directors of the target company and acting against them[8]. Accordingly the main participants of the merger and acquisition processes are managers of the corporations.

Material grounds for implementation of the corporate legal defensive measures are bylaws and articles of incorporation and/or merger agreement; at the same time types of corporate of corporate defensive measures and the authority of using them might be directly coming from regulating norms of the corporate legislation itself. In the present work we will discuss several corporate legal defensive measures and the necessity of using them from the point of view of "selective equal treatment" of shareholders.

Regulations of corporate law and court cases give the managing body of the enterprise obligations to observe fiduciary duties when making a decision connected with the expected hostile acquisition and to give the shareholders recommendations highlighting the best interests of the corporation[9]. Board is the

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

3 *Thompson O.*, Corporations and Other Business Associations, 5th ed., Aspen Publishers, NY, 2006, 762.

4 Ibid, 766.

5 Stakeholders – are persons interested in the corporation's success, among them are: shareholders, employees, local community and etc. *Joo W. T.,* Corporate Governance, Law, Theory and Policy, Kent Greenfield, There's a Forest in Those Trees: Teaching About the Role of Corporations in Society, Carolina Academic Press, 2nd ed., Durham, 2010, 12-17.

6 *Thompson O.*, Corporations and Other Business Associations, 5th ed., Aspen Publishers, NY, 2006, 762.

7 *Chanturia L.*, Corporate Governance and Liability of Directors in Corporation Law, Tb., 2006, 231-232 (In Georgian).

8 *Maisuradze D.,* The Business Judgment Rule in Corporate Law (based on examples of USA and Georgian law), edited by *I. Burduli,* Tb., 2011, 125-126 (In Georgian).

9 *Gordon N.*, Mergers and Acquisitions: "Just say never?" Poison Pills, Deadhand Pills, and Share-holder adopted bylaws: and essay for Warren Buffet, 19 Cardozo Law Review 511, Yeshiva University, 1997, 15, "One

managing body that takes decision about the implementation of corporate legal defensive measures. "The main problem is connected with the director's behavior. Namely, what has director to do, to obey blindly the acquirers, which might cause loosing a job or to resist such acquisition. Courts give directors the right to resist such purchases, if they can ground the necessity of it and the primacy of the corporation's interests".[10]

American model of corporate governance of differs from the European one.[11] Accordingly the managing body taking defensive measures in Delaware law might be a Board, but in European law such body might be a Directorate or a Supervisory Board in case of granting it such authority by the charter.

Article 141 of corporate law of Delaware defines the Board's authority in relation to the corporation. Namely according to the mentioned article the management and the governance of the corporation, except the cases provided for by the corporation law of Delaware itself or the by the articles of incorporation of the corporation, are done by the directors. The named article is granting the board wide authorities of disposition of the corporation's activities.[12]

In American scientific literature there are different opinions concerning the authority of taking corporate defensive measures or whether the board must have this authority. Some scientists think that shareholders must be authorized to implement defensive measures, that they must be able to make the right decision in case of the hostile acquisition, namely to agree on the aggressor company's offer or to refuse it.[13] Other scientists think that Board must be authorized to take defensive measures, as the company's management is best informed on the corporation's real value and their future perspectives, accordingly they will be able to defende better the corporation's and shareholders' interests.[14] The court of Delaware firmly thinks that the implementation of defensive measures is within the authorities of the Board.[15]

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reading of section 141(a) would give the board exclusive power to manage, unless otherwise provided in the articles, with the understanding that a charter amendment requires an initial board resolution, and thus board consent, to any limitations on its power. But the proviso also permits variations "otherwise provided" in the chapter, which includes section 109, a broad source of shareholder power - but whose use cannot be "inconsistent with" the charter or the law, meaning - and here the circle starts again - section 141(a). Under prevailing modes of corporate statutory interpretation in Delaware, in which different statutes have "equal dignity" or "independent legal significance", nothing can be resolved about the scope of section 109(b) from the reference in section 141(a) to the articles alone, not the bylaws. The idea of a bylaw may be less clearly cabined than supposed in light of the expansive description of section 109(b): "any provision ... relating to the business of the corporation."

10 *Chanturia L.,* Corporate Governance and Liability of Directors in Corporation Law, Tb., 2006, 231 (In Georgian).

11 Ibid,109-110.

12 Delaware General Corporation Law, 141 (a): "the business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors, except as may be otherwise provided in this chapter or in its certificate of incorporation. If any such provision is made in the certificate of incorporation, the powers and duties conferred or imposed upon the board of directors by this chapter shall be exercised or performed to such extent and by such person or persons as shall be provided in the certificate of incorporation."

13 *Joo W.T.*, Corporate Governance, Law, Theory and Policy, Lucian Arye Bebchuk, The Case Against Board Veto in Corporate Takeover, Carolina Academic Press, 2nd ed., Durham, 2010, 562.

14 Ibid, 576-577.

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

Accordingly Article 141 of the corporate law of Delaware also includes the authority of directors for implementation of defensive measures.

In Georgian corporations directors' management authority is basically based on paragraphs 1, 2 and 3 of Article nine of the Entrepreneurs law of Georgia. . In the first paragraph of Article nine of the Entrepreneurs law of Georgia there are listed persons exercising the power of a manager: The following shall have management rights: in a general partnership - all partners; in a limited partnership – general partners (*komplementars*), and where the general partner is a legal person – a natural person appointed by the legal person; in a limited liability company, a joint-stock company and cooperatives – directors, unless otherwise provided for by the charter (partners' agreement)".[16] The second and third paragraphs define the authority of the management itself, namely according to the second paragraph of the Entrepreneurs Law of Georgia , "Managerial powers shall imply making decisions on behalf of the enterprise within the scope of the powers, whereas representative powers shall imply acting on behalf of the enterprise in relations with third persons".[17] According to paragraph three of Article nine of the same law "Managerial powers shall include representative powers as well, unless otherwise provided for by the charter (partners' agreement)".[18] It is also important to mention Article 56 of the named law, concerning directly the authority of joint-stock companies' directors, namely according to paragraph one of the mentioned article "the directors shall manage and represent the company".[19]

Based on the named articles of the Entrepreneurs Law of Georgiait can be said that directors' authority includes the management authority, and implementing defensive measures in the corporate law of Delaware, as well as in Georgian law is a part of the management authority, if of course this authority is not restricted by the articles of incorporation or the charter.

It is also interesting paragraph 6 of Article 54 of the law Entrepreneurs Law of Georgia, which defines a list of authorities of the corporation's general meeting, but according to the last sentence of sub-paragraph "k)" of the named paragraph the authorities of general meeting [20] listed in paragraph 6 of the charter can be reauthorized on the supervisory board or/and directors[21]. This is very important, because at critical moment of the corporation effective activities of the board, as body implementing defensive measures, might be strengthened.

Afterwards in discussing directly court cases we will see that in corporate law the main initiators of taking defensive measures, the very persons implementing defensive corporate measures are directors.

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16 Entrepreneurs Law of Georgia , 1994, Article 9.1 (In Georgian).

17 Ibid, Article 9.2 (In Georgian).

18 Ibid, Article 9.3 (In Georgian).

19 Ibid, Article 56.1 (In Georgian).

20 Generally general meeting plays an important role in the process of reorganization, because the shareholder approval is always decisive for carrying out reorganization, but directors who are managers hired by the shareholders, are obliged to prepare reorganization documents and carry out a deal in complying with the best interests of the corporation and the shareholders. Based on this directors are also obliged to give recommendation to the shareholders about each issue to be dealt on the general meeting, particularly the shareholders must agree or not on the certain deal and why. If the acquiring corporation's offer does not comply with the best interests of the corporation, directors will take defensive measures and recommend the shareholders not to agree on that offer.

21 Entrepreneurs Law of Georgia, 1994, Article 54.6 (In Georgian).

3. Equal Rights of Shareholders and Legal Limits of its Reasonable Restriction

The purpose of our work is to discuss an issue of "selective equal treatment" of shareholders, but first of all it is inevitable to discuss an issue of "equal treatment"[22] and to define reasonable limits of its restriction, if any.

Paragraph 9 of Article 3 of the Entrepreneurs Law of Georgia provides that "Partners of a general partnership, limited partnership, limited liability company, joint-stock company and cooperative shall have equal rights and obligations in equal circumstances, unless otherwise provided for in this Law or in the Charter. The Charter may define different rights and obligations irrespective of the contributions made by the partners".[23] The mentioned regulation of the Entrepreneurs Law of Georgia provides "unless otherwise providedin the charter", but the mentioned regulation is a component of the general part of the Entrepreneurs Law of Georgia. In discussing equal treatment of shareholders we must touch upon paragraph 1 of Article 52 of the Entrepreneurs Law of Georgia, particularly "Unless otherwise provided for by the Charter, shares may be common or preferred. One common share shall ensure a right to one vote at the general meeting of shareholders, while a preferred share shall provide no right to vote. A preferred share shall ensure receipt of dividends at a fixed rate. The amount of, and procedure for, receipt of dividends shall be provided for in the Charter of an enterprise. The Charter may define a different determination of rights for common and preferred shares. All shares of the same class shall provide equal rights to their holders. Any promise that future dividends will certainly be paid shall be void.".[24] The named article of the Entrepreneurs Law of Georgia speaks about the two classes of shares, unless anything else is stated by the charter of the company, so there are two kinds of shares – the common share, providing the right to vote and the preferred share, providing the right to get dividends.

"The share confirms the person's membership in the joint-stock company and person's rights and obligations based on this membership. The shareholder is not obliged to take part in the management of the company. The shareholder might not be participating in the company's affairs and might only get dividends".[25]

Paragraph 1 of Article 52 of the Entrepreneurs Law of Georgia is emphasizing that shares of one class provide their possessors with equal rights, though the existence of shares of different classes don't provide one class superior legal status to another class.

"Traditionally there are two different shares: a common share, as an ordinary case of authority-obligations of the membership and a preferred (priority) share, which compared with the other shares is characterized by certain priorities, but it does not mean that the possession of the priority share gives the shareholder a special, better legal position (than let us say, a common share). In the law of capital societies the so called *Gleishbehandlung der Aktionare* is established or principle of equal legal treatment of shareholders".[26]

Based on this though the Entrepreneurs Law of Georgia talks about the existence of different classes of shares, corporate Law confirms the principle of "equal treatment" of all shareholders. On its

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22 *Burduli I.*, Foundations of the Corporate Law, Vol. I, Tb., 2010, 330 (In Georgian).

23 Entrepreneurs Law of Georgia, 1994, Article 3.9 (In Georgian).

24 Ibid, Article 52.1 (In Georgian).

25 *Chanturia L., Ninidze T.,* Commentary on the Law about Entrepreneurs, third edition, Tb., 2002, 315 (In Georgian).

26 *Burduli I.*, Foundations of the Corporate Law, Vol. I, Tbilisi, 2010, 330 (In Georgian).

turn the Entrepreneurs Law of Georgia does not mean giving legal priority status to any classes of shares. As for equality principle in corporate law, it is based on equal status of all the shareholders (partners, sharers) before the company, considering certain priorities proceeding from the share. A certain privilege, as it was said, concerns the property rights of the shareholder. So a person possessing a privileged share has the right to get higher dividends, also in time of liquidation of the company he has the right of priority satisfaction of his request on the remained property (after the creditors)".[27]

So shareholders of the joint-stock company have equal rights or are sharing the principle of "equal treatment". Is it possible "to deviate" from the principle of "equal treatment" of shareholders?

Article 52 of the Entrepreneurs Law of Georgia envisages the existence of share classes and convertible securities in the shares. According to paragraph 1^1 of this article "In addition to the classes of shares provided for by this article, a general meeting of shareholders of the company may decide on additional classes of shares. The quantity of shares of any class, the associated rights and duties, as well as the conditions for changing them must be reflected in the Charter of a company (and in the case of public offering – in the issue prospectus as well) before placing the shares of that class. After placing shares, changes to the rights and duties associated with placed shares, as well as to the procedure for changing the shares of that class as provided for by the Charter shall not be permitted".[28]

In order to understand in what context the phrase: "All shares of the same class shall provide equal rights to their holders.", is used in the Entrepreneurs Law of Georgia, there is reasonably given the first paragraph of the named article. Is it specifying generally all of the rights or only about the right to vote and the right to get dividends? Paragraph 1^1 of the same article talks of the existence of the other classes of shares and the rights and obligations connected with them which can be foreseen in the charter, though in the same paragraph there is nothing said about equal rights-obligations inside the shares of each class. So it means that a legislator has specified equal status of the right to vote and the right of getting dividends among the shareholders of each class[29] and gives the opportunity to consider unequal treatment connected with other rights-obligations of each class. In order to analyze better the possibility of the principle of "selective equal treatment" it is necessary to discuss examples of existence of such selective rights.

The main basis of "deviation" from the equality principle among shareholders is the defense of the company's interests. The company's interest might mean to defend the corporation from a hostile acquisition and the board must defend this interest by implementing corporate-legal defensive measures. In such a case the board as a subject performing corporate defensive measures has the management obligations before the corporation and the shareholders in order for all the measures carried out by it must comply with the best interests of the corporation and the shareholders.

Actions performed by the board must meet the certain legal criteria. Only in such a case the action performed by the board and accordingly "deviation" from the principle of "equal treatment" of the shareholders will be counted as appropriate to the obligation of the management. The next chapter discusses the criteria which must be met by the board so that the implemented corporate legal defensive measures considered as legally enforceable. In the next chapter we will discuss corporate defensive measures used by the board on the basis of the "selective equal treatment" of the shareholders.

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27 *Burduli I.*, Foundations of the Corporate Law, Vol. I, Tbilisi, 2010, 331 (In Georgian).

28 Entrepreneurs Law of Georgia, 1994, Article 52.1^1 (In Georgian).

29 Pay attention to the fact that in paragraph 1 the word "right" is used, but in paragraph 1^1 –"rights-obligations". The right to vote and the right to get dividends – both are categories of right.

4. "UNOCAL" Test

Unocal v. *Mesa Petroleum*[30] is one of the most important cases which discusses using corporatelegal defensive measures by the board against hostile acquisition. On the basis of this case a fundamental rule of checking the legal force of the defensive measure has been established under the name of Unocal Test.

Mesa Petroleum which possessed 13% of *Unocal*'s shares raised a claim connected with the acquisition of 37% of shares, after which Mesa *Petroleum* was planning to take over all the shares of Unocal. The purchasing price was declared 54$ per share..

The *Unocal'*s board consisted of 8 outside (who were not the corporate employees) and 6 inside (who were the corporate employees) directors[31]. The board decided that the price of the *Unocal'*s shares was more than the price offered by Mesa and discussed various possible defensive measures. Then the outside directors gathered separately and advised the board to decline the offer and implement defensive measures. A possible defensive measure was purchasing the company's shares by the tender offer.

The board is obliged to define to what extent the mentioned offer complies with the company's best interests. The decision to be taken by the board, as it was already mentioned, is connected with the fiduciary duties of Directors.[32]

In discussing the *Unocal'*s case court adopted a two-standard rule, which was established under the name of *Unocal'*s test. According to the first standard of this rule danger must be real, i.e. real danger must be threatening the corporation's interests and according to the second standard the defensive measures implemented by the directors must be adequate to the danger. It is very important to keep a balance between these two standards. The connection between these standards must be reasonable and the board's decision must be in compliance with both standards.

Finally the board decided to implement defensive corporate measures in connection with the offer of *Mesa Petroleum.* Opposite to the offer of *Mesa Petroleum* the board would acquire itself the shares of its own company at higher price than *Mesa Petroleum* was offering the shareholders. The board considered the price offered by *Mesa Petroleum* to be lower than market price, and the own offer to be real and adequate. Furthermore *Unocal'*s offer was called as selective purchase of shares by tender offer, which would exclude acquisition of the shares possessed by *Mesa Petroleum*. In spite of it the court decided that the measures implemented by *Unocal* were adequate to the danger and selective purchase of shares was not breaching *Mesa Petroleum'*s rights, as the directors made the decision on selective purchase on the basis of the company's best interests and the danger threatening the company.[33]

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30 *Unocal Corp. v. Mesa Petroleum Co*. Delaware Supreme Court, 1985, 493 A .2d 946 (In Georgian).

31 *Chanturia L.*, Corporate Governance and Liability of Directors in Corporation Law, Tb., 2006, 115 (In Georgian).

32 *Thompson O.*, Corporations and Other Business Associations, 5th ed., Aspen Publishers, NY, 2006, 775, "In the board's exercise of corporate power to forestall a takeover bid our analysis begins with the basic principle that corporate directors have a fiduciary duty to act in the best interests of the corporation's stockholders. As we have noted, their duty of care extends to protecting the corporation and its owners from perceived harm whether a threat originates from third parties or other shareholders".

33 *Thompson O.*, Corporations and Other Business Associations, 5th ed., Aspen Publishers, NY, 2006, 777, "In conclusion, there was directorial power to oppose the Mesa tender offer, and to undertake a selective stock exchange made in good faith and upon a reasonable investigation pursuant to a clear duty to protect the corporate enterprise. Further, the selective stock repurchase plan chosen by Unocal is reasonable in relation to the threat that the board rationally and reasonably believed was posed by Mesa's inadequate and coercive two-tier

Mr. Chanturia is talking of the same case and two standards in his own book too. Particularly: "At the beginning of the 80's of the XX century Supreme Court of Delaware more developed this practice and made criteria more precise on the existence of which depends the usage of *Business Judgment Rule* for the estimation of the measures performed against hostile acquisition: first, directors must ground that the acquisition is danger to the corporation and the second, the implemented defensive measures comply with the danger. Besides in the court's opinion in case of the hostile takeover the board is even obliged to investigate whether the acquisition of the enterprise is involved in the interests of the corporation or the shareholders".[34]

Hence the defensive measures of the board are in compliance with the fiduciary duties of Directors, if the decision of the board meets the both criteria of "Unocal" Test.

4.1. Shareholders of the Target and the Acquiring Corporation

Unocal case is extremely important because of two reasons: first of all the court trying this case worked up criteria for checking the legal force of the corporate legal defensive measures ("Unocal" Test) and second, the method of the corporate legal defensive measure used by the *Unocal* board.

Depending on different court cases the court of Delaware worked up and developed other tests currently in force when there is an attempt for hostile acquisition[35], but "Unocal" Test has been the main basis for checking of the corporate legal defensive measures, performed by the board, but after court cases of Genesis and Omnicare the court extended the application of the "Unocal" Test for corporate defense measures of merger agreement.[36]

The method of corporate-legal defensive measures performed by Unocal is, as it was already mentioned, selective tender offer. Unocal's board excluded from buying shares of *Mesa Petroleum* who had already purchased a certain amount of Unocal's shares. Accordingly the board of Unocal tried implementation of selective rights between the shareholders and applied the tender offer as a form of corporate defensive measure and the court based on the company's interest supported the division of possessors of the target corporation's shares into shareholders of the target and acquiring corporations. The court supported the board that a real danger was threatening the interests of the corporation and the shareholders and the implemented method of selective tender offer was the adequate to the existed danger.

In spite of the fact that the board successfully implemented the selective tender offer and the court supported the board, it must be noted that American SEC (Security Exchange Commission) prohibited

tender offer. Under those circumstances the board's action is entitled to the measured by the standards of the business judgement rule."

34 *Chanturia L*., Corporate Governance and Liability of Directors in Corporation Law, Tb., 2006, 232

35 For example, Revlon Test, where the board is obliged to alienate the company under the best conditions so that the shareholders will have maximum profit. Revlon Test might be applied on the various grounds. One of them is starting an active process of selling the company by the board in answer to the hostile offer. *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc*. Delaware Supreme Court, 1986, 506 A.2d 173

36 *Omnicare, Inc. v. NCS Healthcare, Inc*. Delaware Supreme Court, 2003, 818 A.2d 914 Before deciding this case Unocal Test was considered to be applied on defending the corporation the from a hostile offer, though Delaware court extended its usage on applying to corporate defensive measures for defending the reorganization agreement, i.e. by *Unocal Test* it is possible to estimate also the legal force of defensive measures of the reorganization agreement , *Davis C. D*., Omnicare v. NCS Healthcare: Critical Appraisal, 4 Berkeley Business Law Journal 177, 2007, 4.

the selective purchasing method used by Unocal.[37] According to *SEC* rules during the tender offer the company must purchase shares from all the shareholders desiring to alienate shares and not only from its own old shareholders. The method used by Unocal was the tender offer to its old shareholders - *selective self-tender offer*. Unocal test remained as a rule checking the effectiveness of the defensive measures, but the method of tender offer used by Unocal was recognized as improper by SEC. SEC prohibited selectivity of purchasing the shares by tender offer and not generally selectivity of purchasing the shares.

In Georgian corporate law an issue of obligatory tender offer is defined by Article 53^2 of the Entrepreneurs Law of Georgia, but this article does not give the opportunity of dividing shareholders into target and purchasing corporate shareholders. On the contrary, according to the 1st paragraph of the named article, "If a shareholder or a group of shareholders acting on the basis of the agreement (for the purposes of this article "purchaser") acquires a packet of shares and after which controls more than ½ of the total number of votes, he/she is obliged to implement the tender offer in no later than 45 days from the start of this fact provided for by the Securities Market Law of Georgia on redeeming all the shares that are left or in the same term to make it lesser than ½ of the total number of votes controlled by him/her".[38] During the obligatory tender offer it is necessary to make an application on redeeming all the shares that are left and have the right to vote. Accordingly during the obligatory tender offer it is impossible for the shareholders possessing shares of the same class to have different legal status. As for the Securities Market Law of Georgia according to paragraph 4 of Article 15 of the mentioned law "Conditions of the tender offer and the information given by the offerer must be the same for all the possessors of proper securities".[39] According to paragraph 5 of the same article "If the offerer gets a consent to sell more securities than it was in the tender offer he/she will acquire securities on the basis of the proportional redistribution".[40] Accordingly the Securities Market Law of Georgia is also establishing the principle of "equal treatment" between the shareholders.

In the following chapters we will discuss other forms of applying corporate legal defensive measures and accordingly "selective equal treatment" of shareholders.

5. "Additional Right" (*Poison Pills*)

Poison Pills or additional right – what is meant under this term? Who might have this right and how can this right be performed?[41]

The mentioned defensive measures are provided for by the corporate law of Delaware[42]; they are also provided for by a model law about corporations.[43] *Poison Pills* or by the word-to-word meaning "poisoned pills" is a collective name of the rights granted to a shareholder which gives the opportunity to the shareholder in case of a specific occasion to demand additional securities from the company.[44] In

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

38 Entrepreneurs Law of Georgia, 1994, Article 53^2.1.

39 Securities Market Law of Georgia "Legislative Herald of Georgia", 1998, Article 15.4.

40 Securities Market Law of Georgia "Legislative Herald of Georgia", 1998, Article 15.5.

41 *Thompson O.*, Corporations and Other Business Associations, 5th ed., Aspen Publishers, NY, 2006, 779.

42 DGCL, §151.

43 MBCA, §6.01.

44 *Thompson O.*, Corporations and Other Business Associations, 5th ed., Aspen Publishers, NY, 2006, 779, "poison pill" is a colloquial name for various rights given to shareholders entitling them to additional securities of

case of implementing the Poison Pills, as well as other defensive measures by the board the two criteria of Unocal Test must be satisfied.

Poison Pills are mainly of two types.[45] In the first case directors are giving all the shareholders of the company certain rights, which ordinarily have no value, but they will gain the value, when for example, an acquiring company decides to buy 20% or 25% of shares of the named company or announces a tender-offer. In such cases all the shareholders of the company, we mean the original shareholders of the company, are obtaining the right to purchase additional shares issued by the company by far cheaply than the market price (*flip-in*). The purchasing company does not have the same right. So the acquisition of the target company might cost the purchasing company a lot. In the second case on the basis of the named defensive measure the shareholders of the target company are granted the right to purchase at a reduced price the shares of the company with which the target company must merge (*flip-over*).[46] If the purchasing company at the first stage of transaction manages to take over the target company's control packet of shares, the second version of the "poison pills" will prevent the purchaser from merging with the target company and will give the target company the opportunity to develop independently.[47]

Generally the mentioned defensive measure is an additional stimulus for the purchaser to come to the board of the target company and make the offer friendly, because if the purchaser acquired anyway the number of shares which became the basis of activating "poison pills", it will be impossible to deactivate poison pills back.[48] Before putting poison pills into force directors, as the implementers of the mentioned defensive measures, are entitled to call back the Poison Pills.[49]

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the company upon the happening of certain events. These plans have been adopted by more than 1000 public corporations and over half of the largest 500 American corporations, making them one of the most popular defensive tactics adopted by management seeking to deter hostile takeovers".

45 *Wachtell, Lipton, Rosen & Katz,* Takeover Law and Practice, 2012, 64, <http://www.law.qmul.ac.uk/docs/events/corporate%20law/65795.pdf>.

46 *Thompson O.*, Corporations and Other Business Associations,5th ed., Aspen Publishers, NY, 2006, 779.

47 There can be other variations of poison pills, e.g. "Flip-over" Rights allow the holders to purchase shares in the acquiring company under certain circumstances, "flip-in" Rights allow the holders to purchase shares of the target company, and "back-end" Rights entitle the holders to acquire debt securities or other assets," *Velasco J.,* The Enduring Illegitimacy of the Poison Pill, 27 Iowa Journal of Corporation Law 381, 2002, 2.

48 *Thompson O.*, Corporations and Other Business Associations, 5th ed., Aspen Publishers, NY, 2006, 780.

49 *Velasco J.*, The Enduring Illegitimacy of the Poison Pill, 27 Iowa Journal of Corporation Law 381, 2002, 2; "There are only three known ways around the poison pill. The first is to negotiate a friendly transaction with the target company. This is possible because the Rights are redeemable by the target company's board of directors until the poison pill is triggered. If a friendly arrangement can be reached, the poison pill Rights can be redeemed and the takeover can continue. However, this is little more than a phantom option; if a friendly transaction were feasible, a hostile bid would not have been necessary. A second way around the poison pill is to persuade the courts that the target company's board of directors is breaching its fiduciary duties by refusing to redeem the poison pill Rights. If this can be done, the court may order the company to redeem the Rights and allow the takeover to continue. However, courts are not easily persuaded. The target company can often develop a plausible rationale for resisting the hostile takeover in the interests of its shareholders. Despite the obvious benefits to shareholders, who would prefer to sell their shares at an often substantial premium to market price, courts are hesitant to second-guess the business judgment of directors. Thus, the courts tend to permit the target company's directors to resist hostile takeovers, by means of the poison pill or otherwise. The third way around the poison pill is to launch a proxy contest to remove the target company's board of directors and replace them with a more sympathetic group. This new board of directors can then redeem the poison pill Rights and allow the hostile takeover to proceed. A proxy contest, however, is expensive and time-consuming.

As it is seen the shareholder and not a share has "the additional right" and the possession of the right on its turn specifies the implementation of this right.[50] It is true that after issuing shares it is not admissible to change rights-obligations connected with the share, but as it will be seen in the articles specified by the corporate law of Delaware it is possible to redeem, convert them and so on. The old shareholders of the target company will have the "additional right" because they have already possessed the shares, i.e. the shares within the same class might have equal right-obligations, but it does not mean that the holders will have equal rights. Just granting this right to the holders gives the opportunity to ask for the additional right, as a defensive measure. After issuing the share it would be impossible to wangle the right given to the share.

According to Article 151 (e) of the corporate law of Delaware the right to be transformed or changed might be given any class of shares on the grounds of a certain event but based on the holder's or the corporation's articles of incorporation in the shares of the same or other class or at the price and rule stated by the board.[51] According to Article 157 (a) in compliance with the company's articles of incorporation on the basis of the decision of the company's board any company can create and issue the right, connected with issuing and selling of shares or other securities or existed without any connection with it, which gives the possessor the right to purchase the corporation's shares.[52]

According to the Model Business Corporation Act, particularly to 6.01 (c)(2) of this law, "The articles of incorporation might envisage, that certain classes of shares might have the right of being redeemable or convertible upon happening the specified event by a certain amount stated instead of securities, money, loan or other property".[53]

Thus, only the most determined bidders can proceed with this option, and yet, this is the only real option available to most hostile bidders."

50 *Velasco J.*, The Enduring Illegitimacy of the Poison Pill, 27 Iowa Journal of Corporation Law 381, 2002, 1, "The poison pill operates in a fairly simple manner. A company's board of directors adopts a "Shareholder Rights Plan" pursuant to which a dividend of one "Right" is declared on each share of common stock. Each Right is attached to, and not tradable separately from, its corresponding share. Initially, the Rights are essentially meaningless. However, if certain specified events occur, such as the acquisition by a hostile bidder of more than a specified percentage of the company's shares, the poison pill is triggered. Once triggered, the Rights would detach from the shares and entitle all of the target company's shareholders, other than the hostile bidder, to acquire securities at a discount."

51 DGCL, § 151 (e), "Any stock of any class or of any series thereof may be made convertible into, or exchangeable for, at the option of either the holder or the corporation or upon happening the specified event, shares of any other class or classes or any other series of the same or any other class or classes of stock of the corporation, at such price or prices or at such rate or rates of exchange and with such adjustments as shall be stated in the certificate of incorporation or in the resolution or resolutions providing for the issue of such stock adopted by the board of directors as hereinabove provided".

52 DGCL, § 157 (a), "Subject to any provisions in the certificate of incorporation, every corporation may create and issue, whether or not in connection with the issue and sale of any shares of stock or other securities of the corporation, rights or options entitling the holders thereof to aquire from the corporation any shares of its capital stock of any class or classes, such rights or options to be evidenced by or in such instrument or instruments as shall be approved by the board of directors".

53 MBCA, §6.01 (c), "The articles of incorporation may authorize one or more classes of shares that: (2) are deemable or convertible as specified in the articles of incorporation: (i) at the option of the corporation, the shareholder, or another person or upon the occurrence of a specified event; (ii) fro cash, indebtedness, securities, or other property; and (iii) at prices and in amounts specified, or determined in accordance with a formula".

On the basis of the above mentioned fact it can be said that there is a right connected with a share being converted into other security or being redeemed at a certain price. The bearer of this right is a holder of the target corporation. Furthermore converting into other security is possible not only in the company the holders of which they are, but in other companies too and what is important, for activation of this right it is necessary a triggering or substantial event. Of course the directors' decision cannot be opposite to the rule stated by the articles of incorporation. The directors are executives acting according to the rules stated by the articles of incorporation and legislation.[54]

According to Article 6.02 of the Model Business Corporation Act, directors can be given an issue of defining rights and additional conditions for the authorized shares in the articles of incorporation,[55] which at the same time is pointing to the right of the board to foresee redeeming or converting privilege of shares upon issuing them.

The term *Poison Pills* denotes directly "poisoned pills", but as for its contents, it is emphasizing an issue giving the holder additional rights and just these rights are a stipulating factor of defensive measures. In addition, as it will be seen in court cases there does not exist only a concrete direction of the "poisoned pills", it's a collective name of different types of measures. Accordingly as a Georgian equivalent to the "poisoned pills" a term "additional right" can be used, i.e. from the point of view of using defensive corporate measures, additional right given to the shareholders. This additional right will entitle the holders to purchase shares issued by the target company or the purchasing company's shares at a price lower than the market price.

In order to analyze better the opportunity of using "poisoned pills" as a defensive measure, it is necessary to discuss examples of court practice.[56] One of the most important cases decided by court and which strengthened the legal status of "poison pills" is a case *Moran v. Household International*.[57]

Household International is a diversified company having daughter companies in financial services in transportation and manufacture directions. Moran was one of the directors of *Household* and a manager of "*Dyson-Kissner-Moran".* At the same time the named company is the biggest shareholder of *Household International.* In 1984 board of *Household International* made decision about approving

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54 As it was mentioned before, corporate law of Delaware and court practice are emphasizing the issue of the company's governance by the board, DGCL, §141.

55 Entrepreneurs Law of Georgia, 1994, Article 59 explains the meaning of "authorized shares".

56 The first case of using and discussing "Poison pills" by court was fixed in New Jersey state, *Cohen M. M.*, "Poison pills" as a negotiating tool: seeking a cease-fire in the corporate takeover wars, Columbia Business Law Review 459, 1987, 4, "Lenox, Inc. ("Lenox") issued the first poison pill to initiate litigation in June 1983 in response to the unwelcome advances of Brown-Forman Distillers Corp. ("Brown-Forman"). Brown-Forman had commenced a tender offer for "any and all" shares of Lenox at § 87 and announced a follow-up merger. Lenox responded by issuing an original pill - a dividend of convertible preferred stock at the ratio of one share for every forty common shares. This preferred stock was convertible into the voting common stock of the acquirer should Lenox merge with another entity or sell all of its assets. Brown-Forman sought a temporary restraining order, but the Federal District Court in New Jersey refused to issue the order. The court found that Lenox's defensive tactics, including the pill, were not "clearly illegal and contrary to the shareholder's interests." Thus, the poison pill appeared to have withstood its first legal challenge. This victory would proved short-lived - the first crude poison pill had been too weak. Shareholders were still enticed to tender because of the large premium offered. The preferred stock had not deterrent effect because it only provided an additional dividend of twelve cents per share. Lenox finally capitulated and sold out at $ 90 per share, but not before Brown-Forman agreed to retain upper management".

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

the "rights agreement" as defensive corporate measures. The mentioned document meant the following – holders possessing common class shares of the company would have one "right" per share, that would be activated based on different grounds. Such grounds were the following – announcement of a tender offer on 30% of *Household*'s shares and second – acquisition of 20% of *Household*'s shares by any other organization or other group of shareholders. If a tender offer was announced on 30% of the company's shares, the rights envisaged by defensive measures would be more activated and it would be possible to acquire the one hundredth of new preferred shares at a price of 100$ and these rights were redeemable by the board, as one right at a price of 0.50 $. If any other company acquired 20% of *Household*'s shares, the mentioned rights would be activated and the company would be able to acquire the one hundredth of the privileged shares but these rights would not be redeemable. According to the mentioned defensive measure, if the shareholder did not use the right in relation to the privileged shares, he/she would have the right to purchase 200 dollar worth of common shares of the purchasing company at a price of 100$. This right would be emerged, if the purchasing company decided to merger with the target company.

Before taking defensive measures the board of *Household* had consultations with different companies, which based on the existed situation of that time advised it to conduct the policy opposite to the hostile takeover. At the board meeting upon approving "poison pills", 14 votes were for and 2 votes –against. The meeting was attended by experts, who advised to take defensive measures.[58] As a result of it Moran and his company brought in an action against *Household.*

Court began with defining of an issue of the directorial power of directors – to what extent making decision about defensive measures by directors was within the range of their authority. In the complainants' point of view the board was not authorized to approve defensive measures, it was not authorized either to restrict the shareholders' right to choose hostile takeover connected with purchasing shares.

The complainants called Article 157 of corporate law, on the basis of which is possible to implement defensive corporate measures, the article, which was only giving the opportunity of proving additional rights for financing the corporation. The complainants remarked that Article 157 was not giving the possibility of issuing modeled rights in such a way as it had been done by the board. They were saying that Article 157 was not giving the opportunity of granting rights connected with other companies. Accordingly the board was not able to implement defensive measures based on Article 157. Court did not agree with the complainants' position connected with Article 157 of corporate law of Delaware.[59] Particularly complainants were not able to prove that the aim of Article 157 was only issuing additional rights for financing the corporation. The court remarked that the rights granted to the shareholders were not modeled, because implementation of the rights granted by "poison pills" would be possible when the grounds of it happened (20% of *Household* shares would be purchased or tender offer connected with purchasing of 30% of *Household* shares would be announced). Based on Article 157 the court also stated that it was possible to give rights connected with shares of other company. The board was entitled to implement defensive measures on the grounds of the mentioned article.

[58] *Cohen M. M.,* "Poison pills" as a negotiating tool: seeking a cease-fire in the corporate takeover wars", Columbia Business Law Review 459, 1987, 5, "The court found it important that the Household pill had been adopted by a board composed primarily of outside directors before a takeover had been initiated."

[59] DGCL §157 (a), "Subject to any provisions in the certificate of incorporation, every corporation may create and issue, whether or not in connection with the issue and sale of shares of stock or other securities of the corporation, rights or options entitling the holders thereof to acquire from the corporation any shares of its capital stock of any class or classes, such rights or options to be evidenced by or in such instrument or instruments as shall be approved by the board of directors".

As it was mentioned before complainants were saying that the board was not entitled to encroach on the shareholders' rights to agree or not with the hostile offer. The court remarked that the shareholders' rights connected with restriction of hostile takeover had not been encroached; despite taking defensive measures the shareholders had an opportunity to get the hostile offer. According to court the implemented defensive measures had not been absolute; there were other means of hostile acquisition, which had not been provided for by the mentioned defensive measures.[60] Also if directors had decided to implement defensive measures, their decision would have been checked anyway within the range of the fiduciary duties.

Complainants also declared that the defensive measures were impeding to grant the representative authority to one holder, namely were impeding the shareholders' group to grant a shareholder the right of using 20 % of votes. The court explained that the basis of implementing the defensive measures might have been when one shareholder had become a beneficiary owner of 20% of shares and the fact that one shareholder had been granted the representative right of 20% votes would not have become a basis for triggering the defensive measure.

On the basis of all the above mentioned court decided that the triggering of the defensive measures was the board's authority. After clarification of this issue the court began to discuss to what extent the Business Judgment Rule defended the decision taken by the board about implementing defensive measures.[61] In this court case it is very interesting that defensive measures or preventive mechanism were implemented before an attempt of hostile acquisition had been really occurred. According to court a better step was implementing defensive measures as a preventive mechanism, as upon an attempt of a hostile acquisition directors would have been less stressed while making decisions.[62] So the Business Judgment Rule would have defended better such preventive measure.

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60 *Henry L. G.*, Continuing Directors Provisions: these next generation shareholder rights plans are fair and reasoned responses to hostile takeover measures, 79 Boston Law Review 989, 1999, 3, "The dissident shareholder next argued that poison pills would prevent shareholders from receiving tender offers. In accord, the Securities and Exchange Commission ("SEC") filed an amicus brief, stating that "the Rights Plan will deter ... virtually all hostile tender offers." The court struck down that argument on four counts. First, the court pointed out the fallacy in such arguments by highlighting a contemporaneous acquisition that had occurred even though the target had a poison pill. Second, the court noted that one could form a group of up to 19.9 percent and solicit proxies for consents to remove the board and redeem the Rights. Third, the court stated that an incumbent board may not arbitrarily reject an offer. Rather, a board faces the same fiduciary standards that any board would face in adopting a defensive tactic. Fourth, the court compared poison pills to other defensive mechanisms and noted that pills do "less harm to the value structure of the corporation than do the other mechanisms." Unlike some measures, the poison pill does not increase the debt load of the target, it does not require an outflow of cash from the corporation, and it does not dilute earnings per share or have negative tax consequences for the corporation or its shareholders."

61 *Maisuradze D.,* The Business Judgment Rule in Corporate Law (on examples of USA and Georgia Law), Collected articles I, edited by I. Burduli, Tb., 2011, 120 (In Georgian); *Aronson v. Lewis*, 473 A.2d 805 (Del. 1984) – It is a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company.

62 *Thompson O.*, Corporations and Other Business Associations, 5th ed., Aspen Publishers, NY, 2006, 781, "... here we have a defensive mechanism adopted to ward off possible future advances and not a mechanism adopted in reaction to a specific threat. This distinguishing factor does not result in the Directors losing the protection of the business judgment rule. To the contrary, pre-planning for the contingency of a hostile takeover might reduce the risk that, under the pressure of a takeover bid, management will fail to exercise the reasonable judgment. Therefore, in reviewing a pre-planned defensive mechanism it seems even more appropriate to apply the business judgment rule."

From the case it is also seen that directors acted on informed basis about the implemented defensive measures. They were given a review of these measures and an article, in which there was described general situation of hostile acquisition of that time. There was also criticism from Moran connected with the mentioned plan. It was an additional factor of gaining more knowledge for directors, as they had already heard criticism of this plan. At that time the corporate climate was oriented on hostile purchases. Accordingly as danger is real (considering also the factor, that Moran had already expressed his wish to acquire *Household International*'s shares by his own company), the decision made by directors is proportional to the danger.[63] So court supported the respondents.

5.1. Poison Pills and an Issue of "Selective Equal Treatment" of Shareholders - Interrelations

As it was mentioned before, "poison pills" comprise of two main parts – the shareholders' rights connected with the company's shares and the shareholders' rights connected with the purchasing company's shares.

The existence of "poison pills" is connected with the existence of selective rights. Let us suppose the basis of triggering of "poison pills" is provided for by the target company's bylaws, particularly acquisition of 15% shares of the target company by the purchasing company. As soon as the purchaser acquires 15% shares in the target company, the Poison Pills will be activated and the native shareholders of the target company will be able to buy new shares issued by the target company at a less price than the market price.[64] Analogous rights, though the purchaser has purchased a part of the target company's shares at the moment of triggering of "poison pills", will not be activated for the shareholders of the purchaser, so the shareholders of the acquiring company are excluded. Thus it means that there can be different rights-obligations for the shareholders of the same class,[65] though the Delaware court has never

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63 *Henry L. H.*, Continuing Directors Provisions: these next generation shareholder rights plans are fair and reasoned responses to hostile takeover measures, 79 Boston Law Review 989, 1999, 3, "The court then addressed whether the directors had met their burden under the business judgment rule. The court held that the business judgment rule protects the board's decision to implement the rights plan. When the business judgment rule is applied to defensive mechanisms, the initial burden lies with the directors. First, the directors must show that they had reasonable grounds to believe that a danger to corporate policy and effectiveness existed. The directors meet that burden by showing good faith and reasonable investigation. Second, the directors must show that the defensive tactic is reasonable in relation to the threat posed. Only then does the burden shift back to the plaintiffs, who have the ultimate burden of demonstrating that the directors breached their fiduciary duty."

64 *Ji L. X.,* A New Look at Dead Hand Provisions in Poison Pills: Are They Per Se Invalid After Toll Brothers and Quiturn?, 44 Saint Louis University Law Journal 223, 2000, 3, "Although there are many variations as discussed below in detail, poison pills all share some common key features. One key feature is that when a "triggering event" occurs, the pill entitles all shareholders of the target company, other than the hostile bidder, to purchase stock of the target company or that of the bidder at a substantial discount compared to the then-current market price. An exercise of this right results in a severe dilution of the hostile bidder's holdings. The dilution is so substantial that hostile bidders are forced to negotiate with the target board instead of triggering the pill since typically the board is the only body entitled to redeem the pill. In the case of a dead hand poison pill, only the continuing directors can redeem. In any event, in the absence of elimination of the pill, the bidder can proceed with the acquisition only by suffering a massive dilution".

65 A very interesting opinion is expressed about selective rights of shareholders, namely there can be discrimination between the shareholders and not between the shares, *Velasco J.*, The Enduring Illegitimacy of the Poison

directly discussed an issue of granting different rights to the shareholders of the same class. It is provided by corporate law of Delaware.[66] The MBCA directly gives holders of the same class identical rights but it is not provided by corporate law of Delaware and accordingly it is not prohibited either. Is it possible for analogous approach to be provided by Georgian legislation?

We have discussed paragraph 9 of Article 3 and Paragraphs 1 and 1^1 of Article 52 of Entrepreneurs Law of Georgia. During discussion we remarked that unlike the rights to vote and to get dividends, in relation to other issues it is possible for the holders of the same class to have different legal status. The court named defense of the best interests of the corporation and the shareholders in "*Unocal"* case as the basis of existing selective rights.

As we mentioned before the existence of "poison pills" is connected with the existence of selective rights. Correspondingly in Georgian corporate law the implementation of "poison pills", as a corporate-legal defensive measure, will be impossible without using a principle of "selective equal treatment".

Following this latter position, we will be able to use defensive corporate measure of "poison pills" in case when the purchasing company is planning to takeover the target company. For example, by the bylaw we can foresee that the principle of "poison pills" will be triggered after the purchaser acquires 15% shares of the target company. In case of occurrence of such event the remained shareholders will have the right to purchase newly issued shares of the company at a discount compared to the then-current market price, but the purchasing company will not have this right, in spite of the fact that upon triggering the principle "poison pills" the purchasing company already possesses the shares of the target company. As it was mentioned before, only the board of the target company can call back these rights.

To what extent will the holders of the Georgian company have "additional right" in relation to the shares of the purchasing company? Such issues are directly foreseen by corporate law of Delaware and "poison pills" will also have effect on the company with which the target company will be merged. In the bylaws of the corporation Georgian corporate law does not ban provision of "additional right" of this kind. In case of probable merging with the purchasing company by the target company's charter it is possible to foresee rights of the target company's holders in connection with the shares of the purchasing company. If merging takes place without using these rights, then comes out that the parties have breached the target company's charter and have not implemented the rights granted to the holders by the bylaw. Envisaging the "Poison Pills" by the bylaw in relation to the purchasing company's shares will help the target company to block the second stage of transaction – merging with the purchasing company and to develop independently.

In my opinion when one company is trying to take possession of the second company, from the very start it means putting the target company and the shareholders of the target company into an unequal position. The purchasing company is buying the target company's shares just in order to take control

Pill, 27 Iowa Journal of Corporation Law 381, 2002, 10, "The flip-in pill and back-end pill are most susceptible to the criticism that they impermissibly discriminate among shares of the same class by granting meaningful Rights to some shareholders and meaningless Rights to others. This is problematic because, while most state corporation laws permit shares of different classes to have different rights, they forbid, either explicitly or implicitly, discrimination among shares of the same class. Most courts that have struck down the poison pill have done so on this ground. Delaware courts have never directly dealt with this issue. However, other courts that have dealt with the issue have argued that poison pills do not discriminate among shares (which is forbidden), but only among shareholders (which is not forbidden)".

66 *Henry L. G.,* Continuing Directors Provisions: these Next Generation Shareholder Rights Plans are Fair and Reasoned Responses to Hostile Takeover Measures, 79 Boston Law Review 989, 1999, 3.

over it and compel it to merge with it or turn it into a daughter company. It might be accompanied by a two-staged purchase of shares, which has a forced character.[67] I think an unequal situation is formed from the very start and it is created by the purchasing company attempting to take possession of the target company. Such possession is always hostile, as otherwise the target company would not use "poison pills". Triggering the "additional right" of shares by the target company is the target company's reply to the unequal situation created by the purchaser.

the court in *Unocal* supported the existence of selective rights of shareholders, it emphasized the superiority of the corporation's interest over equal legal status of the shareholders. The corporation's and shareholders' interest was more valuable for the court than the interest of a group of the shareholders to seize the control of the company. Accordingly when we are talking about the principle of "selective equal treatment" of shareholders we must put a question –to what is the principle of "selective equal treatment" applying? Based on the corporation's interest the board in *Unocal* case made "discrimination" between the shareholders of the target and purchasing companies. Can we say that between the shareholders in relation to each other a principle of "equal treatment" is enforced, but in relation to the corporation – a principle of "selective equal treatment"? In the next chapter based on the corporation's interest the possibility of existence of "selective equal treatment" of shareholders on implementing corporate-legal defensive measures will be described much well.

6. Interrelationship between the Shareholder's Preemptive Purchase Right and the Principle of "Selective Equal Treatment" of Shareholders

Based on the purposes of the work we must discuss preemptive right, provided for by the Entrepreneurs Law of Georgia, which because of the grounds represented below, can be named as the most effective and operative corporate-legal defensive measure of the Georgian corporate law.

According to sub-paragraph g) of paragraph 6 of Article 54 of the Entrepreneurs Law of Georgia general meeting is entitled "wholly or partially cancel a shareholders pre-emptive right (when increasing the capital by issuing securities) ".[68]

Is it possible to use the preemptive right provided for by the Entrepreneurs Law of Georgia as a defensive measure? Let us imagine a case, when "A" company is buying shares of "B" company. "B"

[67] It is recognized that a two-staged tender-offers have the "forced" character, particularly shareholders are "afraid", that if they can't manage to sell shares at the first stage of purchase, the company's control packet of shares might be sold, the price of shares might fall and at the second stage of purchase they economically might be in worse position more than those shareholders who sold shares at the very first stage of the offer. The "forced" character of such purchase is also due to the fact that the holder does not know what decision will his/her colleague shareholder make and is trying to sell own shares at the very first stage of purchase, i.e. a company might be also sold when the majority of the holders don't want to sell shares but are "compelled" to do so, *Joo W. T.*, Corporate Governance, Law, Theory and Policy, Carolina Academic Press, 2nd ed., Durham, 2010, Pills, Polls, and Professors Redux, 575, "Tender offers are not functional equivalents of free votes, since the decision not to tender (whether into an all-cash, all-shares offer or a two-tier, front-end loaded offer) carries with it economic risks and detriments; not knowing whether the mass of other shareholders will tender or not, the individual holder faces the classic "prisoner's dilemma" and is effectively stampeded into tendering. The proponents of takeover defenses also observed that many hostile bids were opportunistic attempts to buy assets on the cheap, and that there was no empirical evidence that such takeovers were always (or ever) good for the economy."

[68] Entrepreneurs Law of Georgia, 1994, Article 54.6 (In Georgian).

company has one class of shares – common shares. "A" company acquired 20% of "B" company's shares. What must "B" company do in order to decrease "A" company's possession of "B" company's shares, let us suppose up to 5%. If "B" company decides to issue additional shares, will all the shareholders have the right to purchase additionally issued shares? If all the holders have this right, it means that "A" company will have the preemptive right to subscribe additionally issued shares and correspondingly the number of "B" company's shares that are in "A" company's possession will not be decreased.

In the Entrepreneurs Law of Georgia it is said that general meeting is entitled to cancel wholly or partly the holders preemptive right to subscribe to additional securities by means of issuing securities in case of the growth of capital. The preemptive right is only in relation to additional issuing of securities. "Can a shareholder at any time of alienation of the share by any other shareholder of the corporation in the first place to purchase this share based on a legal regime of the preemptive right? The answer to this question is given by sub-paragraph g) of paragraph 6 of Article 54 of the Entrepreneurs Law of Georgia. In accordance with the mentioned norm an issue of annulling the preemptive right of shares is in the competence of the general meeting. According to the law the usage of preferable purchase is only possible, when the growth of capital is happening by means of issuing new shares".[69] The Entrepreneurs Law of Georgia strengthens the authority of the general meeting to annul "wholly or partially cancel a shareholders preemptive right". Does the annulling of the preemptive right mean putting the shareholders in an unequal position?

We have discussed Article 52 of the Entrepreneurs Law of Georgia, where it is said about equal rights-obligations of shares. We have also discussed the opinion, according to which it is possible to put shareholders into an unequal positions. Following the above mentioned opinion, it will be turned out that sub-paragraph g) of paragraph 6 of Article 54 corresponds to this position, namely, the general meeting is authorized to annul the shareholder's preemptive right. This right is not fundamental and inherent; it depends on certain circumstances[70], and can be annulled wholly or partly. In the example discussed by us is it possible that the purchase of "B" company's shares by "A" company become the grounds of annulling of the preemptive right for the shares bought by "A" company? If it is possible, it means that buying "B" company's shares by "A" company will become the grounds of issuing additional shares by "B" company, in relation to which "A" company's shareholders (in spite of the fact that they own the part of "B" company's shares) will not have the preemptive right. "B" company will issue additional shares. The native shareholders of "B" company will have the preemptive right that will cause reduction of percentage of "A" company's shares.[71] In such a case "the preemptive right" provided for Entrepreneurs Law of Georgia might become very effective method of implementing "poison pills" inside the company, which will bring very hard economical result to the purchasing company.

In discussing *Unocal Test* above it was mentioned that selective purchase of shares by means of tender -offer was thought by court to be in accordance with the Directors fiduciary duties, though the other party thought that the selective purchase was unfair. The court remarked that the selective purchase was justified by the corporation's interests.[72] Though the selective purchase method in Unocal case differs

69 *Burduli I.,* Foundations of the Corporate Law, Vol. II, Tb.*,* 2013, 248 (In Georgian).

70 Ibid, 248.

71 It is possible to give the old holder of "B" company the preemptive right to subscribe to the additionally issued shares at a substantial discount compared to the then-current market price. This preferable purchase right will be just "poison pills" or the shareholder's additional right, which can be called back by the board, if it is granted this right by the general meeting, as the general meeting is authorized to annul wholly or partly the shareholder's right of preferable purchase.

72 *Thompson O.*, Corporations and Other Business Associations, 5th ed., Aspen Publishers, NY, 2006, 777, "In conclusion, there was directorial power to oppose the Mesa tender offer, and to undertake a selective stock

from selectivity of "poison pills" or the preemptive right, but based on the purposes of our work and in general of formation of the defensive measure it is possible that the circumstances in the *Unocal* case for grounding selectivity can be used for grounding selectivity in case of the preemptive right. "Annulment of the preemptive right of a shareholder is due to certain reasons. These reasons might be different. A special attention is paid to the circumstances when "a new capital or new shares are used for certain purposes". From this point upon annulling the preemptive right when capital is growing, the interests of the corporate enterprise are the most important. So the legal ground for annulment of the preemptive right must serve (1) the purpose and welfare of the corporation and (2) the measure for achieving this purpose must be reasonable, necessary and proportional.[73] So for Georgian law a very interesting issue would be upon annulling the preemptive right whether it must be necessary the corresponding grounded decision of the general meeting.[74] Here is meant a material ground i.e. substantiation of the reasons, why it is necessary to annul this right wholly or partly, in short it is necessary to make objectively right decision. There is no Georgian court practice connected with this issue".[75]

The preemptive right is a lawful right of shareholders and deprive them of this right must be considered as the interference in their legal status. So depriving the shareholders of this right must be exceptional and only under certain conditions. Depriving or restricting the preemptive right is only admissible when otherwise is impossible to achieve the purpose without increasing the capital and the restriction of the shareholders' rights serves the interests of the corporation as a whole".[76]

Accordingly when the interest of the corporation is to defend the corporation it is justified to deprive the part of shareholders of the preemptive right, that is implementation of the principle of "selective equal treatment", which will also make real the selective purchase of the newly issued shares.[77]

exchange made in good faith and upon a reasonable investigation pursuant to a clear duty to protect the corporate enterprise. Further, the selective stock repurchase plan chosen by Unocal is reasonable in relation to the threat that the board rationally and reasonably believed was posed by Mesa's inadequate and coercive two-tier tender offer."

73 We can compare these both principles to Unocal Test, according to which the defensive measure is complying with the fiduciary duties, when danger is real (when the corporation's welfare is threatened with danger) and the implemented measure is appropriate to the danger (or danger and the measure are adequate to each other), *Unocal Corp. v. Mesa Petroleum Co*. Delaware Supreme Court, 1985, 493 A.2d 946.

74 As we are comparing the preemptive right and the usage of "poison pills", it will be interesting to note that one of the main advantages of poison pills is its implementation capability by the board. Accordingly it will be reasonable to entitle the board with the right of granting or annulling the preemptive right. "Another key feature of the poison pill is that it generally is adopted by board action alone and requires no shareholder approval. This is a major advantage that the poison pill offers over many other defensive measures. The board might seek shareholder advisory votes regarding adopting, amending, or redeeming a pill; however, the board usually acts on its own. Furthermore, poison pills can be adopted by the target board as a pre-offer defensive technique or as a defensive measure in the face of a threat or an actual hostile offer", *Ji L. X.*, "A New Look at Dead Hand Provisions in Poison Pills: Are They Per Se Invalid After Toll Brothers and Quiturn?", 44 Saint Louis University Law Journal 223, 2000, 3.

75 *Burduli I.,* Foundations of the Corporate Law, Vol. II, Tb., 2013, 254-255 (In Georgian).

76 *Chanturia L., Ninidze T*., Commentary on the Law about Entrepreneurs, third edition, Tb., 2002, 376 (In Georgian).

77 We were talking about discrimination between shareholders in the corporate law of Delaware when "poison pills" are used. It is interesting to compare selective characters of "poison pills" and the preemptive right. In such a case the preferable purchase right might be implied in granting additional rights to the shares within the company, i.e. discrimination might be observed between shareholders and not between the shares. Also if we emphasize the fact that in sub-paragraph g) of paragraph 6 of Article 54 of the Entrepreneurs Law of Georgia,

At the end of the discussion of the preemptive right we should ask the following question: Is "poison pills" provided by corporate law of Delaware identical to the preemptive right provided by Georgian corporate law?

Based on the purposes of using defensive measures granting "poison pills" might comprise a wide spectrum of issues, bearer of which is a shareholder but the shareholder's preemptive right can be used as one of the directions of the Poison Pills and not as an identical designator.

Corporate law of Delaware provides a shareholder with a preemptive right, if this right is envisaged by the corporation's articles of incorporation.[78] The corporate law of Delaware does not know "the obligatory preemptive right of shareholders. According to Article 102(b)(3) of the Delaware law shareholders don't have the preemptive right, if something else is not stated by the document establishing the corporation. Charter autonomy spreads to the forms of preemptive right for shareholders. Particularly the preemptive right might be granted to shares of one or several classes (series) and their owners. Common Law considers that the preemptive right is the means of defending of property and voting rights of the shareholders. First of all by means of it shareholders maintain their percentage of share in the corporation, are defending voting right and influence upon the enterprise activities. At the same time preemptive right is considered as an assigned and not a natural right. Accordingly the company can restrict, as well as annul it".[79]

In addition we can remark that the MBCA envisages granting of a preemptive right to a shareholder, if it is provided for by the articles of incorporation.[80] The grounds of restriction or annulment of this right can also be determined by the article of incorporation.

7. Redemption of Shares by the Corporation

Corporate law of Delaware attributes a big importance to the issue of redemption of own shares by the corporation and very often redemption of own shares is a well-known method of implementing a defensive measure. Article 151 (b) of corporate law of Delaware envisages that ". . . Any stock which

there is said about the preemptive right of shareholders, courts of many states of the USA think that selective granting of additional rights to the shareholders in the corporation is unfair. Court of Delaware has never judged about the existence of different rights in the same class of the shareholders, though as it was noted corporate law of Delaware does not ban the existence of different rights in the same class of shares, while the MBCA does not give such opportunity. From this point of view the following opinion is interesting: "The Moran case involved a flip-over rights plan, and not a flip-in plan. Under a flip-in plan, all shareholders of the target company, except the bidder, are entitled to exercise their rights to purchase stock of the target upon the occurrence of the triggering event. Thus, a flip-in plan can create two new categories of shareholders of the target company - bidder shareholders and non-bidder shareholders - and treat each category differently. This proved not to be an issue in Delaware because Delaware law allows disparate treatment of different holders of shares of the same class. Nevertheless, this discriminatory feature of the flip-in plan was a cause of concern to a number of courts in different jurisdictions and initially was held invalid in some. In response, the legislatures of those states passed laws expressly upholding their legality. These statutes often grant directors broad discretion to determine the terms of rights issued under poison pills. Some of them have been used to ,,justify yet stronger varieties of poison pills", *Ji L. X.*, A New Look at Dead Hand Provisions in Poison Pills: Are They Per Se Invalid After Toll Brothers and Quiturn?, 44 Saint Louis University Law Journal 223, 2000, 6-7.

78 DGCL § 102 (b) (3) "No stockholder shall have any preemptive right to subscribe to an additional issue of stock or to any security convertible into such stock unless, and except to the extent, that such right is expressly granted to such stockholder in the certificate of incorporation".

79 *Jugheli G.,* Defending of Capital in Joint-stock Company, Tb., 2010, 202-203 (In Georgian).

80 MBCA §6.30.

may be made redeemable under this section may be redeemed for cash, property or rights, including securities of the same or another corporation . . .".[81] The mentioned article also provides that redemption of shares can be done according to the articles of incorporation or the rule determined by the decision of the board in certain time, price and ratio. The issue of redemption of shares is also provided for by the MBCA.[82]

For the purposes of our work it is very important to define an issue – whether the Entrepreneurs Law of Georgia gives corporations the opportunity of purchasing their own shares.

Article 53^1 of Entrepreneurs Law of Georgia regulates the issue of redemption of shares by society.[83] In the article, redemption of shares by society is mainly discussed as a right of the dissenter shareholder to demand redemption of own shares from the corporation, if he/she does not support the decision of the general meeting which discusses the reorganization of the enterprise or compromises the shareholder's rights. In such a case the shareholder has the right to demand from the corporation to redeem own shares and the corporation is obliged to satisfy the shareholder's demand. The named article also defines a procedure of redemption of shares, a rule defining the value and cases when redemption is not allowed. For the means of our paper, the last paragraph of the noted article is especially important which talks generally of the rule of redemption of shares and not of the right of the dissenting shareholder to demand from the corporation the redemption of shares. "In this case the law permits trade of own shares, though it has certain legal and economical result".[84] Particularly according to paragraph 9 of Article 53^1 of Entrepreneurs Law of Georgia "The Company may, at the stock exchange, purchase and then alienate its own placed shares (treasury shares) at its sole discretion. The quantity of the treasury shares may in no event exceed 25% of placed shares unless a lower limit provided for by the Charter. In counting votes, distributing dividends, and during a liquidation process and for purpose of computing other rights arising from shareholding, treasury shares and shares owned by subsidiary enterprises of the company shall not be taken into account.".[85] "This addition to the law must be considered as sharing of experience with the western countries, which undoubtedly is a positive step in the economical reality of Georgia".[86]

Paragraph 1 of Article 59 of Entrepreneurs Law of Georgia defines the definition of the placed shares, namely "A share shall be deemed placed if the company issued it to any other person in exchange for sum certain or other payment (irrespective of whether the company has received such payment or not)".[87] Hence the society has the right to acquire its own placed shares, which after acquiring them by the society will become treasury shares. But there is also some restriction enforced, namely the amount of treasury shares must not exceed 25% of the placed shares. The corporation is allowed to redeem maximum 25% of the own placed shares. Such shares after redemption will have a status of treasury shares, which at the same time means that while counting votes, treasury shares will not be taken into consideration, i.e. votes are counted only by the amount of the placed shares. Upon counting of votes,

81 DGCL, §151 (b), "...Any stock which may be made redeemable under this section may be redeemed for cash, property or rights, including securities of the same or another corporation, at such time or times, price or prices, or rate or rates, and with such adjustments, as shall be stated in the certificate of incorporation or in the resolution or resolutions providing for the issue of such stock adopted by the board of directors...".

82 MBCA 6.01 (c)(2).

83 Entrepreneurs Law of Georgia, 1994, Article 53^1 (In Georgian).

84 *Burduli I.,* Foundations of the Corporate Law, Vol. I, Tb., 2010, 377 (In Georgian).

85 Entrepreneurs Law of Georgia, 1994, Article $53^1.9$ (In Georgian).

86 *Burduli I.,* Foundations of the Corporate Law, Vol. I, Tb., 2010, 381 (In Georgian).

87 Entrepreneurs Law of Georgia, 1994, Article 59.1.

the shares owned by the daughter enterprise, are not foreseen either. The same approach is envisaged in corporate law of Delaware, according to which the shares owned by the corporation don't have the right to vote.[88] It is also inadmissible to contemplate the own shares when quorum of shareholders' meeting is being stated. The same restrictions are to the corporation's shares which though are owned by the other enterprise, but the majority of shares participating in selecting its director, directly or indirectly belong to the corporation.[89]

"For clarity I'll give an example of redemption of own shares, connected with raising of stock price. The general meeting of the joint-stock company "x" made decision on purchasing (acquiring) of the own shares. The corporation's capital is 100 000 GEL, which is divided into shares of certain nominal value. The society purchased a certain part of the own shares (e.g. 5%). Accordingly the holders owning this 5% (say conditionally 100 shares) left the joint-stock company. The property of the remained holders is increasing (e.g. the price of one share from ten units will be less than the price of one from nine). Thus purchase of the own shares from the corporation will be an additional leverage of the enterprise so that on the one hand it will improve and increase the property state of the shareholders remaining in the corporation and on the other hand it will take a better control over the group of the shareholders. So *shareholder value*[90] mainly implies management of the enterprise in relation to the growth (maximization) of the shareholders' property. Redemption of the own shares is also possible by means of exchanges. As it was mentioned in capital market law of the USA acquisition of own shares is an ordinary event, while German law is banning it, if we don't envisage the exceptions given in the law".[91]

The discussed example shows that redemption of the own shares might have different purposes. Among them especially important is the growth of shares price. If the company which is a target for acquisition redeems a part of shares, the price on shares will be increased. Accordingly will be increased the probability of acquisition of the target company at a higher price.

Is it possible to use purchasing of own shares envisaged by the law "About Entrepreneurs" as a defensive measure of the corporation? The answer to this question must be positive.

In discussing "poison pills" and the preemptive right, we were talking of selective equal rights of shareholders; we also noted that the selective tender offer used in *Unocal* case had been recognized as unfair by the Securities and Exchange Commission of the USA.[92] Considering *Unocal* practice, it is inevitable to grant shareholders who are willing to redeem shares, in spite of the fact they are or not the old shareholders of the target company, though according to the named article of the law of Entrepreneurs Law of Georgia the number of the redeemed shares must not exceed 25% of the placed shares. The target company's offer must be more attractive than the offer of the purchasing company in order for the target company's shareholder to sell shares to its own company and not to an aggressor company. By such action shares of those shareholders who want *short-term value* (to get profit immediately) will be transferred to the corporation, and the shareholders oriented on *long-term value* (or perspective value) or those who are not going to sell shares, will stay in corporation.[93] Accordingly, those shares (though

88 DGCL § 160 (c).

89 *Jugheli G.,* Defending of Capital in Joint-stock Company, Tb., 2010, 197-198 (In Georgian)

90 Below we will discuss *Unitrin* case, where court is talking of two categories of shareholders who are interested in: *short-term value* and *long-term value.*

91 *Burduli I.,* Foundations of the Corporate Law, Vol. I, Tb., 2010, 380 (In Georgian).

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

93 *U*nlike Unocal, who has divided the shareholders into target and acquiring shareholders, *Unitrin* divided them

no more than 25%) whose owners want to sell shares will be transferred to the corporation's ownership. The acquiring corporation will have to increase the price of the offer or to refuse to purchase the target company. From these two choices even in the first case the target corporation is winning, as the price of the shares will be increased and accordingly the shareholders' profit will be also increased.

The case given below is a reformed edition of "Unocal" test[94], based on redemption of shares as the implementation of the mechanism of a defensive measure.

7.1. Reformed Edition of "Unocal" Test

Court case *Unitrin* v. *American General* [95] is a modern version of *Unocal* test, which has refined and developed *Unocal* test, where a rule of redemption of shares is used as a defensive measure.

American General is the biggest provider of family insurance on American market. *Unitrin* is also in insurance business and the third biggest provider of family insurance. On the 12th of July 1994 *American General* sent to executive director of *Unitrin* Vie a letter – offering a merger agreement, where *American General* would acquire all of the outstanding (placed) shares one share for – 50 and 3/8$. The offer exceeded then-current market price of *Unitrin* by 30%. *American General* was also expressing its readiness to increase the price of the offer, if *Unitrin* demonstrated additional assets. On the 25th of July the board assembled and discussed *American General*'s offer. Investment Company – *Morgan Stanley,* which was *Unitrin*'s financial adviser, advised the board that the price offered by *American General* was not adequate. Legal advisers advised the board that the merger of *Unitrin* and *American General* would cause legal problems and decreasing the competition on family insurance market, where the competition was weak itself. The board refused the offer, as it was not complying with the best interests of *Unitrin*.

In August, 1994 *American General* published a *press-release*, in which divulged wishes of purchasing all outstanding shares one share for 50 and 3/8 $. In the *press-release* was remarked that the board of *Unitrin* rejected the mentioned offer. After publishing the *press-release* the price on *Unitrin*'s shares increased. The board of *Unitrin* assembled on the 3rd of August and discussed the *press-release.* They became aware of the hostile nature of the *American General's* offer. With increasing prices on shares and *American General's* offer the shareholders might have been in a losing position.Before the 12th of August *Unitrin*'s board published several press-releases in which it noted the following: first, the price of *Unitrin*'s share was higher than the price in *American General*'s offer; second, *American General*'s offer did not imply *Unitrin*'s as an independent organization's long-term business perspectives; third, *Unitrin*'s real value was not implied in *Unitrin*'s outstanding common shares and *Unitrin*'s position itself from financial point of view was very good; fourth, merger with *American General* would cause violation of competition law; fifth, the board implemented defensive measures through "poison pills" and redemption of shares in order to defend against undesirable acquisition.[96] *Unitrin*'s board assembled on the 11th of August and made a decision to redeem 10 million shares accepted for trade (the total amount of *Unitrin*'s outstanding shares makes up 51.8 million dollars).

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into *short-term value* and *long-term value shareholders* The court in *Unitrin* case supported this division., *Unitrin, Inc. v. American General Corp*, Supreme Court of Delaware, 1995, 651 A.2d 1361.

94 *Oesterle A.D.*, The Law of Mergers and Acquisitions, Thomson/West, 3rd ed., Ohio, 2005, 533-534.

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

96 *Oesterle A. D.*, The Law of Mergers and Acquisitions, Thomson/West, 3rd ed., Ohio, 2005, 535.

On the 12th of August *Unitrin* publicly announced a program for redemption of shares. Board considered that the price of *Unitrin*'s share on market was not implied well and this redemption of shares should have caused the growth of the price of the remained shares as well, besides, the shareholders, who were at the same time directors, were not participating in this redemption program. By the 12th of August directors had 23% of *Unitrin's* shares. From the 12th of August to the 24th of August *Morgan Stanley* on request of *Unitrin* acquired about 5 million shares. The redemption price of shares was slightly more than in American General's offer. In addition it should be noted that by the Unitrin's charter it was envisaged the principle of making decision by supermajority.[97] If any company had acquired 15% of shares in *Unitrin*, this principle would have been triggered automatically.

As the board took a defensive measure we must compare the taken defensive measure to the standard of *Unocal*. First criterion is reasonableness test, according to which the board must show that it had reasonable grounds that danger was threatening its effective activities and second criterion is the proportionality test, showing that the defensive measure taken by the board was proportional in relation to the existed danger.[98]

The first criterion of *Unocal* test – criterion of reasonableness – demands from *Unitrin*'s board based on honesty and reasonability to find and declare that there was danger for *Unitrin*.[99] In discussing the case there were two distinguished types of danger: inadequate price and issues connected with monopoly. The court declared that possible violations in relation to antimonopoly legislation and inadequacy of the price, which might cause misleading of *Unitrin*'s shareholders, were the grounds of taking the defensive measures, though the court noted additionally that misleading of the shareholders because of the inadequacy of the price danger was "soft", of middle level, because negotiations with the shareholders about the price might have been possible.[100] By the court decision the board satisfied the reasonableness criterion of the Unocal test.

The second standard of *Unocal* test is a proportionality criterion, namely according to the mentioned test the board must show that its answer complies with the level of danger. This criterion

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97 A principle of making decision by supermajority is one of the defensive corporate legal measures when the corporation for making decision by its charter envisages agreement of higher percentage of votes than it would be necessary in ordinary cases, for example, according to paragraphs 6 and 7 of Article 54 of the Entrepreneurs Law of Georgia, for making decision about the reorganization of the company the approval of more than 75% of presented partners is necessary, who have the right to vote, if otherwise is not provided for by the charter of the joint-stock company. Accordingly by the corporation's charter it can be defined that for making decision about the reorganization the approval of more than 80% or 90% of presented shareholders having the right to vote is necessary. If a purchaser acquired a certain amount of shares that have the right to vote in the target corporation, the supermajority principle will not allow the purchaser to make decision on any issue, in this case on reorganization, without the votes of the old shareholders of the target corporation. *Thompson O.*, Corporations and Other Business Associations, 5th ed., Aspen Publishers, NY, 2006, 764.

98 *Oesterle A. D.*, The Law of Mergers and Acquisitions, Thomson/West, 3rd ed., Ohio, 2005, 537, "First, a reasonableness test, which is satisfied by a demonstration that the board of directors had reasonable grounds for believing that a danger to corporate policy and effectiveness existed, and Second, a proportionality test, which is satisfied by a demonstration that the board of directors' defensive response was reasonable in relation to the threat posed."

99 *Oesterle A. D.*, The Law of Mergers and Acquisitions, Thomson/West, 3rd ed., Ohio, 2005, 537.

100 *Oesterle A. D.*, The Law of Mergers and Acquisitions, Thomson/West, 3rd ed., Ohio, 2005, 537, "The Court of Chancery then noted, however, that the threat to the Unitrin stockholders from American General's inadequate opening bid was "mild," because the offer was netotiable both in price and structure".

consists of two part: first of all, it must be defined whether the redemption program is preclusive or coercive regarding shareholders.[101] After discussing this issue, proportionality criterion studies the adequacy of the implemented defensive measure regarding the perceived threat. Unitrin's Board had implemented three defensive measures: "Poison Pills", the Repurchase Program and the Supermajority Principle. As we have discussed "Poison Pills" and the Supermajority Principle above, we'll focus only on redemption program.

From the circumstances of the case it is clear that in connection with the Repurchase Program the Court of Chancery admitted that using the supermajority principle existed in the *Unitrin*'s charter and implementation of the redemption program (using both measures simultaneously) would have caused prohibition of using the shares owned by *American General* by *Unitrin*'s directors. The Delaware Court of Chancery thought that internal directors, who were at the same time Unitrin's shareholders, would not have supported the best offer for the corporation, if it had not been relevant to their own interests.[102]

The first circumstances of the discussion of the Court of Chancery connected to directors, who were at the same time shareholders, was that they had to get at least 25% of shares. According to *Unitrin*'s charter for any business transaction with a shareholder owning 15% of shares, approval of the majority of the directors or a shareholder or a group of shareholders' owning 75% of shares was necessary. Directors had 23% of shares at their disposal, but they decided not to take part in the redemption program.[103]

According to the Court of Chancery 100% of shareholders almost never assembled at the shareholders' meeting. The average percentage was 85%. Accordingly the directors already possessed sufficient amount of shares in order to cope with any possible offer.

The second circumstances the Court of Chancery paid a special attention to was *Unitrin*'s ability of using the Repurchase Program and making decision by the supermajority simultaneously.

According to the court it must have been illogical for *American General* or any potential purchaser to buy more than 15% shares, as it would have triggered the supermajority vote in the charter. If *American General* had started struggling for stockholders' votes before purchasing 15% of shares (to prevent the trigger of the supermajority vote), it would have needed 45.1% votes (if 90% of shareholders attended the meeting). But if it had started purchase immediately, it would have needed at least more than half of shares (50.1% shares).[104]

But unlike of the Court of Chancery, according to the Supreme Court of Delaware the crucial factor would have been the kind of offer of *American General* and not the amount of shares possessed by it. If the offer of *American General* had been attractive, it would have won, regardless of the number of votes, controlled by the directors.For example, one of the directors of *Unitrin* confirmed at court that all offers had the proper price.[105] Accordingly struggling for shares should have been important, in

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101 The preclusive and the coercive nature (i.e. the draconian features) of the defensive measure is discussed by Delaware Court in the case of *Paramount Communications, Inc. v. QVC Network*, *Inc.,* Delaware Supreme Court, 1994, 637 A.2d 34.

102 *Oesterle A. D.*, The Law of Mergers and Acquisitions, Thomson/West, 3rd ed., Ohio, 2005, 540, "Stockholders are presumed to act in their own best economic interests when they vote in a proxy contest".

103 *Oesterle A. D.*, The Law of Mergers and Acquisitions, Thomson/West, 3rd ed., Ohio, 2005, 540, "The Court of Chancery found that by not participating in the Repurchase Program, the Board "expected to create a 28 percent voting block to support the Board's decision to reject a future offer by American General".

104 *Oesterle A.D.*, The Law of Mergers and Acquisitions, Thomson/West, 3rd ed., Ohio, 2005, 541.

105 Ibid, 542, "Fayez Sarofim, one of the Unitrin directors that holds a substantial number of shares, testified that ,everything has a price parameter".

spite of the fact that there were in practice "Poison Pills", the Repurchase Program of shares and the Supermajority Principle.

The Redemption Program of shares cannot be considered as coercive in relation to the shareholders, because each shareholder could voluntarily make decision on selling of shares. According to the court the Redemption Program was not preclusive as well, because the shareholder could have accepted the alternate offer. Accordingly the implemented measures were not draconian and did not turn the offer into mathematically impossible and realistically unattainable.[106]

From the case it is clear that the Board of *Unitrin* could prove the existence of the expected danger for the corporation and also proved that the implemented measures had not been coercive and preclusive in relation to the shareholders, though in connection with the defining the adequacy to the danger of the Redemption Program, the Supreme Court returned the case to the Court of Chancery for the further discussion, namely, the Court of Chancery had to define whether the Repurchase Program was adequate to the danger. In talking of the adequacy of the Repurchase Program to the danger the Court of Chancery must take into consideration the following circumstances::[107] (1) whether it was the business decision strengthened by the legal point of view, the acceptance of which was possible for the Board in the context contrary to taking over; (2) whether the Repurchase Program was the adequate to the danger coming from the offer of *American General*; (3) By the Repurchase Program the Board confessed that all the shareholders are not the same, namely, there are such shareholders who want to get immediately the amount of money corresponding to shares.[108]

The Supreme Court of Delaware remarked that the Court of Chancery had made a mistake by saying that the Repurchase Program of shares was not inevitable. The *Unitrin*'s Board had the right and obligation to defend its shareholders from the existed danger. If the Court of Chancery decides that the measures individually, as well as combined together, were proportional to the danger, then the action of the *Unitrin*'s Board must be discussed by the Business Judgment Rule. The evidence must be produced by the plaintiffs. To cope with the Business Judgment Rule they must prove that the purpose of the decision made by the directors was to hold down their job or there was some exceeding of their commission or the decision was made by violation of the informed basis.[109]

7.2. Short-term Value Shareholders and Long-term Value Shareholders

The case discussed above, as it was already mentioned, is a modernized version of *Unocal* test. In order to defend the corporation's interests the *Unocal*'s Board used a method of a selective tender offer in relation to the shareholders and divided the shareholders into two categories: old shareholders

106 *Unitrin, Inc. v. Am. Gen. Corp*., 651 A.2d 136, 1388-1389 (Del. 1995).

107 The Supreme Court of Delaware returned the case to the Court of Chancery for this concrete part so that the latter was to decide whether the Repurchase Program was adequate to the danger.

108 *Unitrin, Inc. v. American General Corp.,* Supreme Court of Delaware, 1995, 651 A. 2d 1361, "The record reflects that the Unitrin Board's adoption of the Repurchase Program was an apparent recognition on its part that all shareholders are not alike. This court has stated that distinctions among types of shareholders are neither inappropriate nor irrelevant for a board of directors to make, e.g., distinctions between long-term shareholders and short-term profit-takers such as arbitrageurs, and their stockholding objectives"…

109 *Oesterle A.D.*, The Law of Mergers and Acquisitions, Thomson/West, 3rd ed., Ohio, 2005, 543; *Unocal*, 493 A.2d at 958.

of the target corporation and shareholders of the purchasing corporation, that was further banned by *SEC* (Security Exchange Commission).The *Unitrin*'s Board opposite to the *Unocal*'s Board used the rule of repurchase of shares and distinguished two types of shareholders: short-term value shareholders and long-term value shareholders and the court supported such a form of division of shareholders.[110] As distinguished from the selective tender method any shareholder who wants to repurchase shares is entitled to repurchase them.

As a rule, in case of hostile takeover market price of the target corporation's shares is increasing and short-term value shareholders might take this advantage immediately and inflict of losses on long-term value shareholders. The Repurchase Program of shares offered by the Board was aimed at shareholders oriented on short-term as well as long-term perspectives. The shareholders who wanted to alienate shares could sell shares immediately at a higher price than it had been offered by *American General*. The shareholders oriented on a long-term perspective who are considering the ownership of shares as an investment in a long-term perspective, are perceiving the Repurchase Program of shares on the one hand as a means of defending the corporation's interests and on the other hand, after implementing the program, as a means of increasing the market price of the shares possessed by them.[111]

In the *Unitrin* case two standards of *Unocal Test,* existence of the danger to the corporation and adequacy of implemented defensive measures, were established as reasonableness and proportionality criteria. A proportionality criterion together with the adequacy of the defensive measure to the danger also explores the coercive and the preclusive nature of defensive measures regarding to shareholders. In other words if the implemented corporate-legal defensive measure had the signs of "selective equal treatment", this measure must be checked – whether it was preclusive or coercive in relation to the shareholders. In studying this defensive measure of course is also meant studying signs of "selective equal treatment" of shareholders. Basedon the Repurchase Program the *Unitrin*'s Board distinguished short-term value shareholders and long-term value shareholders and according to the court the defensive measure was not preclusive or coercive in relation to the shareholders.

By establishing and using *Unocal* test corporate courts of Delaware gave the priority of deciding the faith of tender offer by election and not on securities market. The *Unocal* test authorizes the Board to protect the shareholders' interests, to implement defensive measures, to inform the shareholders about the expected danger, so the Board does not leave the shareholders alone on securities market in the face of the other corporation's offer. The court gives the Board this right, if the Board meets the standards

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110 *Oesterle A.D.*, The Law of Mergers and Acquisitions, Thomson/West, 3rd ed., Ohio, 2005, 537, "The record reflects that the Unitrin Board's adoption of the Repurchase Program was apparent recognition on its part that all shareholders are not like. This court has stated that distinctions among types of shareholders are neither inappropriate nor irrelevant for a board of directors to make, e.g., distinctions between long-term shareholders and short-term profit-takers, such as arbitrageurs, and their stockholding objectives..."

111 *Oesterle A. D.*, The Law of Mergers and Acquisitions, Thomson/West, 3rd ed., Ohio, 2005, 537, "The Board also noted that some Unitrin shareholders had publicly expressed interest in selling at or near the price in the Offer. The Board determined that Unitrin's stock was undervalued by the market at current levels and that the Board considered Unitrin's stock to be a good long-term investment. The Board also discussed the speculative and unsettled market conditions for Unitrin stock caused by American General's public disclosure. The Board concluded that a Repurchase Program would provide additional liquidity to those stockholders who wished to realize short-term gain, and would provide enhanced value to those stockholders who wished to maintain a long-term investment."

stated by Unocal test. It means that courts of Delaware gives the advantage to elections and discussing the tender offer at the meeting of shareholders and don't leave this issue to be decided at securities market.[112] The used defensive measures must not be preclusive or coercive in relation to the shareholders voting. The defensive measures defend the corporation from being purchased, impede the purchasing process, but the purchaser can familiarize the shareholders with his own offer, displace the Board by means of the general meeting and a new Board can withhold the defensive measures after which the acquisition might be renewed.[113] Thus, defensive measures satisfy the requirements of the *Unocal Test* when these measures don't restrict the right of shareholders to make decision by voting.

Thus if the implemented corporate-legal defensive measures originate different legal status among the shareholders, it must not have a preclusive or coercive character in relation to voting at the general meeting, i.e. the shareholder's right to vote must not be restricted, but the defensive measures implemented by the Board can establish a principle of "selective equal treatment" of the shareholders on securities market, the example of which we had in discussing *Unitrin*'s case, when the Board distinguished short-term value and long-term value shareholders. Both types of shareholders in case of merger or acquisition of the company would have had the opportunity to use the right to vote at the general meeting, but only a part of the shareholders, namely short-term value shareholders, participated in the Repurchase Program.

Different cases were discussed above about the usage of the principle of "selective equal treatment" of the shareholders. The usage of the tender offer, "Poison Pills", the preemptive right or the redemption of shares by corporation is directed to the securities market, the purpose of which is protection of interests of the corporation and the shareholders. If we take the selective tender offer out of this list,[114] the rest of the corporate-legal defensive measures – the "Poison Pills", the preemptive right and the redemption of shares by the corporation are establishing the principle of "equal treatment", in relation to the right to vote by the shareholder which complies with paragraph 1 of Article 52 of the Entrepreneurs Law of Georgia, according to which "one common share shall ensure a right to one vote at the general meeting of shareholders, while a preferred share shall provide no right to vote" and "all shares of the same class shall provide equal rights to their holders"

8. Conclusion

In the work the existence of different rights-obligations between the shares of the same class has not been discussed, but has been defined the possibility of existence of different legal status of shareholders including those owning the shares of the same class, i.e. effect of the principle of "selective equal treatment" on shareholders.

The basis of legal restriction of equality of shareholders rights is protection of interests of the corporation. One of the forms of protection is implementation of corporate legal defensive measures, which defend the corporation from hostile takeover and accordingly protect the society's interests.

The implementation of corporate legal defensive measures discussed in this work is based on the principle of "selective equal treatment" of shareholders. At the same time based on the discussion

[112] *Joo W. T.*, Corporate Governance, Law, Theory and Policy, Ronald J. Gilson, Unocal Fifteen Years Later, (And What We Can Do About It), Carolina Academic Press, 2nd ed., Durham, 2010, 544-554.

[113] Ibid, 548-549.

[114] As it was already mentioned above, despite the fact that the court supported this method, purchase of shares by selective tender offer was banned by legislation.

we came to the conclusion that Georgian legislation does not prohibit the "deviation" from the rule of equality of rights of the shareholders. The purpose of the discussed defensive measures is to protect shareholders on securities market, i.e. the principle of "selective equal treatment" of shareholders does not influence on voting of shareholders, and accordingly it is impossible to violate equality of rights of shareholders connected with their right to vote.

Finally it should be noted again that corporate-legal defensive measures is one of the most important issue in corporate law, which is connected with other well-known issues as the principle of "selective equal treatment" of shareholders.

Natalia Motsonelidze*

Separation of Subrogation from Regress and Cession

I. Introduction

For the most part of modern country legislations subrogation is a familiar doctrine.[1] However for the description of the process regulated by the above doctrine the term "subrogation" is used in only few cases.[2] In this regard Georgia is not exclusion. Article 832 of Civil Code of Georgia covers subrogation doctrine and describes legal relationship, in which the parties are successors of their rights during their relationship. However, the term "subrogation" is not used in the legislation. Accordingly, above mentioned term is often unfamiliar to legal professionals working in insurance area, using this tool for transfer of right quite often. Mainly, the process, in which the insurer realizes the right to claim of the insured towards the third party, is referred to as the regressive relationship. The above is essentially incorrect. In addition to regress, the subrogation is often identified with such establishments of the law as cession, without any grounding.

It has to be mentioned that subrogation as well as cession and regress are the independent theoretical constructions of the civil law. However, their characteristics are so similar that it is often difficult to separate them. In order to make the essence of subrogation clear, it is essential to separate it from the above mentioned concepts of the law. Above mentioned separation has theoretical as well as practical importance. In particular, the concepts differ from each other with the legal basis of their genesis, as well as in terms of their legal outcomes. The above determine different nature of rights and obligations of parties to the relationship. Due to the above discussed circumstances, it is important to characterise each concept separately and conduct their comparative analysis.

II. Separation of Subrogation and Regress

1. Complexities Related to the Definition of Terms

Many authors, earlier and at present, in the process of characterisation of subrogation, use the term regress.[3] There are other scientists, who actively use the term subrogation; however they still review it as the type of regress.[4] For example, one of the scientists indicates that "the insurer's right to return

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1 Germany, Switzerland, France, Austria, Slovakia, Latvia, Quebec, Russia and etc.

2 Article 965, Civil Code, Russian Federation.

3 *Hormuth H.* in: *Beckmann R.M., Matusche-Beckmann A.,* Versicherungsrechts-Handbuch, 2. vollständigeAuflage, Verlag C.H. Beck München 2009, §22; *Lomidze O.,* Transfer of Creditor's Rights to other Person Based on the Law, Russian Justice, №12, 1998, 13; *Novitski I.B.,* Regressive Liabilities between the Socialist Industrial Companies, Gosiurizdat, 1952, 192; *Serebrovski V.I.,* Selected articles on Heritage and Insurance Law, Status (Series: "Classics of Russian civilities"), 1997, 548 (In Russian).

4 *Agarkov M.M.,* Liability according to the Soviet Civil Law, M., 1940, 160; *Iudelson K.C.,* Key Problems Related to the Right to Regress in Line with the Soviet Civil Law, Scientific Works, VIUN, 9th ed., 1947;

the insurance payment is based on the general principle of civil law, according to which the person reimbursing the damage caused by other person, is equipped with the right to replace the insured person and direct all counterclaims and claims to the one causing the damage. The above type of succession is subrogation, which is the special form of regressive claim."[5]

It has to be noted that only small number of scientists use the term "subrogation" in the German legal literature.[6] They mainly use the term "regress" instead.[7] Moreover, despite the fact that the norm on the transfer of right to claim from insured to the insurer is established in the law on insurance contracts from its adoption,[8] even following the implementation of reforms in the insurance area, the German legislators do not use the term "subrogation" for the description of above mentioned legal relationship and refer to it as the legal transfer.[9]

2. Common Features of Subrogation and Regress

The scientists agree that subrogation and regress have common features; the above naturally causes the confusion and mixing of these two concepts. In particular, subrogation and regress are types of recourse,[10] which are directed towards the return of funds paid earlier.[11] The purpose of both concepts is return of funds by the debtor to the payer[12] and restoration of proprietary status of the person, who has satisfied the claim of creditor instead of someone else.[13] Moreover, the formal basis for the creation of both relationships is the law, as for the material basis – fulfilment of obligation by the third party. The main objective of subrogation and regress is not to allow ungrounded enrichment of one of the parties to the liability based legal relationship.

Despite the indicated external similarities, the scientists agree, that the difference between regress and subrogation has the principle nature.[14]Accordingly, it is necessary, to review and study them as two, independent law concepts.

NovitskiI.B., Regressive Liabilities between the Socialist Industrial Companies, Gosiurizdat, 1952, 145-195, *Golmsten A. Kh.,* Experience of Developing General Study on Regress Law, Legal Research and Articles. Vol. No. 2, Saint Petersburg, 1913, 184 (In Russian).

5 *Gendzekhadze E., Martianova T., In*suring the Responsibility of Risk for Non-payment of Credit, Law, 1994. № 4, 31 (In Russian).

6 *Sieg K.*in: *Bruck E., Möller H.,* Kommentar zum Versicherungsvertragsgesetz und zu den Allgemeinen Versicherungsbedingungen unter Einfluss des Versicherungsmittlerrechtes, 8. Auflage, Berlin, 1961, §67, Rn. 97.

7 *von Koppenfels-Spiels K.* in: *Looschelders D., Pohlmann P.,* VVG Versicherungsvertragsgesetz, Kommentar, 2. Auflage, 2011, §86; *Hormuth H.* in:*Beckmann R.M., Matusche-Beckmann A.,* Versicherungsrechts-Handbuch, 2. vollständige Auflage, Verlag C.H. Beck München, 2009, §22.

8 The transfer of right to claim possessed by the insured to the insurer was regulated under paragraph 67 of old German law on the Insurance Agreements, as for the new edition of the law – the same is regulated under the paragraph 86 (In Georgian).

9 *"gesetzlicheFörderungsübergang".*

10 *Dedikov C.V.,* Regress and subrogation for the OSAGO agreements, Economy and law, № 9, 2004,67 (In Russian).

11 *KiselI.V.,* Liabilities with the Participation of Third Parties: Dis. M., 2002, 122 (In Russian).

12 *Belov V.A.,* Singular Succession of Rights in Liabilities, 2nd ed., M., Center "Iurinfor", 2001, 98 (In Russian).

13 *Sarbash S. B.,* General Doctrine on Fulfilment of Agreement Liabilities: Dis. D.U.N. M., 2005, 158 (In Russian).

14 *ChebuninA.V.,* Theoretical and Practical Issues of Subrogation on Insurance Type Relationships, Cibiur Herald, №4, 2001, <http://law.isu.ru/ru/science/vestnik/20014/kravcov.html>(In Russian).

3. Distinctive Features of Subrogation and Regress

Essential difference between the subrogation and regress is in the basis of formation of relationship. In particular, regress always considers existence of two liability based legal relationships: first and essential is the main liability, which is fulfilled by the third party (secondary debtor), and the second is related to the first, main liability and its origination is directly related to fulfilment of the first liability. For example, during labour relationship the enterprise or organization is responsible for damage inflicted to the third party by an employee (worker).[15] In addition, after the enterprise or organization fully compensates inflicted damage, it, in accordance with the regression procedure, has the right to require from its employee to refund the amount, which was paid to the affected party by the enterprise.[16] Liability based legal relationship, originated between the injured party and employee of enterprise, is the first and primary obligation. It creates the new, regressive liability, in particular, the claim rights of enterprise towards the worker. Therefore, the regressive liability is considered as secondary liability originated from primary liability. In the example given above, the basis for origination of main liability based legal relationship is tort that means damage to a person caused by a worker; and the basis for origination of produced, i.e. regressive liability type legal relationship is labour legal relationship, existing between the employee and employer.

The above mentioned example shows that during the regress new right is always originated, and as a result of termination of primary liability– new liability is originated.[17]

The above mentioned factor conditions different times for origination of regress and subrogation. The regressive liability is originated only following fulfilment of main (basic) liability,[18] in particular, after the enterprise or organization compensates the damage inflicted to the third party by a worker. In case of subrogation, unlike regress, the only and primary liability is presented, under conditions of which the creditor ("primary creditor", insured) leaves the obligatory legal relationship immediately at getting the payment and the "secondary creditor" is substituted by the person, which has undertaken the liability to the "primary creditor" instead of other person. To discuss the example of insurance law, after the insurer compensates the damage, caused by insured event, to insured person, he has then the right to replace the insured person, in relation to the third person and require repayment of amount paid. Unlike the unity of above mentioned labour legal relationship, in case of subrogation, the only and the main tortuous relationship between the injured person and the one, who inflicted the damage, is in place. This definitely conditions the circumstance that insurer, generally, is represented in the name of insured person to the party inflicting the damage, and implements realization of his rights, for his own interests. In addition, unlike regress, where the creditor (employer) does not need any consent from anybody for implementation of right of regress claim, during subrogation, the insured person (insured) may refuse his

[15] Compare to the first Part of Article 37 of Civil Code of Georgia and the Article 997 of Civil Code of Georgia (In Georgian).

[16] *Chikvashvili Sh., Chanturia L., Zoidze B., Ninidze T., Shengelia R., KhetsurianiJ.*(editor), Comment of the Civil Code of Georgia, book four, Vol. №2, Tb., 2001, 403 (In Georgian).

[17] *Lomidze O.,*Transfer of Creditor's Rights to other Person based on the Law, Russian Justice, №12, 1998,16-18 (In Russian).

[18] *Smirnov V.T.,* Regressive Claims for Liabilities on the Damage Incurred, State Editorial House for Legal Literature, MSK, 1960, 5 (In Russian).

claim towards the third person. Accordingly, in that case, the insurer does not any more enjoy the right of subrogation.[19]

In case of regress, as well as subrogation, the creditor loses the right of claim. In case of regress this is conditioned by origination of newest, independent obligatory legal relationship with new parties, where the liability, in which the party was represented by a creditor, represents only precondition for origination of newest, obligatory legal relationship. But in case of subrogation, the creditor leaves obligatory legal relationship and he is replaced by a person, who fulfilled the liability in his favour. As the scientist Mussini mentions, in case of subrogation, unlike regress, the singular legal succession is in place.[20] In particular, the content of existing obligatory legal relationship remains unchanged. Accordingly, even the request proceeding from content of relationship is not changing. The new creditor, insurer becomes the legal successor of "primary creditor" – of insured person.[21] But in case of regress, new obligatory legal relationship is originated.

3.1. The Judicial Practice of Georgia on Separation of Regress and Subrogation

3.1.1. Difference in line with Content of Liabilitybased Legal Relationship

It is worth to mention that the tendency of discussions on problem of separation of subrogation and regress is observed even in Georgian judicial practice. At present, there are only two court decisions, in which, in terms of insurance relationships, the subrogation and regress are discussed. However, both of them are of essential importance in this matter, for establishing uniform judicial practice in future. The first judgment, in which the court discussed the issue on replacement of persons during insurance relationships, has been made on 17th February, 2012.[22] The Supreme Court shared the discussion of Appellate Court on permissibility of double compensation of injured person for life insurance. The court separated the right of regressive claim and substitution of creditor in tortuous obligation from each other, and indicated that "in accordance with the article 832 of Civil Code of Georgia, the right of claim of indemnification from third person considers not the right of regressive claim, but substitution / replacing of creditor in tortuous liability, which may be aimed at avoidance of unjust enrichment of insured person, as well as the third person". Based on the mentioned decision, the first precedent was created in the Georgian judicial practice, where the court has not identified the article 832 of Civil Code of Georgia (CCG) with regressive requirements and discussed it as totally different type legal relationship. Later, the Supreme Court has once again discussed the regressive claim right and concession of right of claim stipulated by the article 832 of Civil Code of Georgia and made the decision where the term "subrogation" has been used for the first time".[23] In addition, the court has clearly separated the regress

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19 The Second Sentence of First Part of Article 832 of Civil Code of Georgia (In Georgian).

20 *Musin V.A.,* Subrogation in the Soviet Civil Law, Soviet State and Law, №7, 1976, 129 (In Russian).

21 Similarly, Chamber of Civil Cases of Supreme Court of Georgia, the set of decisions of 2012, 12, case No.as-581-549-2011, 61,<http://www.supremecourt.ge/files/upload-file/pdf/kr201212.pdf>(In Georgian).

22 The court decision No.as -663-624-2011 of 17th February, 2012 of the Chamber of Civil Cases of Supreme Court of Georgia. Set of Decisions of 2012, 11, 72, <http://www.supremecourt.ge/files/upload-file/pdf/kr201211.pdf> (In Georgian).

23 Chamber of Civil Cases of Supreme Court of Georgia, the Decision No.as -581-549-2011, dated 5th September, 2012, 61. Set of Decisions, 12, <http://www.supremecourt.ge/files/upload-file/pdf/kr201212.pdf>, (In Georgian).

and subrogation from each other and indicated that during subrogation, unlike regress, not origination of new liability based legal relationship, or substitution of one liability by another takes place, but only the creditor is substituted in liability, without changing the content of liability based legal relationship. Accordingly, in line with the court, in such cases the claim shall be transferred to the creditor in a volume as the primary creditor had. The new parties may make the claim and counter claim to each other in the volume, at which it was at first stage of origination of liability based legal relationship – between the primary creditor and debtor.

3.1.2. Separation of Subrogation and Regress, based onthe Period of Limitation

Based on the above mentioned distinctive criteria of subrogation and regress, the formal difference between them is distinguished, which is revealed in different periods of limitation of these two establishments.

The legislation determined the period of limitation of complaint, different from each other, for both means of recourse. Indeed, the law maker does not directly indicate to the specific terms of implementation of regressive claim and subrogation right, and even does not determine the special term, but in accordance with the third part of article 129 of Civil Code of Georgia, in individual cases, the terms, different from limitation period may be considered under the law, in line with 1st and 2nd sections of the same article. In case of subrogation, as replacing of possessor of claim right is presented without replacing of legal nature of claim right, it is natural that new limitation periods will not be effective for transferred requirements, but, unlike regress, the course of commenced limitation period will be prolonged.[24]

Logical explanation of above mentioned situation is easily possible based on the different legal nature of regress and subrogation.

In case of regressive liabilities, counting of complaint limitation period starts from the moment of fulfilment of main / primary liability,[25] i.e. from the period, when the regressive liability has been directly originated (by way of example of labour relationship given above, after the employer compensates the damage to injured person, third party). As for the subrogation, changing of counting of course of term for complaint limitation period does not take place.[26] Insurer shall start counting of time not from the moment of payment of insurance compensation, but from the period, when the rights of insured person has been violated and he was informed about it or had to be informed.[27] Generally, this is the day, when the insurer was notified about occurrence of insured event. Similar attitude is not unfair towards insurers because

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24 *Hormuth H.* in: *Beckmann R.M., Matusche-Beckmann A.,* Versicherungsrechts-Handbuch, 2. vollständige Auflage, Verlag C.H. Beck, München, 2009, §22, Rn. 66.

25 *Lomidze O.,* Transfer of Creditor's Rights to other Person based on the Law, Russian Justice, №12, 1998,13-14 (In Russian).

26 BGH VersR 1961, 910, indicated: *Bumann H.,* Berliner Kommentar zum Versicherungsvertragsgesetz, hrsg. *Honsell H.,* Springer, Berlin, New York,1999 §67, Rn.138; OLG DüsseldorfVersR 1956, 325; *Sieg K.* in: *Bruck E., Möller H.,* Kommentar zum Versicherungsvertragsgesetz und zu den Allgemeinen Versicherungsbedingungen unter Einfluss des Versicherungsmittlerrechtes, 8. Auflage, 1980, §67, Rn.97.

27 It is worth to mention that in accordance with the articles 200 and 201 of Civil Code of Russia, in case of subrogation, the law maker directly considers prolongation of course of limitation period, but in case of regressive liability, in accordance with the 3rd part of article 201, counting of complaint limitation period starts from the moment of fulfilling of primary liability.

they are getting the information on insured event rather quickly. The liability, to notify the insurer, is clearly considered under the legislation, as well as insurance policy (agreement). In accordance with the first section, article 814 of Civil Code of Georgia: "Upon becoming aware of the occurrence of the insured event, the insurer (insured party) shall be obligated to notify the insurer immediately". Moreover, in case of violation of the mentioned obligation, possibly, the sanction may be applied against insured party; in particular, due to failure to provide information in a timely manner due to inadequate reason, the insurer may refuse insurance compensation.[28] In addition, when the matter concerns complaint limitation periods during subrogation, it is important to remember that under the power of article 832, the rights are transferred to insurer taking into consideration the rules and procedures, valid between the insured party and person responsible for infliction of the damage. As it was mentioned in previous chapter of the present article,[29] the feature of subrogation is that by substitution of insured person by insurer, the content of liability based legal relationship remains unchanged, which existed between the insured party and the one who inflicted the damage. For example, if, as a result of traffic accident, the insured person is damaged, after substitution by the insurer, the rights and obligations, which were effective between the party inflicting the damage and insured person proceeding from tort, remain unchanged. The contradictory requirements of the parties still remain in force. Exactly, proceeding from this nature of subrogation, the complaint limitation periods remain unchanged. In particular, as distinct from regress, counting of the term will start not following payment of insurance compensation by the insurer, but from the moment of occurrence of insured event.

3.1.3. Judicial Practice on the Limitation Periods

The above mentioned approach on different periods of limitation of subrogation and regress is shared by the Supreme Court of Georgia. In particular, the court has uniquely indicated in the decision made on 5th September 2012 that the article 832 of Civil Code of Georgia regulates the legal relationship, during which the persons are replaced in the liability. This, in line with the court, does not change the content of liability based legal relationship and, accordingly, not even the course of existing period of limitation.[30]

By the mentioned decision the Supreme Court of Georgia has also determined the issue of course of limitation period in case of subrogation.

The above mentioned issue has included the following factual circumstances: On 27th June, 2006 the insurance agreement on cargo, to be delivered to Kirghiz company, has been signed between the insurance company and insurer. On 13th September, 2006 it was found out that the cargo, to be delivered to Kirghiz company, has been damaged, due to which the insurance company, based on the insurance agreement, has compensated the damage to the insured party. After that the insurer applied to the carrier and required to refund the insurance amount, on which the carrier has refused due to limitation period of requirement. The insurance company has applied with complaint to the appeal court and requested compensation for damage from the carrier, which has been satisfied by the court. The court has justified

[28] Similarly, the Federative Republic of Russia. See the article 961 of Civil Code of Russia (In Georgian).

[29] See chapter of the present work: "Legal Basis for Separation of Subrogation and Regress" (In Georgian).

[30] Chamber of Civil Cases of Supreme Court of Georgia, the Decision No.as -581-549-2011, dated 5th September, 2012, 61. Set of Decisions, 12, <http://www.supremecourt.ge/files/upload-file/pdf/kr201212.pdf> (In Georgian).

its decision based on the following: the court has considered that the liabilitybased legal relationship, stipulated by article 832 of Civil Code of Georgia, which the court classified as the right of regressive compensation claim, has been originated between the parties. In addition, due to the reason that special term is not determined for regressive claim under the law, based on the 3rd section of article 129 of Civil Code of Georgia, the court has pointed at general limitation period and determined ten years' term of claim limitation period for the mentioned relationship, based on which the claim of a party on damage compensation has been satisfied.

The Supreme Court of Georgia did not share the opinion of appeal court and indicated that the liability based legal relationship considered under the article 832 of Civil Code of Georgia belongs not to regressive claim rights, but to replacing of a person in a liability. This definitely conditions replacing only the creditor in the relationship and maintaining of its content unchanged. Accordingly, limitation periods, which took place in case of old creditor, are extended also towards the new creditor. For example, if insured event has occurred in 2006 and insurer has compensated the damage to insured party in 2007, the course of limitation period towards the party inflicting the damage shall start not from 2007, i.e. when succession of rights considered under article 832 has taken place, but from 2006 – from the moment of insurance event.

The mentioned decision, as it was referred to above, is important as court has precisely specified, when the counting of course of limitation period shall start during succession of rights, considered under the article 832. Due to the fact that limitation period for succession of rights, considered under the article 832, is not determined under the law, the court considered expedient to use the regulation stipulated by section 3, article 129 of Civil Code of Georgia and define special period of limitation. Taking into account that liability based legal relationship,[31] proceeding from transportation agreement, is presented and the special one year limitation period is determined for the mentioned relationship under the article 699 of Civil Code of Georgia, this time definitely shall be determined as the claim limitation period between insurer and carrier. Accordingly, its counting shall start since 13th September, 2006. Proceeding from the fact that the party applied to the court without observance of this term, in given case, the claim has been considered as expired and the complaint has not been satisfied.[32]

4. Summary

The above mentioned court resolutions are important for the establishment of common court practice as well as for bringing more clarity to the legal term regulated under the article 832 of Civil Code of Georgia. Provided court resolutions uniquely indicate the attempt of the judge to clearly distinguish the subrogation and regress concepts, which coincides with the approach of courts in the European countries.[33] Adopted decisions will facilitate the legal advisers, representatives of insurance companies and other persons interested in insurance area, to separate subrogation from other similar type of legal establishments. Mentioned separation, in terms of legal outcome, has the principle importance for the insured as well as the insurer. In particular, subrogation gains economic meaning for the both subjects. It creates some type of guarantee for the insurer to get back the funds paid to the insured. The reserve funds of the insurance companies are filled up with the insurance premiums as well as other incomes generated

31 Article 668 of Civil Code of Georgia (In Georgian).

32 The similar Practice has the Presidium of Russian Supreme Arbitrary Court, for more information see: Herald of Supreme Arbitrage Court, Russian Federation, №3, 1998, 37-38 (In Russian).

33 OLG Düsseldorf VersR 1956, 325, OGH VersR, 1969, 385, Indicated: *Bumann H.,* Berliner Kommentar zum Versicherungsvertragsgesetz, hrsg. *Honsell H.,* Springer, Berlin, New York, 1999 §67, Rn. 138.

by the company. Other incomes include the amounts recovered from the third persons responsible for the damage to the insured, for which the insurer has reimbursed the damage. As for the insured person, according to the German experience, [34] at the moment of contract conclusion he/she benefits from the certain concession, if does not prohibit the insurer to use the subrogation right towards the third party responsible for the incurred damage. Based on the above mentioned function of subrogation, development of this concept may encourage new insurance companies to enter the Georgian insurance market, and it may give to the citizens additional incentives to conclude the insurance agreements. All the above mentioned will facilitate development of insurance relationships and insurance market.

III. Separation of Subrogation and Cession

1. Complexities related to the Definition of Terms

It has to be noted that, similar to the term "subrogation" one does not encounter the term "cession" for the description of claim assignment in neither Georgian nor German legislations. However, the term "cession" is actively used in the scientific literature for the indication to the assignment of claim;[35] the parties participating in the relationship are referred to as the "cedent" and "cessioner".[36] Legislators from some countries attempt to clearly separate these concepts and use the different terminologies. For example, the German legislator uses subrogation when the right is transferred by virtue of law, and cession- when the claim is assigned by the contract.[37]

2. Common Features of Subrogation and Cession

Despite the fact that the legislator, in some ways, indicates to the different legal nature of subrogation and cession, there are many cases of confusion of these concepts and identification of these concepts as analogous. The above is not accidental. Subrogation, as well as cession is the concept regulating the transfer of creditor's right of claim. According to the Georgian legislation both of them imply transfer of creditor's (cedent, subrogant) rights to the third party (cessioner, subrogate). Moreover, in the event of cession and subrogation, he/she gets these rights in full. In particular, he/she gets these rights with the security, privileges and interest, which were agreed initially between the creditor and the debtor. Moreover, article 207 of Civil Code of Georgia directly indicates on the application of rules, which are valid in the event of acquisition of ownership of rights and claims in case of assignment of right by virtue of the law.[38] The same approach is valid for the German legislation too. According to the paragraph

[34] *Langheid T.* in: *Römer W., Langheid T.,* Versicherungsvertragsgesetz, 2. Aufl. Verlag C.H Beck, München, 2003, § 67, Rn. 39.

[35] *Akhvlediani Z., Chanturia L., Zoidze B., Jorbenadze S.,* Comments to the Civil Code of Georgia, Vol. 2, Tb., 1999, 140; *Chechelashvili Z.,* Assignment of claim and transfer of debt, thesis work, 2008, <http://tsu.ge/data/file_db/faculty-law-public/zviad%20chechelashvili.pdf> (In Georgian); *Habersack M., Schwab M.,* Münchener Kommentar zum BGB, Band 5, Schuldrecht Besonderer Teil III, 6. Auflage, Verlag C.H. Beck München, 2013, BGB § 812, Rn. 202-215.

[36] *Müller H.F.* in: *Prütting H., Wegen G., Weinreich G.* (Hrsg.), BGB Kommentar, Köln, 2013, §398, Rn.4.

[37] German legislator refers to the Subrogation with the term – "gesetzlicheFörderunsgübergan", and Cession with the term – "Abtretung".

[38] In case of Assignment of Claim by virtue of Law articles 198-206 of CCG are applied (In Georgian).

412 of Civil Code of Germany, the norms regulating assignment of claims are applied for cases of assignment of right by virtue of the law.[39] Based on the above, the norms regulating the relationships proceeding from the assignment (cession) of claims include the article 832 of Civil Code of Georgia and the article 86 of the German law on Insurance Agreement, considering the transfer of claim right by force of law.[40] All the above mentioned causes the high probability for identification of subrogation and cession as analogous establishments. Despite the fact that at first glance these establishments of the civil law are similar, the scientists come to the agreement that both of them have independent legal nature and theoretical construction.[41]

3. Differentiating Features of Subrogation and Cession

3.1. Importance of Causa for the Validity of Subrogation and Cession

3.1.1. Importance of Causa for the Validity of Cession

During the years, there were various views on the legal nature of claim assignment (cession) in the Russian legal literature.[42] Part of the scientists considered the assignment of right of claim and primary deal as the basis of such transfer as a whole. Moreover, they were rejecting the view on the independent nature of cession agreement and were indicating that transfer of claim right from one person to another is executed not through the independent (abstract) agreement, but through fully defined, causal agreement. Depending on the basis for assigning the claim right the mentioned agreement might be one of the agreements under the liability law: sale-purchase, exchange and donation.[43] Part of the scientists was not considering the possibility to qualify cession as independent agreement.[44]

It has to be mentioned that there are opponents to the latter position. They define cession in the way, as considered as early as in the period of Roman law. Namely, they consider cession as independent transfer of claim right from one person to another.[45]Moreover, they refer to cession as "special deal" and indicate that "the legal relationship between the cedent and cessioner is defined directly from the essence

[39] In case of Assignment of Claim by virtue of Law paragraphs 399-404 and 406-410 of German Civil Code are applied, with the exception of paragraph 405, which refers to the assignment of claim via the presentation of document. See in detail: *Hormuth H.* in: *Beckmann R.M., Matusche-Beckmann A.,*Versicherungsrechts-Handbuch, 2. vollständige Auflage, Verlag C.H. Beck, München 2009, §22, Rn.63.

[40] Müller H.F. in: *Prütting H., Wegen G., Weinreich G.,* (Hrsg.), BGB Kommentar, Köln, 2013, §412, Rn.1.

[41] *KoraevK.B.,* Concepts of Cession, Subrogation and Regress in the Civil Code of Russia, „Notary", Scientific-Practical and Informational Federal Publications, MSK. Legal Professional, №3, 2008, 21-25 (In Russian).

[42] *Pobedanoscev K.,* Course on Civil Law. Section 2 – Agreements and Liabilities. – CPb – Synode typography, MSK.,1896, 230; *Trepitsin I.N.,* Civil Code of Province of Poland and Russian Kingdoms in Relation to the Project of Civil Regulation, General Section of Liability law., Warsaw, 1914, 25; *Annenkov K.,* System of Russian civil law, Vol. 3, Obligatory rights – CPb; Typography of *Stasulevich M.,* MSK.,1898, 193 (In Russian).

[43] *Pobedanoscev K.,* Course on Civil Law. Section 2 – Agreements and Liabilities. – CPb – Synode typography, MSK., 1896, 230; *Trepitsin I.N.,* Civil Code of Province of Poland and Russian Kingdoms in relation to the project of Civil Regulation, General Section of Liability Law., Warsaw, 1914, 227 (In Russian).

[44] *Pobedanoscev K.,* Course on Civil Law, Section 2 – Agreements and Liabilities. – CPb – Synode typography, MSK., 1896, 231; *Trepitsin I.N.,* Civil Code of Province of Poland and Russian Kingdoms in Relation to the Project of Civil Regulation, General Section of Liability Law., Warsaw, 1914, 230 (In Russian).

[45] *Annenkov K.,* System of Russian Civil Law, Vol. №3, Obligatory rights – CPb; Typography of *Stasulevich M.,* MSK.,1898, 193 (In Russian).

of the agreement on the assignment of claim right and it does not depend on the agreement, based on which the assignment of the claim right was exercised."[46]

The above mentioned view fully complies with the position on the independent nature of agreement on the assignment of claim right dominating in the German literature and shared by the German legislators and court system. As early as at the beginning of 20th century, German scientist Dernburg noted that cession is an independent (abstract) deal, which must be considered separately from the primary agreement (basis of such cession agreement).[47]

The modern German legal doctrine acknowledges the independent nature of legally obligatory relationship and assignment of claim right (cession).[48] Proceeding from the principles of abstraction, the validity of these two agreements is independent from each other.[49] Accordingly, if the Causa, basis of the assignment of claim right is void for any grounding, this fact will not have influence on the validity of the agreement of the assignment of claim right.[50] In particular, if the claim was assigned based on the deal, which was legally invalid then the right of claim was generated for the cedent against the cessioner based on the norms regulating the unjustified enrichment.[51] The position established in the German law on the independent nature of cession, which is based on the abstraction principles, is acknowledged in the Georgian law as well. In the Georgian law, cession unlike the transfer of ownership right on the item, is an abstract agreement and its validity does not depend on the validity of the main basis agreement.[52]

3.1.2. Importance of Causa for the Validity of Subrogation

Part of the scientists considers the difference in the effectiveness of abstraction principle for these concepts as one of the differentiating features. In particular, if in the event of cession, unlike the transfer of the ownership right on the item, the Causa is not important for the validity of the claim assignment, in the event of subrogation, for the transfer of right the validity of initial agreement bears the essential importance. Based on the view of scientists, in case of subrogation, unlike the cession, the attention should be drawn to the validity of the insurance agreement itself; namely, was there the legal basis for the fulfilment of liability by the insurer? According to one of the German scientists – "if the insurer reimburses the insurance damage under the circumstances where the insurance agreement was not valid or the agreement was considered as void from the moment of its conclusion based on the appeal, the assignment of claim right as considered by the law on the insurance cannot be executed."[53]The scientist

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46 *Meier D.I.,* Russian Civil Law in Two Sections, Section One – MSK, 1997, 167 (In Russian).

47 *Dernburg G.* Pandekts, Liability Law, Vol. №2, Russian ed., MSK, 2011, 132 (In Russian).

48 *Hawellek J.,* Die persönliche Surrogation, Eine vergleichende Untersuchung von Rechtsübergänge zu Regresszwecken in Deutschland Spanien und England,Mohr Siebeck, Hamburg, 2010, 47.

49 The issue is solved differently, when based on the desire of parties to the agreement, the validity of claim assignment depends on the main agreement which is the basis of the latter one. In this case paragraph 139 of German Civil Code is applied, which refers to the voidiness of part of the deal, See: *Müller H.F.* in: *Prütting H., Wegen G., Weinreich G.* (Hrsg.), BGBKommentar, Köln, 2013, §398, Rn.5. See the same. *Ahrens H.,* §139, Rn. 1-24.

50 *Zvaigert K., Kotz H.,* Introduction of Comparative Legal Studies into the Private Law Area, Vol. #2,translated by *Sumbatashvili E.,* edited by *Ninidze T.,* Tb., 2001, 133 (In Georgian).

51 *Müller H.F.* in: *Prütting H., Wegen G., Weinreich G.* (Hrsg.), BGB Kommentar, Köln, 2013, §398, Rn.5.

52 *Chechelashvili Z.,* Assignment of Claim and Transfer of Debt, Thesis Work, 2008, 40 (In Georgian).

53 *Sieg K.* in: *Bruck E., Möller H.,* Kommentar zum Versicherungsvertragsgesetz und zu den Allgemeinen Versicherungsbedingungen unter Einschluss des Versicherungsvermittlerrechts, 8. Aufl., Berlin: De Gruyter,1961, § 67 Anm. 57; *Baumann H.,* Berliner Kommentar zum Versicherungsvertragsgesetz, (hrsg.) *Honsell H.,* Sprin-

notes that due to the non-existence of insurance agreement, there will beneither insurernor insured in place,[54] which is the necessary precondition for the implementation of subrogation. Moreover, in order to have the unjustified enrichment of one of the parties to the relationship, the insured must return received insurance payment,[55]and if insurer has already implemented the subrogative claim – the insurer must return amount received via such implementation and the insurance premium.[56]

3.2. Succession of Persons for the Liabilities

The above mentioned feature differentiating subrogation and cession is not the only differentiating feature. There is view among the scientists that these two establishments differ from each other in the issue of succession of persons in the liability based relationships. Namely, according to some scientists, if in case of cession the succession of persons for the liabilities is always implied, in case of subrogation it is difficult to state the same straightforwardly.[57] For the legally justified response to the above issue, it is expedient to, first of all, study the establishment of cession.

3.2.1. Succession of Persons for Cession Cases (Unacceptability to Apply the Analogues)

There are various views on the composition of cession in the scientific legal literature. According to the first view, cession is agreement between the creditor (cedent) and another person (cessioner), as a result of which the right to claim is transferred from the creditor to other person.[58]

The above view is the subject of discussion among the scientists. Part of the scientists is of the view that such approach, in other words consideration of agreement (contract) as cession, was characteristic of the establishment at its development stage, in the period of Roman law. Conclusion of such agreement did not cause the succession of persons for liabilities. This approach of the Roman law to the cession was caused by the fact that Roman legal professionals were considering the relationships under the liability

ger, Berlin, New York,1999 §67, Rn.82; Mentionedissue was left open bythe Supreme Court of Germany, BGH VersR 1963, 1192, 1193 Compare: *Hormuth H.* in: *Beckmann R.M., Matusche-Beckmann A.,* Versicherungsrechts-Handbuch, 2. vollständige Auflage, Verlag C.H. Beck, München 2009, §22, Rn.43.

54 See *Sieg K.* in: *Bruck E., Möller H.,* Kommentar zum Versicherungsvertragsgesetz und zu den Allgemeinen Versicherungsbedingungen unter Einschluss des Versicherungsvermittlerrechts, 8. Aufl., Berlin: De Gruyter, 1961, § 67 Anm. 57.

55 Article 976 of CCG. Similarly, paragraph 812 of German Civil Code. See *Hormuth H.* in: *Beckmann R.M., Matusche-Beckmann A.,* Versicherungsrechts-Handbuch, 2. vollständige Auflage, Verlag C.H. Beck, München, 2009, §22, Rn.43.

56 *Sieg K.*in: *Bruck E., Möller H.,* Kommentar zum Versicherungsvertragsgesetz und zu den Allgemeinen Versicherungsbedingungen unter Einschluss des Versicherungsvermittlerrechts, 8. Aufl., Berlin: De Gruyter,1961, § 67 Anm. 57.

57 *Lomidze O.,* Transfer of Liability Type Rights: General Rule and Exception, Russian Justice, № 9, 2000,16-18; *Lomidze O.,*Transfer of Creditor's Rights to other Person based on the Law, Russian Justice, №12, 1998,13 (In Russian).

58 *Sergeev A.P., Tolstogo U.K.,* Civil Law, Vol. №1, MSK., 2006, 629; *Voshatko A.V.,* About the Essence of Assignment of Claim, Works on the Trade Law, Edited by *Krasheninikova E.A.,* 7th ed., Yaroslav, 2000, 16; *Pochuikin V.V.,* Key Problems Related to the Assignment of Right to Claim in the Modern Civil Law of Russia, 2003, 23-24; *TerekhovA.V.,* Relationship of Subrogation and Cession in the Russian Civil Law, Herald of the MSK University, Ministry of Internal Affairs, Russia, № 3, 2007, 116 (In Russian).

law as the relationship having purely personal nature and accordingly, were deeming unacceptableto change persons in liabilities. Such succession was causing change of the entire liability.[59]However, later, proceeding from the requirements of civil turnover, this approach changed and cession considered the independent transfer of claims from the creditor to other person.[60]

According to other view, cession is the transfer of creditor's right to claim to other person, as a result of which the persons are changed for the liabilities.[61]This view is based on the fact, that relationships under the liability law have proprietary rather than personal nature.[62]

Article 199 of Civil Code of Georgia considers the assignment of claim with the similar meaning. The legislator notes that owner of the claim can assign the claim to third person. According to the sentence 2, section 2 of the same article, in the event of assignment of the claim, the third person takes the place of the former possessor of the claim. German legislation chooses the similar approach. In particular, according to the article 398 of the German civil code, "Creditor may assign the claim to other person via the agreement concluded with the latter. From the moment of agreement conclusion the new creditor takes the place of the former creditor." Based on the analysis of provided norms, we can state that in the relationships under the liability law assignment of right to claim (cession) considers unconditional replacement of persons in the liabilities.

Unlike Georgia and Germany, in some countries there is not legislative act which provides the succession of persons in the process of assignment of right to claim. However, according to the scientists, the rule on the unconditional replacement of persons has been widely spread in arbitrage and court practices.[63] The unconditional replacement of persons considered under the cession has been adopted in the legal doctrine as well.

Although the view on the unconditional replacement of persons in the event of cession is acknowledged by the scientists, there is difference in positions related to the assignment of claim by force in the event of subrogation. Namely, part of the scientists is of the view that application the analogue of cession for the subrogation is not acceptable, as this may cause negligence of rights and interests of subjects which are parties to the relationship.

3.2.2 Legal Outcomes of Succession in Case of Claim Assignment

Succession in the event of assignment of claim considers leaving the liability relationships by the creditor without any authority. Namely, as mentioned above, in case of succession, the initial creditor transfers to the new creditor his/her claims and rights in full. Accordingly, former creditor is left without

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59 *Baron U.,* System of Roman Civil Law, Vol. №4, Liability Law, 2005, 640-641(In Russian).

60 *ShershenevichG.F.,* Manual for Russian Civil Law, 1995, 287-288; *Pobedanoscev.P.,* Course on Civil law, 2003, 215-216 (In Russian).

61 The above mentioned issue is similarly solved in the Russian court practice. See in detail: Resolution of board of VACRF №5464/96 dated 25.03.97, Herald BAC, 1997, № 6, Compare: *Lomidze O.,*Transfer of Creditor's Rights to other Person based on the Law, Russian Justice, №12, 1998, 16-18(In Russian).

62 *Sinaiski V.I.,* Russian Civil law, 2002, 345-346; *Braginski M.I.,* Contract law, Vol. №1, General Provisions, 2002, 465; *Sukhanova E.A.,* Civil Law, Vol. №3, 2006, 43 (In Russian).

63 *Lomidze O.,* Transfer of Liability Type Rights: General Rule and Exception, Russian Justice, № 9, 2000,16-18 (In Russian).

any right (to claim);[64] this may have negative impact over the creditor (insured) whose claims have not been fully satisfied. In the event of subrogation, unconditional withdrawal of the first creditor from the liability type relationship may cause two problems – first, the insured may be left without the relevant compensation and the second – may facilitate the unjustified enrichment of the third party responsible for the damage.

The above mentioned threat may refer to those insured, which have reduced or incomplete insurance agreement with the insurer. We can illustrate mentioned legal problem via the analysis of section one, article 827 of the Civil Code of Georgia, considering the possibility of conclusion of reduced or incomplete insurance contract between the insured and insurer. In particular, according to the above article, the parties to the insurance agreement have right to conclude insurance agreement considering incomplete insurance, in other words, with the liability of insurer to partially reimburse the incurred damage.[65] In case of such insurance agreement, the amount of reimbursement is calculated in proportion to the ratio of the insurance amount and insurance value. In case of incomplete insurance agreement, generally, the insurance payment does not fully cover the incurred damage. For example: If as a result of insurance accident the value of the incurred damage equalled to GEL 10000 and according to the article 827 of CCG, the insurer is liable to reimburse only 30% of damage, then the insured will receive compensation in the amount of GEL 3000, and GEL 7000 will not be covered. In such cases, naturally, the person incurring damage has fully legitimate right, proceeding from the delict relationship, to request reimbursement of remaining uncovered damage from the person responsible for the damage. The above mentioned problem arises in this case, which is related to the unconditional succession of rights between the persons.

If we assume that in case of subrogation, similar to cession, the replacement of persons is done unconditionally, then the insured person, loses right for any claims proceeding from the delict relationship due to his/her withdrawal from the liability based relationship. Accordingly, the subject will not be entitled to request from the person responsible for the damage to reimburse the uncovered damage – in the provided example, reimbursement of GEL 7000. Based on the subrogation, his place will be taken by the insurer, who will replace the insured in the liability. However, generally, replacement of insured person by insurer does not consider the automatic transfer of all claims of the insured against the person responsible for the damage to the insurer. The legislator notes straightforwardly that the subrogative claim right is transferred to the insurer only within the damage covered by the company to the insured[66] - in the provided example, within GEL 3000. In the event of subrogation, in case of unconditional succession of persons in the liability type relationships, the insured, incurring the damage as wellas the insurer are left without basis for claiming uncovered damage. Accordingly, the right of claim against the debtor is

[64] *Lomidze O.,*Transfer of Creditor's Rights to other Person Based on the Law, Russian Justice, №12, 1998, 13; *Lomidze O.,* Transfer of Liability Type Rights: General Rule and Exception, Russian Justice, № 9, 2000,16-18 (In Russian).

[65] Partial insurance is considered under the paragraph 75, law on insurance agreement of Germany as well as section one, article 827 of CCG. In case of incomplete insurance, by the insurance agreement the parties agree on incomplete insurance. the amount of reimbursement is calculated in proportion to the ratio of the insurance amount and insurance value. For example: If the insurance value of the item is GEL 5000 and according to the insurance agreement the insurance cover is defined as GEL 2500, and the damage incurred equals to GEL 1000, the insurer based on the rules for the incomplete insurance is liable to reimburse only GEL 500, proportionate amount of insurance value to the insurance amount of damage. See in detail: *von Koppenfels-Spiels K.* in: *Looschelders D., Pohlmann P.,* VVGVersicherungsvertragsgesetz, Kommentar, 2. Auflage, Carl Heymanns Verlag, Köln, 2011, §75, Rn.1-15.

[66] See article 832 of CCG.

limited to GEL 3000, and the remaining GEL 7000 remains uncovered. This naturally creates the danger of unjustified enrichment of the debtor. Prevention of the mentioned legal problem is the key goal of subrogation establishment.[67]

Therefore, there is a view, according to which any type of succession of rights does not consider unconditional replacement of persons in liabilities. Norms, regulating assignment of claims, are considered as norms of dispositional nature. Accordingly, according to some scientists, in the event of exceptions made by the legislators for the mandatory replacement of persons, the legislator has specific objective to simplify legal relationship.[68]It is possible to clearly perceive the above mentioned based on the analysis provided in the next chapter of present article.

3.2.3. Essence of Persons' Replacement in the Liability Type legal Relationships

When talking about the replacement of persons for the liabilities, the replacement of person in the liability type legal relationships is considered. The latter has its composition – subjective rights and liabilities of parties, determining the legitimate (allowed and obligatory) limits of specific person's actions in the specific situation. The regulated social relationship also has its contents – real behaviour of participants, their interaction. Therefore, replacement in liabilities can be characterized as replacement of relationship between the subjects, also as transfer of legitimate behavioural boundaries from the old authorized person to a new successor.[69]

It has to be noted, that often liability type relationship has complex nature, as each participating party has his/her rights and liabilities. For example, under the rent agreement, the rentee is liable to pay to the rentor agreed rent,[70] also to carry out day-to-day repairs[71] and etc. Moreover, the rentor is liable to transfer to the rentee the rented item for its use considered under the agreement in the condition required for its use and maintain the condition during the whole period of the rent.[72] Perception of these rights and liabilities of the parties (rentor, rentee, seller, purchaser and etc) shall be made as one integral legal relationship. The specific rights of parties participating in the liability type relationship are referred to with the term: "authority". However, the comment is made that these rights are part of subjective rights' composition. In the event of change of persons in the liabilities, its subjective composition is changed, however the systemic connection between the authority and liability is retained. The new person is not given the specific authority of the replaced person, but the set of rights, which were possessed at the moment of replacement. For example, if at the moment of succession the person had rights as well as obligations, such obligations are also transferred to the successor.[73]

Analysis of Georgian legislation makes is evident that in certain cases, transfer of rights can be executed without replacement of persons in the liability part. One of the examples of the above is the case

67 See *Hawellek J.,* Die persönliche Surrogation, Eine vergleichende Untersuchung von Rechtsübergänge zu Regresszwecken in Deutschland Spanien und England, Mohr Siebeck, Hamburg, 2010, 152; *Frick I.,* Regress und Anrechnungs probleme in der Summenversicherung, Peter Lang Frankfurt am Main. Bern, NewYork, 1985, 1.

68 See *Lomidze O.,* Transfer of Liability Type Rights: General Rule and Exception, Russian Justice, № 9, 2000,16-18 (In Russian).

69 Ibid.

70 Compare Article 531 of CCG.

71 Compare Article 548 of CCG.

72 Compare Article 532 of CCG.

73 *Lomidze O.,* Transfer of Liability Type Rights: General Rule and Exception, Russian Justice, № 9, 2000, 16-18 (In Russian).

of transfer of right on the mortgage certificate.[74] Section one, article 289[4]of CCG considers assignment of right on the mortgage certificate. Assignment of claim provided in the certificate is executed via the notarized signing of the right transfer on the mortgage certificate. Inscription on the securities is the unilateral deal, and the transfer of right on certificate – assignment of claim (cession). Mortgage certificate confirms the right of owner on the mortgage as well as the right of holder of mortgage certificate to get the cash liability (execution of liability) secured via the mortgage.[75]For example, in the event of mortgage, which ensures the fulfilment of liability to periodically pay the cost of supplied goods by the buyer, the mortgage certificate determines the right of the person on mortgage as well as right to get the liability fulfilment. Moreover, the possessor of the right is not requested to provide additional evidences confirming the above right. Additionally, in case of mortgage, ensuring the liability of rentee to pay the rent (for example, based on the lease agreement) – the mortgage certificate ensures the confirmation of existence of mortgage, as well as determines the right of rentor to receive the rent from the rentee. The latter can be transferred to the third person via cession in accordance with the article 198 of CCG. The above is possible even if this liability is only part of the complex liability type construction. In this case, the parties to the main liability (mortgage) – the creditor and the debtor remain unchanged.

Second case, when it is possible to assign claim without changing person in the liability part, is the universal succession.[76] The purpose of universal inheritance is to transfer the property of inheritor to the successors.[77]It considers item as well as liability and subjective obligations. In case of universal succession the succession of persons is executed by virtue of the law.[78] However, even in case of universal succession, the successor is not always put in place of the inheritor, in other words the inheritor is not automatically replaced in the rights, which were possessed by the inheritor at the moment of succession. For example, according to section one, article 43 of the Law of Georgia on Enterpreneurs, transfer of share in the limited liability company via inheritance can be prohibited via the company statutes; moreover, according to the paragraph 4, article 62 of the same law, based on the cooperative statutes, the succession of rights to the person in case of inheritance may depend on the personal factor of the successor.[79] In particular, he/she may be refused to become a partner. In this case the partners are liable to give him/her compensation in proportion to the share of the inheritor in the company. Accordingly, the successor gets the rights in the volume possessed by the inheritor. In such case, we have the legal dependence of the person getting the right on the person issuing the right.[80]

The liability type relationship generated between the legal person and its members, has complex structure. If the successor of deceased person is not able to become the member of the company, the

74 Compare Article 289[4] of CCG.

75 Compare "a" sub-paragraph, Article 289[1] of CCG.

76 The Supreme Court of Georgia under the resolution No as - 747-700-2010, dated 28 December 2010 of Chamber of Civil Cases, indicated the material justice considers universal and singular succession of rights. Universal, in other words general succession of rights considers the cases when all rights and liabilities of the former possessor are transferred to the successor. In case of singular (private) succession, only certain rights (assignment of claim) of the former possessor are transferred to the successor. See above mentioned court resolution at:<http://www.supremecourt.ge/files/upload-file/pdf/kr20113.pdf> (In Georgian).

77 See *Große-Wilde F. M.*,*Ouart P. E.* (Hrsg.), Deutscher Erbrechtskommentar, 2. Auflage, (§1922-2385 BGB, Art. 25, 26, 235 EGBGB mit Formulierungshilfe und Mustern, Carl Heymanns Verlag, 2010, Rn. 13.

78 See Article 1328 of CCG.

79 Law of Georgia on „Enterpreneurs", dated 28 October 1994, as of 17 April 2014, <https://matsne.gov.ge/index.php?option=com_ldmssearch&view=docView&id=28408&lang=ge>.

80 *Lomidze O.,* Transfer of Liability Type Rights: General Rule and Exception, Russian Justice, № 9, 2000,16-18 (In Russian).

rights of the inheritor are distributed among the other members of the legal entity. In this event we don't have the "classical" case of replacement of persons in the liability type relationships. The characteristics of legal regulation of rights possessed by the member of the legal entity ensures, on the one hand, balance between the interests of the successor and company members, and on the other hand, gives opportunity to avoid the reduction of capital caused by the withdrawal of the company member.[81]

Next case, when the transfer of rights is possible without replacement of persons in the liabilities, is fulfilment of debtor's liabilities by the third person in favour of the creditor. This covers such cases, when the third person is not a personal debtor, but he/she satisfies the creditor's request and as a result, the right to claim possessed by the initial creditor is transferred to him.[82]Replacement of creditor via subrogation belongs to such cases.[83]Similar to the above discussed examples, the rights of initial creditor may be transferred to the new creditor without changing the creditor in the liability. According to some scientists, in case of making exception from the general rule, the legislator is always guided with the specific objective. In case of subrogation, the above objective is to avoid unjustified enrichment of person responsible for the damage and full compensation of insured.[84] Proceeding from the above objective of the legislator, scientists are of the view that subrogation does not always imply automatic withdrawal of creditor from the liability; therefore in the process of subrogation it is unacceptable to talk about complete replacement of persons. Moreover, if we consider that the key purpose of insurance law is to protect the interests of insured person and full compensation of incurred damage, it is straightforward that it will not be fair to automatically replace the insured with the insurer. Sharing the experience of English law, it can be stated that reimbursement of damage to the insured by the insurer does not automatically imply taking place of the insured by the insurer. The English law is not familiar with the succession of rights related to the change of credit by virtue of the law.[85] More specifically, in the English law immediately after the reimbursement of damages to the insured by the insurer, the insurer is equipped with the right, via subrogation, to request the third person responsible for the damage to pay back the reimbursed amount. Moreover in the process of implementation of such request, the insurer acts on behalf of the insured and protects right of the insured person. The reason for the above is that even after the reimbursement of damage to the insured by the insurer, the insurer remains the legitimate possessor of rights.[86]

There is a critical approach to the automatic succession of the creditor in the event of subrogation in Russian legal doctrine. For the protection of rights of the insured person, the idea of allowing the partial transfer of right to claim was proposed.[87] The Supreme Arbitrage Court of the Russian Federation shared the above idea. According to the court partial assignment of right to claim in the liability based

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81 *Lomidze O.,* Transfer of Liability Type Rights: General Rule and Exception, Russian Justice, № 9, 2000,16-18 (In Russian).

82 Compare Article 292 of CCG.

83 *Lomidze O.,* Transfer of Liability Type Rights: General Rule and Exception, Russian Justice, № 9, 2000,16-18 (In Russian).

84 Ibid.

85 *Wengler W.* in: *Schlegelberger F.,* (Hrsg.), Rechtsvergleichendes Handwörterbuch für das Zivil- und Handelsrecht des In- und Auslandes, Frankfurt a.M., Band VI, 1938, 489f. Indicated: *Liebelt G.,* Aspekte der "Subrogation" im englischen Recht der Schadensversicherung, NZV, Düsseldorf, 1993, 298.

86 *Schirrmeister G., Prochownick W.,* Das Bürgerliche Recht Englands, Bd. II (1929), § 692, 783-784.

87 *Koraev K.B.,* Concepts of Cession, Subrogation and Regress in the Civil Code of Russia, „Notary", Scientific-practical and informational federal publications., MSK., Legal Professional, №3, 2008, 21-25 (In Russian).

relationships does not contravene law with principles.[88] If we consider the modern pace of development of the proprietary relationships, the above mentioned approach to the partial transfer of right to claim to the new creditor is logical. As a result of partial transfer of the creditor's right to claim to other person the persons in the liabilities will not be changed. The new creditor will enter the existing liability based legal relationship within the right to claim granted to him. For example, if the insurance damage equals to GEL 2000 and the insurer covers GEL 1000 based on the insurance agreement, in the event of partial transfer of right to claim, the insurer, under the subrogation power, will have right to claim from the person responsible for the damage to repay GEL 1000. The insured person remains as the creditor for the right to claim the remaining uncovered damage. As a result, the initial liability will be transformed from the individual liability to such liability, which involves simultaneously several active subjects.

With the consideration of the above, it is expedient to indicate in the legislation the possibility for the partial transfer of right to claim in case of subrogation and accordingly to indicate the unacceptability of automatic replacement of the insured person. Mentioned rule will be one of the means for avoiding the unjustified enrichment and prevention of exemption of the person causing the damage from the responsibility.

3.3. Basis for the Establishment of Subrogation of Cession

3.3.1 Legal Basis for the Establishment of Subrogation of Cession

Unlike the above discussed features of subrogation and cession, the following differentiating feature related to the legal basis of the establishment of the concepts does not cause disputes among the scientists.

Based on the analysis of articles 198 and 832 of CCG we can state that together with the features listed in the above chapter subrogation and cession differ from each other with the legal composition, more precisely with the legal fact, which is the basis for their establishment. In particular, when we are talking about the assignment of right to claim (cession), we imply transfer of right to claim based on the active actions of the initial creditor and the new creditor. The agreement, considering transfer of specific liability type right to the new creditor by the initial creditor belongs to such action. As for the transfer of right to claim by virtue of the law, in other words – subrogation, considers transfer of right to claim to the creditor based on remaining legal fact, which is not precondition for the transfer based on the above mentioned agreement. Moreover, the law directly relates the occurrence of mentioned facts with the transfer of right to claim.[89] Example for the above is reimbursement of insurance damage by the insurer.

Based on the above, it is clear that one of the differences between the subrogation and cession lies in the basis of their establishment. The assignment of claim (cession) is based on the agreement, and the subrogation is mainly generated by the law and relatively rarely – based on the agreement. Accordingly, cession is always based on the consent of the creditor,[90] as for the subrogation – it can be implemented even

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88 Presidium of Supreme Arbitrage Court of Russian Federation, Informational Letter №120, 30.10.2007, 5, <http://arbitr.ru/as/pract/vas_info_letter/18448.html>, [13.05.2014] (In Russian).

89 *Lomidze O.,* Transfer of Creditor's Rights to other Person based on the Law, Russian Justice, №12, 1998, 13-14 (In Russian).

90 Compare Articles 198-199 of CCG.

against the will of the creditor.[91] Civil Code of Georgia clearly indicates the above. In particular, according to the section one, article 198 of CCG, the possessor of the claim or right may transfer the claim or right in possession to other person. Moreover, according to the section one, article 199 of CCG, the creditor, in the process of assignment of claim, is free and the liberty might be limited only in case, if the assignment of claim contravenes the law, essence of the liability or his agreement with the debtor, which must be respected. In case of subrogation the legislator imperatively decides to transfer the right to claim possessed by the insured person following the reimbursement of the damage. If we consider the fact that according to the section one, article 832 of CCG, if the insured (creditor) renounces his claim, then the insurer shall be released from the obligation to compensate the [insured for the] damage, it is clear that the creditor, in some cases, is forced to transfer the claim or forced to execute subrogation even against his will.

Other norms of the code indicate to the different legal basis for the establishment of cession and subrogation. Namely, according to section 2, article 199 of CCG, assignment of claim (cession) is implemented via the agreement concluded between the possessor of the claim and third person, and in accordance with the article 832 of CCG, subrogation considers transfer of right to claim possessed by the insured against the third person to the insurer by virtue of the law. Similar approach is observed in the German legislation.Article 398 of German Civil Code imperatively requires conclusion of agreement for the transfer of claim; as for the paragraph 86 of law on Insurance Agreements, refers to the subrogation as transfer of right to claim by virtue of the law, by which, once more, underlines the legal basis for the establishment of this concept. Russian Civil Code has to be also mentioned, where subrogation and cession are regulated with one norm; however the legislator attempts to clearly separate the legal basis for the establishment of these concepts. Therefore, the first part of the norm indicates on the assignment of right by virtue of the agreement and the second part – on the transfer of claim by virtue of the law.[92]

3.3.2 Material Basis for the Establishment of Cession and Subrogation

Deal and the law as the basis for the establishment of subrogation and cession are the formal sides differentiating these two concepts. Besides the formal differences subrogation and cession differ with the material composition.

In particular, indicating on the deal as basis for the establishment of cession implies agreement concluded between the creditor (cedent) and third person (cessioner). However, some scientists are of the view that agreement between the parties on the assignment of right to claim does not result in automatic replacement of persons in liability type relationship.[93] Mentioned agreement ensures generation of liability based legal relationship between the creditor and third party in relation to the transfer of right to claim. In this case agreement is the legal confirmation of the relationship.[94]

We could think that material basis for the establishment of cession is the liability based legal relationship which exists between the cedent and cessioner. Cession with the unilateral deal as the

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[91] According to section one, article 832 of CCG " If the insured renounces his claim against the third person or the right to security on this claim, then the insurer shall be released from the obligation to compensate the [insured for the] damage to the extent of that amount which he [the insured] could have received in connection with the exercise of the right or assertion of the claim in order to compensate his own expenses".

[92] Section one, article 339 of Civil Code, Russian Federation, <http://online.zakon.kz/Document/?doc_id=-1006061&sublink=3390000>, [3.04.2014] (In Russian).

[93] On the mentioned issue see in detail chapter 3.2.3 of the present article.

[94] *KoraevK.B.,* Concepts of cession, subrogation and regress in the civil code of Russia, „Notary", Scientific-practical and Informational Federal Publications, MSK, Legal Professional, №3, 2008, 21-25.

formal basis, such as Will, is the clear example illustrating the mentioned. Drawing up the Will does not itself create the cession case. Death of the Will issuer, as the legally important fact, also does not cause replacement of persons in the liability. However the Will and decease of the Will issuer are the elements of legal composition which are the basis of inheritance related legal relationship, which becomes the material basis for the cession.

The law can be considered as the formal basis for the establishment of subrogation. Moreover, consideration of the law as the basis for the establishment of subrogation theoretically is not acceptable, as legal norms and civil capabilities of the subjects of the civil law are the necessary preconditions for the civil legal relationship. Therefore, material basis of subrogation establishment (Causa obligations) is not the law itself, but fulfilment of debtor's liability by the third party.[95]

Fulfilment of debtor's liability by the third party may be implemented based on the debtor's liability or his right. Liability of third party may be borne only by the agreement. For example, according to the section one, article 799 of CCG, insurer, based on the insurance agreement, is liable to fulfil the liability of the person responsible for the insurance accident. Mentioned agreement is the formal basis for the establishment of relationship.

Separation of formal and material basis of cession and subrogation is important in theoretical as well as practical terms. In the process of legal regulation of these establishments, it is expedient to clearly indicate the formal basis for these establishments and to separate them.

IV. Conclusion

Based on the above discussed, it is clear that similar to regression, cession and subrogation are legal establishments independent from each other. Based on the analysis carried out in the work, the features differentiating these establishments have been clearly identified. First of all, cession and subrogation differ with the legal basis of their establishment. Cession is established based on the agreement unlike subrogation, which in most cases is determined by the law. Proceeding from the above, cession is based on the creditor's will, as for the subrogation – existence of creditor's will is not a decisive factor. Moreover, formal sides of cession and subrogation also differ. Namely, in case of subrogation, no liability is generated for the parties to notify the debtor on the entry of new creditor in the relationship, as for the cession – without such notification, it has no legal power against the third parties. Accordingly, before notifying the debtor about the assignment of claim, he has right to fulfil the liability against the initial possessor of the right to claim.[96]The other difference between the cession and subrogation is demonstrated within the boundaries of the right to claim of the new creditor. For cession, the new creditor can request from the debtor fulfilment of all liabilities in his favour. Creditor has such right if in exchange to the assignment of right to claim he has implemented liability of much less value[97]or right to claim has been acquired at a much lower price from the cedent. For example, when the assignment of right to claim GEL 10000 is made in exchange to GEL 5000, the cessioner's right to claim against

[95] *KoraevK.B.,* Concepts of cession, subrogation and regress in the civil code of Russia, „Notary", Scientific-practical and Informational Federal Publications, MSK, Legal Professional, №3, 2008, 21-25.

[96] Compare Article 200 of CCG.

[97] *Trepitsin I.N.,* Civil Code of Province of Poland and Russian kingdoms in Relation to the Project of Civil Regulation, General Section of Liability Law., Warsaw, 1914, 227 (In Russian).

the debtor still equals to GEL 10000.[98]This differs from subrogation; namely, in subrogation the new creditor is granted with the right to claim within the value of the damage reimbursed to the insured. Accordingly, volume of the responsibility of the third party against the insurer is not determined via the delict relationship between the third party and damaged person, but based on the insurance agreement concluded between the insurer and the insured person.[99] The damaged person (insured) retains the right to claim the reimbursement from the third party based on the delict relationship.[100]

The position existing in the scientific circles[101] and court practice[102] once more indicates on the fact that cession and subrogation are independent from each other legal establishments and they are not identical – this view concerns the possibility of assigning the subrogative right to claim via the cession. The fact that even at the theoretical level, subrogative claim can be subject to assigning via cession straightforwardly indicates on the different legal purpose and nature of these establishments.

Separation of the above mentioned establishments is important in theoretical as well as practical terms. Carried out research demonstrates that each establishment has legal nature and legal construction independent from the other one. This naturally determines different rights and liabilities of subjects participating in the relationships of subrogation, regress and cession. Due to the absence of clear separation of these establishments at the legislative level, often the entities participating in the relationship do not have full understanding of rights granted to them by the legislation for the specific relationship. Mentioned vagueness, in some cases hinders the entities participating in the relationship in the relevant execution of rights granted by the law.[103] Based on the above, it is very important to separate these establishments at the legislative level. For the above purpose, first of all, it is expedient to specify the contents of each establishment and to use the following terms for their description: subrogation, regress and cession. It is also important to specify in the article 207 of CCG, devoted to the automatic application of cession for the assignment of claims by virtue of the law (subrogation), in other words automatic application of norms on the acquisition of possession over the rights and claims, that the mentioned norms are used with the consideration of characteristics of subrogation. The above measure will enable the legislator to once more confirm that subrogation is not analogous to cession, that this is different and independent establishment, requiring different regulation.

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98 For example when the right to claim for GEL 10000 is assigned for GEL 5000, the cessioner is still granted with the right to claim for GEL 10000. *Godeme E.,* General Theory of Liabilities: Legal Editorial House, Justice of SSSR, MSK, 1948, 471 (In Russian).

99 *Danilochkina M.A., Savinski R.K.* Cession of Right to Claim for the Insurer transferred under the Subrogation, "Legal and Law Works in the Insurance area", 2007, №2.

100 *Hormuth H.* in: *Beckmann R.M., Matusche-Beckmann A.,*Versicherungsrechtshandbuch, 2. vollständige Auflage, Verlag C.H. Beck, München, 2009, §22, Rn. 48.

101 *Danilochkina M.A., Savinski R.K.* Cession of Right to Claim for the Insurer Transferred under the Subrogation, "Legal and law works in the insurance area", 2007, №2.

102 Decision of arbitrage court, MSK, dated 26 June 2006 on the case No A40-6918/06-24-46, Decision of arbitrage court, MSK district, dated 23 August 2006 on the case No A41-K1-8730/06 (In Russian).

103 The example of the above mentioned is provided at the begining of the present article, the court decision on the rejection to satisfy the claim to the claimant due to the expiry of validity (term). See in detail: Supreme Court of Georgia, Chamber of Civil Cases, resolution No as- 581-549-2011, dated 05 September 2012, 61. Collection of court decisions N12, <http://www.supremecourt.ge/files/upload-file/pdf/kr201212.pdf> (In Georgian).

Ketevan Kochashvili *

Dedicated to the distinguished civil movement representatives both in Georgia and abroad, Professor Lado Chanturia, whose productive work and diverse contribution is another proof of Georgian phenomenon and talent and the real example of commitment to their country.

Rights and Freedoms in the Framework of Basic Goods

"A human being is the halo of all creations;
he was given the responsibility
from God and liberty
as the greatest award".[1]
Ilia II

1. Generally about the Freedom

The whole history of humankind can be understood[2] as the gradual process of perceiving the idea of freedom. If in the countries of old Asia one-man freedom was recognized, in antic and feudal ages, this perception was spread over the smaller part[3] of society. Modern world recognizes freedom for all.

There is a notion that the secret for happiness lies only in freedom. The formula of freedom lies only in boldness[4]. The declaration of independence in the USA (1776, 4 July) defined the divine right for people: life, freedom and strife towards happiness.[5] According to Kant, each person is distinguished by the strong strife towards happiness while all his and her propensities come together into this basic idea, and are represented as a sum.[6]

Nothing can evolve so many followers as the idea of the art of being free. However, to be the apprentice of freedom is the hardest job. As Alexis de Tocqueville[7] had said, it is in the midst of waterfalls entailed with myriads of problems. Freedom is in the hearts of men, and when it dies neither court nor constitution can help it.[8]

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1 *Ilia II,* Christmas Epistle, 1978, Epistles, Tb., 2013, 16 (In Georgian).

2 Understanding means conceptualizing, seeing many phenomena through in connection and as a result, and then reducing this diversity to one. *Heisenberg V.,* Part and the Whole, Tb., 1983 (In Georgian).

3 *Коркунов Н.М.,* Историяфилософииправа, Изд-5-ое, СПВ, 1908, 336.

4 *Luis Brandies*, the point is indicated: *Rurua N*., the Law and Deliberate Audacity, the Complete Work: The Law of Freedom, Translation, Essay, Political Journalism, Tb., 2003, 226 (In Georgian).

5 *Kanda J., Berry J., Goldman J.,* American Democracy, English Translation by *R. Gachechildaze*, Editor of the translation: *M. Ugrekhelidze*, Tb., 1995, 4 (In Georgian).

6 *Kant I.*, The Metaphysics of Consciousness, translated by *L. Ramishvili*, editor *N. Natadze*, Tb., 2013, 62 (In Georgian). According to the people's viewpoint, actions are good in proportion of the ability to contribute to happiness and wellbeing and are bad while they have the propensity to trigger the causes contrary to the happiness. *Mill G.,* About the Freedom, Utilitarianism. Translated by *T. Tskhadadze*, Edited by *L. Mchedlishvili,* Tb., 2010, 188 (In Georgian).

7 The opinion is indicated: *Geremek B.,* The Transformation of the Central Europe. The complete work by *Rurua N*., Law about Freedom, Translation, Essay and Political Journalism, Tb., 2003, 74 (In Georgian).

8 *Hent l.,* American Judge, the opinion is indicated: *Schwarz H.*, Establishment of Constitutional Law in Post-Communist Europe, translated by *K. Aleksidze*, edited by *K. Kublashvili*, Tb., 2003, 379 (In Georgian).

Each person strives to live in a society where one can express and develop herself freely.[9] The theory of freedom requires the human being to be free from the interventions of the exogenous wills.[10] There is a notion that freedom should be understood not only negatively: freedom as detached from something but (first) positively, which means the internal freedom of an individual. It comprises the meaning of free consciousness and possibility of its free realization.[11]

2. The Imminence of Limitation for the Realization of the Free Will

According to the principle by Kant, freedom of each individual should coexist with the freedom of all, according to the universal law.[12] The mentioned makes the modern principle of constitution: the performance and realization of individual rights and liberties should not the rights and liberties of other people.[13] Thus, person freedom cannot be maintained for too longer period without maintaining the balance of interests. The absolute goal of a person's behavior – internal freedom, relates to the social life, the goal of which is the regulation and maintenance of the freedoms of all individuals within.[14] The limitation of freedom is necessary for improving the social coexistence [15] so as others can also enjoy being free.[16] The very limitation of freedom means the true freedom of individual's behavior.[17] It is an objective and situational measure, independent from people and it is known as the "enforced justice" which is the guarantee for enhancing the individual liberties so as none of other's can actually be violated but enjoyed by everyone[18].

Freedom is determined by establishment of the state and the last one is the measuring tool for each citizen's behavior.[19] A human being, a subject of an established order, reveals herself in the state, the organized form of people.[20] According to Voltaire, the best ruler is the one who will assist an

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9 *Dalai Lama*, Buddhism, Asian values and Democracy, Complete work by *Rurua N.,* Law of Freedom, translation, essay, public journalism, Tb., 2003, 77 (In Georgian).

10 *Smith R. K. M.,* International Human Rights, 2nd ed., edited by *G. Jokhadze*, Tb., 2005, 45 (In Georgian).

11 *Туманова А. С.,* Правачеловека в консервативной политико-правовоймысли России второй половины XIX-начала XX в, ж. "Правоведение", №3, 2011, 191.

12 *Zoidze B*., Experiment for the Practical Understanding of Law (first of all in the framework of the Human Rights), essays, Tb., 2013, 29 (In Georgian).

13 *Никитина Е. Е.,*Свободасовести: теория и практика ограничений прав в Российской Федерации, "Журнал Российского права", №12, 2013, 67.

14 *Vacheishvili Al.*, General Theory of Law, edited by *O. Gamkrelidze*, *O. Marinashvili*, Tb., 2010, 42 (In Georgian).

15 *Schwabbe I.,* Rulings of German Federal Court, translated from German by *E. Chachanidze*, scientific editors*: K. Kublashvili*, *T. Ninodze, B. Loladze, K. Eremadze*, Tb., 2011, 211-212 (In Georgian).

16 *Chanturia L.,*Introduction to the General Part of Georgian Law, Tb., 1997, 56 (In Georgian).

17 *Zoidze B.,*Experiment for the Practical Understanding of Law (mostly in the framework of the Human Rights), essays, Tb., 2013, 29 (In Georgian).

18 *Heirullin V. I.,* Humboldt about Legal Practice, "State and the Law" magazine № 4, 2003, 95 (In Russian).

19 *Zoidze B.,*Experiment for the Practical Understanding of Law (mostly in the framework of the Human Rights), essays, Tb., 2013, 29 (In Georgian).

20 Ibid, 9.

individual, born free, to preserve this natural gift as wide as it makes possible.[21] In a totalitarian country, where the government is empowered by unrestricted power, which controls each aspect of individual's behavior, the freedom is not perceived. Only in democratic country is it possible the people experience the freedom [22](demos – Greek for lay people, Kratos – for power).

It is assumed, the unity of social norms determined by the state (the justice) are only samples of human liberties.[23] As Romans used to interpret, freedom is the natural possibility to do what each one wishes to if this activity is not enforced or prohibited by law.[24] Thus, freedom is the representation of personal wills in the legal framework.[25] Therefore, in the country where law is present, freedom might mean doing "what already is" and not being prohibited from doing it.[26]

Hence, the prime measuring point for each individual should be the good will, which is the prime requirement for honorable life.[27] The free will as the basic law of human existence has the universal form and it is free from selfish instincts.[28] It is not only maintenance for the freedom of action but represents the very obligations for an individual as an inherent contents comprising respect and commitment to the law by anyone as well.[29]

3. The Main Guarantee of Freedom – Recognition of Basic Rights

Legal positivism attributes everything, what exists in legal form, to the legal order. The right itself is also established by legal order.[30] The aim of the democratic and legal country is the existence of free and realized Human Being, which is determined by the acknowledgment of Human Rights and insurance of their full enjoyment[31] Positivism attributes to legal order everything, that exists in the legal

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21 The viewpoint is indicated*: Kutalia R.,* Viewpoints and Philosophy Concerning Legal Issues by Ilia Chavchavadze, Tb., 2004. 54 (In Georgian).

22 *Kanda J., Berry J. M.,Goldman J.,* American Democracy. Translated from English by *R. Gachechiladze*, translation edited by *M. Ugrekhelidze*, Tb., 1995, 14 (In Georgian).

23 *Berdyaev N.A.,* Philosophy of Inequality, M., 1990, 90 (In Russian). indicated*: Chogovadze L. A.,* Structure- and Conditionof CivilLegal Relations, M., 2004, 116 (In Russian).

24 *Florentinus*, Institutions, Roman Legal Statues, Justinian's Digests, Introductory Constitutions, Year 1 and 2. Translation from Latin, Introduction, Notes, Searches and Vocabulary added by *N. Surguladze*, editor group: *N. Surguladze, V. Metreveli, B. Zoidze, M. Garishvili, D. Bostoghashvili, A. Tsignadze, M. Khoperia*. Tb., 2012, 87 (In Georgian).

25 *Ghuchashvili Z*., Moral and Legal Foundation of Freedom of Speech, Tb., 2004. 192 (In Georgian).

26 *Montesquieu C. L.,* Spirit of Laws, translated by *L. Ramishvili*, Edited by *D. Labuchidze*, Tb., 1994, 180 (In Georgian).

27 *Kant I.,* Establishment of Moral Metaphysics,Translated by *L. Ramishvili*, edited by *N. Natadze,* Tb., 2013, 45 (In Georgian).

28 *Vacheishvili Al.,* General Theory of Law, Editor *O. Gankrelidze*, *M. Marinashvili*, Tb., 2010, 42 (In Georgian).

29 *Kant I.*, Establishment of Moral Metaphysics, translated by *L. Ramishvili*, edited by *N. Natadze*, Tb., 2013, 71 (In Georgian).

30 *Gvazava G.,* Division of Sovereignty, magazine "Georgia", 1920, sited in: *Kantaria B.,* Fundamental Principles of Constitutionalism and Legal Nature of Forms of Governing in First Georgian Constitution, Tb., 2013, 508 (In Georgian).

31 *Eremadze K.,* Interest Balance in the Democratic Society, Tb., 2013, 166 (In Georgian).

forms, Rights are created by legal order.[32] However, there is some exceptions and these are the natural rights of an individual, which one has just because the one is the human being.[33]

That is, the human being inherited them by birth and did not receive them from anyone. In its essence, they represent the spirit of the law.[34] The human being is already the right; therefore, the state cannot take away this right from them because they cannot change his nature.[35]

It is considered that the right is the existence of the free will, thus, the right can be attributed to the subject of the free will and the person is the general foundation of the right.[36] The right is considered as the best means for enhancing private autonomy. The autonomy means the ability to be accountable for one's own fate or choices. The existence of the right determined the moral fact, according to which the person belongs to one's own self and not to anyone or the community as a whole.[37]

4. The Right Interpreted as Freedom

"To determine the essence of the right is more important than anything else" (Ilia Chavchavadze[38]) The right is not the subject of consideration by Greek philosophers. They used to debate what was right and what was legal. Nor Roman law recognized the partial definition of the right. "Ius"[39] was used in different meanings, from which one was the freedom recognized by law.[40] In the history of law, there are several stages of the development of the right. In the ancient time and glossator epoch, the right refers to the system of claims. Later, legal power was understood under the same concept.[41] From different meanings of the right, there are recognized, protected interests; ability to limit a specific action by politically organized social force,[42] legal authority as a stem for the right and liabilities, change and

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32 *Zoidze B.,*Experiment for the Practical Understanding of Law (mostly in the framework of the Human Rights), essays, Tb., 2013, 15 (In Georgian). Right is the Sphere of External Freedom, which is Given to the Person by the Objective Law Norms, *Ninidze T.*, Koing's "Legal Archeology", Journal "Law Journal", N. 1, 2011 (In Georgian).

33 *Zoidze B.,*Experiment for the Practical Understanding of Law (Mostly in the Framework of the Human Rights), essays, Tb., 2013, 15 (In Georgian).

34 *Radbrus G.,* Five Minutes of Legal Philosophy, Translated by *D. Gegenava*, Journal "Sarchevi", N1-2 (3-4), 2012, 249 (In Georgian).

35 *Zoidze B*., The Principle of Maintaining the Essence of the Basic Rights, magazine "Review of the Constitutional Law", N5, 2012, 138 (In Georgian).

36 *Korkunov N.M*., History of the Law and Philosophy, 5th ed., 1908,337 (In Russian).

37 *Shaio An.,* From Protective Democracy to Preventive country, "Constitutional Law Overview", N1, 2009, 87 (In Georgian).

38 *Mtereveli V.,* Ilia Chavchavadze's Views on Country and Law, Tb., 1977, 84 (In Georgian).

39 "Ius" meant, sometimes by objective understanding the norms and orders of the law, which means order and its elements, sometimes by subjective understanding meant the right granted to the specific individual, *Koing H.,* For the History of "Right", translation by *T. Ninidze*, "Law Journal", N1, 2011, 235 (In Georgian). *Ulyanov A. V.* Legal Protection of the Weaker Party during the Labor Negotiations, "Russian Law" magazine, № 8, 2013, 117.

40 *Pound R.,*The Destination of Law, Complete Laws*, Rurua N.,* Law about Freedom, Tb., 2003, 163 (In Georgian).

41 *Ninidze T.,*Koing's "Legal Archeology", Jpurn. "Law Journal", N1, 2011, 231 (In Georgian).

42 *Pound R.,*The Destination of Law, Complete Laws, *Rurua N.*, Law about Freedom, Tb., 2003, 66 (In Georgian).

cancellation. In addition, there is the privilege and special case for legal immunity (special authority of the authorized person, for whom all the liabilities of the person enjoying the special status are applicable)[43]. The right itself also means as the concept of freedom, as the immune right to use natural abilities. Even from the viewpoint of the natural law, the right is interpreted as the freedom. Hobbs and Spinoza viewed the right as the freedom and interpreted it in the power of such.[44]

5. Correlation of the Right and Interest

The right as the idea belonging to the will personal freedom of the human being is given to her to protect and realize their interests.[45] The right is the notion legally to be considered (B. Zoidze), the authority of the one to realize their interests.[46] The interest of the person is objective, not a legal category,[47] which indicated to that very hypothetical condition, to achieve of which is preferable.[48] The interest exists independent from the right, while at the very time individuals engage in mutual relationships, the strife for action or expropriation imminently reveals itself.[49] The interest is a quasi-legal pre-condition to give a start to the legal phenomenon so as the realization of the interest finds its way in legal practice and turn into legal phenomenon.[50] According to Yering, the right is an interest protected by law and each right is backed by it. The right finds its way through fight and reaches its apex when the interest acquires the form of the right. If the right is the set of the very statutes determined by society, through which the social order is established, subjectively the right represents the realization of the detached norms to protect individual rights".[51]

6. The Short History of the Universal Rights Development

Historically, the "right" was the category important only for the private law. At the end of the eighteenth century, when constitutional era stepped in, the public related laws concerning the relationship of the government and individual have been recognized.[52] The theory of human right became the main

[43] *Ферраз Т.С.,* Эрозия субъективных прав как следствие тех нического развития (патенты, авторское право), ж. "Правоведение", № 4, 2011, 64.

[44] *Pound R.,*The Destination of Law, Complete Laws, *Rurua N.*, Law about Freedom, Tb., 2003, 66 (In Georgian).

[45] *Chachava S.,* Competition of Demands and the Bases of Demands, Tb., 2011, 6 (In Georgian).

[46] Definitive Legal Dictionary: *Totladze l., Gabrichidze G., Tumanishvili G., Turava P., Chachanidze E.,* editor *G. Khubua, L. Totladze,* Tb., 2012 544 (In Georgian).

[47] *Чеговадзе Л.А.*, Структура и состояние гражданского право отношения, М., 2004, 177.

[48] *Kutalia R.,* I. Chavchavadze Legal and Political Viewpoints and Philosophy of Law, Tb., 2004, 57 (In Georgian).

[49] *Pound R.,*The Destination of Law, Complete Laws, *Rurua N.*,Law about Freedom, Tb., 2003, 151 (In Georgian).

[50] *УльяновА.В.*, Юридическое обоснование защиты слабой стороны в договоре, "Журнал Российского права", № 8, 2013.

[51] *Iering R.*, Fight for the Rights, translation from Russian edition and introduction by *Z. Nanobashvili*, edited by *Zoidze B.,* Tb., 2000, 33 (In Georgian). *Izoria R.,* General Review of the Human Rights, "Justice" magazine, N12, 2001, 95. There is a notion that the principle of equality is purely European phenomenon, *Chanturia L.,* Introduction to the General Part of Georgian Civil Law, Tb., 1997, 77

[52] *Izoria l.,* The Comment of Georgian Constitution, Chapter 2, citizenship of Georgia, Basic Human Rights and Specifications, team of the authors: *Burduli I ., Gotsiridze E., Erkvania T., Zoidze B., Irozia L., Kobakhidze I.,*

postulate of the modern civil order.[53] The general sphere of validity of those rights is not limited to the national level, but is of the universal character. Thus, they represent the cosmopolitan rights.[54]

The idea of the human rights first took its origin back in fifth and sixth centuries of the ancient Greek cities (policies). The main period when the rights spilled over is connected to the Enlightenment period where the rights of the person to be protected from the violation of the absolute royal power come to the fore.[55] During the bourgeois revolutions, not only the long list of the human rights had been created but also the recognition of the equality principle was recognized, which is the foundation of the universal character of the human rights.[56] According to the legal rights specialists, the first precedent for the requirement of the human right protection showed itself in England in 1215 document, which is known as "Magna Charta" document. It comprised numerous principles, which are currently included into the wide framework of the human rights.[57] At the same time, in the same England in 1679 document, by "Habeas Corpus Act" and the "Bill of Rights, the list of rights was further enlarged.[58] The first document officially recognizing basic human rights is considered the Virginia Human Rights Declaration of 1776 (12 June), according to the first paragraph of which, each person is equal and free by birth and owns specific rights since their very birth.[59] According to the declaration of 1789 (August 26) of human rights and liberties, the list of basic human rights was most minutely declared.[60] This very period had also seen the establishment of constitutions based on "natural rights" of individuals in both Europe and USA.

7. Rights and Liberties by Constitution as a General Norm

In the legal present, the constitution represents a united set of rights, norm through which each state functions and their agencies[61] operate. Constitution is represented not only by those norms, which are given it its texts, but its ideas and principles, which are not directly given in any constitutional

Loria A., Macharadze Z., Turava M., Pirtskhalashvili A., Putkaradze I., Kantaria B., Tsereteli D., Jorbenadze S., Tb., 2013, 9 (In Georgian).

53 *Ninidze T.*, Koeing "Legal Archeology", magazine "Magazine of Law", N1, 2011 (In Georgian).

54 *Rukhadze Z.*, Constitutional Law, Tb., 1999, 122 (In Georgian), Human Rights and Freedoms have Universal nature. Everybody is entitled by these Rights and Freedoms despite their Citizenship, *Khetsuriani J.,* Searches in Georgian Jurisprudence. Tb., 2011, 215 (In Georgian).

55 *Izoria l.,* Modern Country and Administration Georgian, Tb., 2009, 77 (In Georgian).

56 *Oboladze R*., General review of Human Rights, Journ. "Law", N12, 2001, 95 (In Georgian). Exists the view that the existence of equality principle is the European Phenomenon, *Chanturia L*., Introduction to Georgian Civil law General Part, Tb., 2005, 45 (In Georgian).

57 *Smith R. K. M.,* International Human Rights, second edition, edited by *G. Jokhadze*, Tb., 2005, 45 (In Georgian).

58 Factually, it meant agreement between English Kind and nobles so as the rights of the last had been recognized. Georgian Constitutional Law, team of the authors: *Gegenava D., Kantaria B., Tsanava L., Tevzadze T., Macharadze Z., Javakhishvili P., Erkvania T., Papashvili T., edited by D. Gegenava*, Tb., 2013, 369 (In Georgian).

59 *Kublashvili K.,* Basic Rights, Tb., 2003, 28.

60 Georgian Constitutional Law, team of authors: *Gegenava D., Kantaria, B., Tsanava L., Tevzadze T., Macharadze Z., Javakhishvili P., Erkvania, T., Papashvili T.,* edited by *D. Gegeanva*, Tb., 2013, 370 (In Georgian); *Kublashvili K,* General Rights, Tb., 2003, 28 (In Georgian).

61 *NoeJordania*, viewpoint is indicate in*: Kantaria B*., Principles of Constitutional Federalism and Legal Nature of Management in the First Georgian Constitution, Tb., 2013, 44.

statements but are recognized in its unity, general ideas and importance.[62] The constitution is not only the normative creation, but also the reflection of the cultural development, the possibility for the people's cultural assertion.[63]

The human rights backed by constitution fill moral reality with the positiveone. The constitution (or international acts) is the institutional forms of the natural rights existing for the positivistic goals of these rights.[64] The general rights and liberties are supreme values, which are above any other constitutional virtues. The constitution is maintained by the human, supreme rights and supra constitutional virtues and not opposite – human rights on constitutional norms.[65] The sacred rights are ensued through the vision and status established by the constitution, according to which a human being is responsible only for herself, develops on her own in social habitat and in the frameworks of social life.[66]

General right is interpreted as the possibility of an individual guaranteed by the constitution, their personal views and interests to fulfill certain action, protect her interests, come up with the justified claims towards both the state and other people. Certain categories of rights, which are connected with will and initiatives of its representation is called freedom.[67] Freedom is the possibility enhanced by constitution, which gives the right to an individual to act according to any legal rights except for those limited by law.[68] Thus, freedom is the unity of those very virtues, which human beings own by nature, that is permanent, non-expropriated values, non-retrieved rights (Thomas Jefferson[69]), protection of which the state should guarantee though its action or inertia. When constitution along with other legal norms consider rights and liberties, this does not mean the rights, which require the elements of freedoms and rights which do not have such substantial presence of it should be differentiated from each other.[70]

8. Functions of the Natural Rights

General rights, like universal, fundamental, abstract, moral and priority ones,[71] have different functions. The function means dependence on an individual upon the state while the state regulates the results of this relationship, both legal and civilian.[72]

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62 *Zoidze B.*, Constitutional Control and Value Hierarchy in Georgia, Tb., 2007, 153 (In Georgian).

63 *Heberle P.*, Essential Character of Georgian Constitution, translated by *L. Bregvadze*, "Sarchevi" Magazine, N. 1-2 (3-4), 2012, 246 (In Georgian).

64 *Aleksy R.,* Existence of Human Rights, "Pravovedyeniye" magazine, № 5, 2011, 24 (In Russian).

65 *Zoidze B.,* The Principle of Maintaining the General Rights, "Review of Constitutional Law" magazine, N5, 2012, 138 (In Georgian). Thus, it does not matter whether these rights are stone written in constitution or in any other constitutional acts while the human rights, which are naturally given to the one, are above any Constitutions or legal acts.

66 *Schwabbe I.,*The Rulings of German Federal Constitutional Court, translated from German by *E.Chachanidze,* scientific editors: *Kublashvili K., Ninidze T., Loladze B., Eremadze K.,* Tb., 2011, 137 (In Georgian).

67 *Rukhadze Z.,* Constitutional Law, Tb., 1999, 123 (In Georgian).

68 Georgian Constitutional Law, team of the authors: *Gegenava D., Kantaria B., Tsanava L., Tevzadze T., Macharadze Z., Javakhishvili P., Ekvania T., Papashvili T., edited by D. Gegenava,* Tb., 2013, 752 (In Georgian).

69 The viewpoint is indicated: *Glasser A.,* Bills of Rights, short history, *N. Rurua,*Complete Works: Law about Freedom, Tb., 2003, 131 (In Georgian).

70 *Zoidze B.,*The Essence of the Labor Law in the Practice of Georgian Constitutional Practice, the complete works: The LaborLaw, 1st Vol., edited by *V. Zaalishvili*, coordinator *G. Amiranashvili*, Tb., 2011, 5 (In Georgian).

71 *Aleqsi R.,* Existence of Human rights, "Pravovedeniye" magazine№ 5, 2011, 23 (In Russian).

72 *Izoria L., Kobakhidze I., Loria A., Macharadze Z., Turava M., Pirtskhalashvili A., Putkaradze I., Kantaria B., Tsereteli D., Jorbenadze S.,* Tb., 2013, 14 (In Georgian).

The classical theory of human rights is based on the teaching by Georg Elinek about the legal status of an individual, according to which, the diverse character of relationships between citizens and the state define the format of rights of various character realized by the state.[73]

The prime designation of natural rights implies protection of each citizen from the intervention of the public force; therefore, these are the rights protecting an individual from the state.[74] At the same time, general rights represent legal norms, which have possible legal force. Thus, it is directly possible they be used in comparative process.[75] According to paragraph seven of Georgian constitution, whenever the authority is performed, people and the state are limited by the rights and liberties universally recognized as well as the ongoing law. Further, according to the first paragraph of German constitution, paragraph one (3), general rights as well as the valid law, are necessary for the legislature and government.[76] Thus, constitutional norms, as well as the norms of any law, are directly viable.[77]

At the same time, basic rights have the so-called "translucent function" in the framework of the entire legal system.[78] The basic rights, as objective norms establish the system of values and order, which as a main constitutional decision spreads and is considered as compulsory for all legal spheres.[79]

The goal of basic freedoms to ensure the free space of an individual from the state where she enjoys the protective, negative status, which means that the state does not intervene in the specific areas of an individual's life and their activity.[80] Thus, basic rights oblige the state to protect and respect the liberties of each individual guaranteed by the constitution, which is then the classical function of the basic rights – status negatives.

Conversely, general rights concerning protection and care, positive ones, enhance the positive relation of an individual towards the state; outline the rights for the state so as the social co-existence of all individuals within the state is ensured. Thus, basic rights as those of the positive ones acquire social function while the positive function of those – status pozitivus comprises legal enforcement from the state to protect or implement specific rights and authorities.[81]

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73 *Erkvania T.,* Private Human Rights in Horizontal Private Legal Relations, "Justice and Law" magazine, N4. 2011, 62 (In Georgian).

74 Before the end of the Second World War, the basic rights did not have the qualification of active laws; by using these rights, it was impossible to check the representatives of the government; they did not have a normative nature and usually they were represented only in the form of a declaration.

75 *Khubua G.*, Comments about Georgian Constitution (Basic Human rights and Specifications), team of the authors: *Izoria L., Korkelia K., Kubralshvili K., Khubua G.,* Tb., 2005, 5 (In Georgian).

76 General Law of German Federative Republic (received in 1949, May 23), Constitutions of Foreign Countries, edited by *V. Gonashvili*, Tb., 2006, 64 (In Georgian).

77 *Ninidze T.*, The Structure of Paragraph one of Georgian Civil Code, Professor AkakiLabartkava 80 year anniversary jubilee dedication by complete works, Tb., 2013, 160 (In Georgian).

78 *Erkvania T.,* Basic Human Rights in Horizontal Private Legal practice, Justice and Law magazine, N4, 2011, 66 (In Georgian).

79 *Schwabbe I.,* Rulings of German Federal Constitutional Court, translated from German by *E. Chachanidze*, scientific editors: *Kublashvili K., Ninidze T., Loladze B., Eremadze L.*, Tb., 2011, 209 (In Georgian).

80 *Demetrashvili A., Kobakhidze I.,* Constitutional Law, Tb., 2010, 73 (In Georgian), The general concept of negative rights means each individual having the right for the independent activity area and access to general goods with the state intervention, *Erkvania T.,* Basic Human rights in Horizontal Private Legal practice, Justice and Law magazine, N4, 2011, 62 (In Georgian).

81 *Izoria L.,* Contemporary State and Administration, Tb., 2009, 188 (In Georgian).

9. Dignity as a Universal Value

True, Europe is considered as the source of democracy and recognition of supremacy of human rights and these virtues are christened as the European ones,[82] but today they represent the universal ones that belong to the humankind. According to the researches in the fields of education, science and culture of 1968, one reads that those strives which human rights are based upon justice, integrity inherent to the human nature and dignity are free from persecution and not only in Western but global civilization.[83] The preamble of the universal declaration of human rights (1948, December 10) indicates: to each members of humankind, the recognition of inherent rights of honor and justice in the world represents the foundation of all freedoms and liberties in the world.[84]

The constitution, as the supreme law (values represent opinions according to which the idea or material object is being valued as good and recognized[85]) represents the order made of the system of values. According to the preamble of European constitution,[86] one reads that the document is the creation of the cultural, religious and humanistic background of the continent and the existence of which contributes to the development of such universal values such as: supreme rights of an individual, freedom, democracy, equality, legal state.[87]

Georgian constitution recognized an individual as a basic value, as self-sustained subject, as well as her dignity and liberties and the right to behave according to her own thinking, thus attaching to the mentioned the privileged right.[88]

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82 *Arthur Schlesinger*, *Samuel Hamington,* The Future of the Third Wave, *Rurua N.,* the complete works: The Law about Freedom, Tb., 2003, 41 (In Georgian). For determining the European state not only Geography is used but political and historical background is also taken. These states should respect values, such are: human dignity, freedom, democracy, equality, supremacy of law, protection of human rights, *Gabrichidze G.*, Law of European Union, Tb., 2012, 27 (In Georgian).

83 *Novak M*., Human Rights, the Textbook for the Parliament, translated by *Chelidze L.*, Tb., 2009, 5 (In Georgian).

84 The Composition of the Complete Legal Acts in the Field of Human Rights, part one, Tb., 2008, 7 (In Georgian).

85 *Kraft,* Die GrundlageneinerwissenschaftlichenWertlehre, 2, Aufl, 1951, s.10. Indicated: *Izoria L.,* Comments from Georgian Constitution, chapter 2, citizenship of Georgia, Basic Human Rights and Specifications, team of the authors*: Burduli I., Gotesiridze E., Erkvania T., Zoidze B., Iroria L., Kobakhidze I., Loria A., Macharadze Z., Turava M., Firtskhalashvili A., Futkaradze I., Knatrai B., Tsereteli D., Jorbenadze S.,* Tb., 2013, 11 (In Georgian).

86 By preambles, the concepts of constitution are interpreted into the clear, understandable language for the public. They guarantee the editing of constitutional history and program representation of the future. Heberle P, the "true nature" of Georgian 1995 Constitution, translated by *L. Bregvadze,* "Sarchevi" magazine, N. 1 -2 (3-4), 2012, 240 (In Georgian).

87 *Saidov A. S.,* Comparative Legal Practice, 2nd ed., edited *by Tumanova V. A., M*., 2009, 212 (In Russian).

88 *Schwabbe I.*, Rulings of German Federal Constitutional Court, translated from German by *E. Chachanidze,* scientific editors*: Kublashvili K., Ninidze T., Loladze B., Eremadze L.,* Tb. 2011, 60 (In Georgian).

10. Connection of a Person with the Dignity Seen through Civil and Philosophical Prism

There is no universal explanation of "dignity". It is interpreted religiously, philosophically, medically and legally though it is always based on the definition related to the person and recognition of her basic rights.[89] Dignity is the virtue for all. It is existential[90] integrated to the human nature as of conscious, responsible being with the free will[91]. According to the first paragraph of the declaration of the universal human rights, each man is born free and equal according to his dignitiess and rights.[92] The recognition of a man as free and equal means recognizing his private autonomy and equipping him with the right for dignity and the recognition of dignity on its own means recognition of his natural rights.[93]

Dignity as an inherent quality of the human nature is not related to abilities of right-authorization or the actual perception of the dignity or possessing[94] it. For dignity, self-esteem of an individual poses no difference, neither the social view towards the one.[95] The essence of the right of dignity is determined by the recognition of the unique nature, individuality of a man. It ensures the individualization and differentiation of a man.[96] At the core of the legal system, the idea of dignity is central.[97]

The history of the development of the concept takes its root from Christianity: God created a man according to his image. Just the very fact that one is born as a man already means appropriate treatment and deserves respect and ethical treatment from all. He as a free, independent, conscious being should represent the purpose on his own.[98] According to Kant, each person is expected to behave so as the

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89 *Gotsiridze E.,* Comments of Georgian Constitution, Chapter 2, Citizenship of Georgia, Basic Human Rights and specifications, team of authors*: Burduli I., Gotsiridze E., Erkvania T., Zoidze B., Izoria L., Kobakhidze I., Loria A., Macharadze Z., Turava M., Firtskhalashvili A., Futkaradze I., Kantaria B., Tsereteli D., Jorbenadze S.,* Tb., 2013, 108 (In Georgian).

90 *Kublashvili K.,* General Rights, Tb., 2003, 92 (In Georgian).

91 *Gotsiridze E*., Comments of Georgian Constitution, chapter 2, Citizenship of Georgia, Basic Human Rights and Specifications, team of authors: *Burduli I., Gotsiridze E., Erkvania T., Zoidze B., Izoria L., Kobakhidze I., Loria A., Macharadze Z., Turava M., Firtskhalashvili A., Futkaradze I., Kantaria B., Tsereteli D., Jorbenadze S.* Tb., 2013, 108 (In Georgian).

92 The Complete Works of Main International Acts in the Field of Human Rights, Part 1, Tb., 2008, 8 (In Georgian).

93 *AleksijP.,*View Point is Indicated: *Polyakov., Antonov A. V., Arkhipov V.V,* Scientific Dialectic Sat the Mein River: International Philosophy Congress in Legal and Social Philosophy, "Pravovideniye" magazine, № 4, 2011, 12 (In Russian).

94 *Gelashvili I*., The Legal Condition of the Embryo, Tb., 2012, 24 (In Georgian).

95 *Loladze B*., Decisions of Georgian Constitutional court, short comments, Batumi, 2010, 14 (In Georgian).

96 *Bichia M.,* Protection of Private Life According to Georgian Civil Code, Tb., 2012, 159-160. Individualism is a strong psychological propensity of Georgians, in our psyche, it is prevalent, *Ninidze T.,* Viewpoint is indicated: *Babek V.,*Designing and Receiving Constitution in Georgia (1993-1995), translated from German by *K. Kulashvili*, 2nd ed., Tb., 2013, 167 (In Georgian).

97 Decision of Georgian Constitutional court of October 26, 2007 N2/2-389: citizen of Georgia *Maia Natadze and others vs Georgian president and parliament*, indicated: *Jorbenadze S.* Activities of Particular Legal Institutions of Civic Code in Relation of the Labor Code, Journal "Sarchevi", N1-2 (3-4), 2012, 16 (In Georgian).

98 *Gotsiridze E*., Comment of Georgian Constitution, chapter 2, citizenship of Georgia, Basic Human rights and Liberties, team of the authors: *Burduli I., Gotsiridze E., Erkvania T., Zoidze B., Iroria L., Kobakhidze I., Loria A., Macharadze Z., Turava M., Firtskhalashvili A., Futkaradze I., Kantaria B., Tserreteli D., Jorbenadze S.,* Tb., 2013, 109; *Kant I.,* Establishment of Moral Metaphysics, translated by *Ramishvili L*., edited by *N. Natadze*, Tb., 2013 (In Georgian).

human nature of his or his neighbor represents the goal but never tool.[99] The general right of dignity prohibits the state to use an individual as a tool to achieve any specific goal.[100] An individual, with their goals, interests and values should be the principle goal for all state related functions.[101]

In the modern jurisdiction, the right for dignity is fundamental and constitutional. It is the supreme constitutional principle, which defines the essential spirit and general values of constitution.[102] Dignity is mother of all rights and the recognition of natural origin of human rights means the very recognition of dignity. Hence, stemming from the very existence of dignity as integrated part of human nature, an individual possesses rights for life, freedom, equality, happiness and honorable living.[103] Dignity is not measured by any specific basic rights while not any particular one but all of the unalterable rights represent the documentation of the principle of dignity; and the realization of each takes us to the (immune) right of a human being, which is dignity.[104]

The content of dignity, as of general right is different from the private legal meaning of the term, where the general subjective principle, that is self-esteem is the key.[105] By this regard, dignity means fulfillment of the rights towards society, private, moral qualities of a man and evaluations, which are based of social requirements.[106] The perception of self-esteem of a person depends on the upbringing of the one to be evaluated, her origin, faith, education, etc. Thus, for the proper understanding of dignity, it is necessary to understand the very criteria, which contributes to the proper evaluation of an individual within a given society and let her see the image she is perceived in it.[107] Private and general individual rights are distinguished. General rights comprise all those ones, which ensue from the right of personal development and dignity.[108] Dignity is central amidst the general individual rights.

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99 *Kant I.,* Establishment of Moral Metaphysics, translated by *Ramishvili L*., edited by *N. Natadze*, Tb., 2013 (In Georgian).

100 *Gelashvili I.,*The Legal Condition of an Embryo, Tb., 2012, 183 (In Georgian).

101 *Turava P.,* Basic Human Rights and Liberties, in the Framework of Privatization Process: International Standards for Protection of Basic Human Rights, edited by *Korkeli K.,* Tb., 2011, 236 (In Georgian).

102 *Kobakhidze I.*, The General Problem of Maternity Protection in the Labor Code of Georgia, complete works: International Standards of Human Rights Protection and Georgia: edited by *K. Korkelia***,** Tb., 2011, 134 (In Georgian).

103 *Gorsiridze E*., Comments from Georgian Constitution. Chapter 2, citizenship of Georgia, Basic Human Rights and Liberties, team of the authors: *Burduli I., Gotsiridze E., Erkvania T., Zoidze B., Iroria L., Kobakhidze I., Loria A., Macharadze Z., Turava M., Firtskhalashvili A., Futkaradze I., Kantaria B., Tserreteli D., Jorbenadze S.,* Tb., 2013, 107 (In Georgian).

104 *Schwabbe I*., Rulings of German Federal Constitutional Court, translated from German by *Chachanidze E.,* scientific editors: *Kublashvili K., Ninidze T., Loladze B., Eremadze K*., Tb., 2011, 112 (In Georgian).

105 *Bichia M.,* Georgian legal Code by *Vakhtang VI, edited by B. Zoidze*, Tb., 2013, 123 (In Georgian).

106 *Ninitdze T.,* Comments from Georgian Civil Code, first book, edited by *L. Chanturia*(In Georgian).

107 *Bichia M.,* Georgian Legal Code by Vakhtang VI, edited by *B. Zoidze*, Tb., 2013, 123 (In Georgian).

108 *Kereselidze D*., \the General Systemic Concepts of Private Legal Practice, Tb,. 2009, 136 (In Georgian). The right for free development maintained by constitution guarantees the realization of an individual's talent and skills, sets the contents of human dignity that is why this right is often considered as the concretization of the right for human dignity. *Bichia M*., Protection of Private Life according to Georgian Civil Code, Tb., 2012, 164-165 (In Georgian). The free development of an individual guarantees the development of her talents and skills and possibilities and in this regard, it is an integral part of a human's dignity. *Gotsiridze E*., Comment from Georgian Constitution, Chapter 2, citizenships of Georgia, Basic Human Rights and liberties, the team of the authors: *Burduli I., Gotsiridze E., Erkvania T., Zoidze B., Izoria L., Kobakhidze I., Loria A., Macharadze Z., Turava M., Pirtskhalashvili A., Futkaradze I., Kantaria B., Tsereteli D., Jorbenadze S,.* Tb., 2013, 88 (In Georgian).

There is a notion that it would be appropriate to make amendments in Georgian civil code, which recognizes only separate human related rights, so as general individual rights are properly established, which should comprise all those rights and liberties of a man, which are underlined by constitution.[109]

11. Declaring Respect for Dignity

Human dignity is unalterable, and ensuring its protection is a direct obligation of the state (first paragraph of German constitution, part one).[110] The state is responsible to respect an individual's dignity, which means respect an individual and ensure the right is properly maintained.[111] Respect for dignity means recognition of an individual capable to respect herself and stay free.

The primary goal of any well-fair state represents the preservation of liberties and dignity of its citizens. True, the state is not oblige to support them materially (distribute material goods to them), but it is obliged to create such an environment, where people will have the opportunities for self-realization.[112] There are several ways to maintain dignity: preserving physical and spiritual peace, ensuring equality among people and creating proper environment to maintain dignity for all.(It is not only the sheer obligation to guarantee people's physical survival but means establishing those minimal criteria)[113] which are necessary for the honorable life of the people, legal protection, free personal development and protection of an individual's biological and original identity.[114]

The right for dignity protection is the right to protect an individual from the state intrusion, but, on the other hand, it is an obligatory norm to oblige the state to protect various subjects from third persons and unfavorable social misdemeanor.[115]

12. Freedom is Directly Proportional to Equality

The idea of a well-fair state appears in the works of ancient scholars; however, in 17-18 centuries it acquired special strength. According to Hugo Grotius, the state is the unity of free people to elicit

[109] *Kereselidze D*., Systemic Concepts of Private Law, Tb., 2009, 137 (In Georgian).

[110] The Constitutions of Foreign Countries, edited by *V. Gonashvili,* Tb., 2006, 64 (In Georgian).

[111] *Kereselidze D., M*ost General Concepts of the Private Law, Tb., 2009, 137 (In Georgian). Each person has the right not only for the physical, spiritual or even legal existence (as a legal object), but also wear all the attribute of her specifications, dignity and respect for the reputation proper. *Papuashvili S*., The Right for those in Custody for the Immunity of their Private Lives According to the European Conventions, complete works: the European standards of Human Rights and their Impact on Georgian Legislature and Practice, edited by *K. Korkelia*, Tb., 2006, 240 (In Georgian).

[112] *Loladze B.,*Decisions of Georgian Constitutional Court with Short Comments, divergence of opinions by members of Georgian constitutional court *KetevanEremadze and BesarionZoidze* regarding the motivational part of the ruling, Batumi, 2010, 225 (In Georgian).

[113] *Demetrashvili A., Kobakhidze I.,* Constitutional Law, Tb., 2010, 83 (In Georgian).

[114] *Gotsiridze E.,* Comments from Georgian Constitution, Chapter 2, Citizenship of Georgia, Basic Human Rights and Liberties, the team of the authors: *Burduli I., Gotsiridze E., Erkvania T., Zoidze B., Izoria L., Kobakhidze I., Loria A., Macharadze Z., Turava M., Firtskhalashvili A., Futkaradze I., Kantaria B., Tsereteli D., Jorbenadze S.*, Tb., 2013, 110-112 (In Georgian).

[115] *Turava P.,* Basic Human Rights and Liberties in the Framework of the Privatization Process, complete works: International Standards for Protection of the Basic Human Rights and Georgia, edited by *K. Korkelia*, Tb., 2011, 236 (In Georgian).

communal advantage and protect individual rights and liberties.[116] The function of a well-fair state is to ensure public well-being through protection of individual rights and interests, contribute to the proper implementation of the rights endowed to the citizens. [117]

There is a notion that in modern era it would be reasonable to label the social well-fair state the one, which is also legal at the same time.[118] The legal state is based upon the idea of justice, the fundamental requirement of which is equality.[119] Justice is made valid by equality. This psychological principle reflected itself during the spread of Christianity, which meant the fact that in face of God everyone is equal. It found its representation in law, specifically through the principle of universality of law. According to Montesquieu, people when put in normal, natural conditions, come to equality but in a society they are not able to preserve this condition and the principle of equality is therefore maintained by law.[120]

The idea of freedom loses its sense if does not have the same contents and availability for all. Here not personal perception of freedom is meant, but rather the legal dimension of the one – the guaranteed right of people to enjoy their rights and liberties. The legal state tries to consider the interests of its people (citizens) as well as their possibilities and put the limit to inequality.[121]

According to paragraph 14 of Georgian constitution, each person is free and equal before the law. Constitution guarantees only legal but not factual establishment of equality, while the reasonable goal of the state cannot be the full equalization of existing factual differences.[122] The equality principle implies the right recognition of all those rights and principles as well as protection, which already exist in equality and have adequate approach to determined issues of the law.[123] The principle of equality is disrupted when one group of people is being differently treated compared to the other one regardless the fact that there is not the difference between them, which needs and justifies unequal approach.

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116 The viewpoint is indicated: *Kantaria B*., Comment from Georgian Constitution, chapter 2, Citizenship of Georgia, Basic Human Rights and Liberties, the team of the authors: *Burduli I., Gotsiridze E., Erkvania T., Zoidze B., Izoria L., Kobakhidze I., Loria A., Macharadze Z., Turava M., Firtskhalashvili A., Futkaradze I., Kantaria B., Tsereteli D., Jorbenadze S.*, Tb., 2013, 384 (In Georgian).

117 *Chachava S*., The Recommendations for the Termination of the Labor Code related Time-limited or Unlimited Contracts, complete works: Labor code, edited by *V. Zaalishvili*, coordinator *G. Amiranashvili*, Tb., 2011, 35 (In Georgian).

118 *Huber,* The Viewpoint is Indicated: *Kantaria B.,* Comment from Georgian constitution, chapter 2, Citizenship of Georgia, Basic Human Rights and Liberties, the team of the authors: *Burduli I., Gotsiridze E., Erkvania T., Zoidze B., Izoria L., Kobakhidze I., Loria A., Macharadze Z., Turava M., Firtskhalashvili A., Futkaradze I., Kantaria B., Tsereteli D., Jorbenadze S.,* Tb., 2013, 390 (In Georgian).

119 *Izoria L.*, Comments from Georgian Constitution (Basic Human Rights and Liberties), the team of the authors: *Izoria L., Korkelia K., Kublashvili K., Khubua G.*, Tb., 2005, 23 (In Georgian).

120 *Montesquieu C. L*, Spirits of Laws, translated from French by *D. Labuchidze*, Tb., 1994 (In Georgian).

121 *Eremadze K.,* Balancing of Interests in Democratic Society, Tb., 2013, 8 (In Georgian).

122 *Izoria L.*, Comments from Georgian Constitution (Basic Human Rights and Liberties), the team of authors: *L. Izoria*, *K. Korkelia, K. Kulashvili, G. Khubua*, Tb., 2005, 24 (In Georgian).

123 The ruling of Georgian Constitutional Court 7.11.2003. Indicated: *Kereselidze T.,* Before Designing a Labor Contract, the Consequences of the Unlawful (Discriminatory) Questions Asked by Employer to the Job candidate. Complete works:Llabor Code, Vol.1, edited by *V. Zaalishvili*, coordinator: *G. Amiranashvili*, Tb., 2011, 72(In Georgian).

13. The Concept of Social Rights in the Context of Labor Rights for Ensuring Freedom, Equality and Avoiding or Eliminating Discrimination

Georgian constitution develops the idea of a social well-fair state. The principle of such a state declared in the paragraph 31 occurs from the fundamental ideas of the constitutional preamble, which means that establishing democratic order and economic freedoms.[124] The government of a social well-fair state grounds the principle of such by the general law. Social rights are different from other rights (civil, political) by their nature. Specifically, they are mostly positivistic-defencive rights, which oblige the government to protect individuals and contribute to creation of the appropriate envornment for their living and activities.[125] That is if civil and political rights imply freedom from the state, social rights (conversely) require assistance from the state and ensuring proper protection of a person.[126]

Paragraph 30 of Georgian constitution guarantees the feedom of labor, which is another component of labor right. Labor is everywhere, where human potential and force is used for social existance (Endeman)[127] Labor almost always means fulfillment of those activities, which satisfy requirements and offers services to society or groups. Thus, it is acceptable and subject to reward.[128] Only activities which contribute to creation of material and spiricual founsation for human life, are considered to be labor. On the one hand, labor is the means for personal development, on the other – personal self realization.[129] As each person can develop their identities through labor, achieve respect in wider society, she can also be the subject of dignitary element. The essence of social state means the liability from the state to guarantee the constitutional rights of labor, which on its own is the foundation of dignitary existance of an individual.

The basics of the labor relations is the labor contract, according to which one person, who takes upon the responsibility to fulfill the work, is considered as part of another's work and his workforce becomes part of another's labor element. On the other hand, the other party takes responsibilty to award the one with the salary for the work fulfillment, which is the income source for the one as he lives on the income received.[130] The propensity of labor agreement, as of agreement of private legal prac-

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124 *Kantaria B.*, Comments from Georgian Constitutions, Chapter 2, Citizenship of Georgia, Basic Human Rights and Liberties, the team of authors*: Burdiuli I., Gotsiridze E., Erkvania T., Zoidze B., Izoria L., Kobakhidze I., Loria A., Macharadze Z., Turava M., Pirtskhalaishvili A., Futkaradze I., Kantaria B., Tsereteli D., Jorbenadze S.,* Tb., 2013, 389 (In Georgian).

125 *DemetraSvili A., KobaxidzeI.,*Constitutional Law, Tb., 2010, 77-78 (In Georgian).

126 *Canava l.,* Socio-Economical Rights according to Constitution of 1921, collection: the Democratic Republic of Georgia and the Constitution of 1921. Editor *D. Gegenava*, Tb., 2013, 61 (In Georgian).

127 Literary review: Science of labor agreements, "Vestnik Grazhdanskogo Prava" magazine, edited by. *M. M. Binaverom*, № 5, 1913, 100 (In Russian).

128 *Tsanava L.,* Socio-economic Rights According to the Constitution of 1921, collection of: the Democratic Republic of Georgia and the Constitution of 1921. Editor: *D. Gegenava*, Tb., 2013, 61 (In Georgian).

129 The Georgian Constitutional Court in 2007 2.10 2/2-389 decision, indicated *Shvelidze G.*, Of the Labor Code of the Employee's Legal Status Characteristics. Collection: Labour Law, Vol. 1, editor: *V. Zaalishvili*, coordinator: *G. Amiranashvili,* Tb., 2011, 123 (In Georgian).

130 *L.S. Tal.,* The Opinion is Indicated: *Gordon V.M.,* The Next Questions in Literature of Civil Law, a Literary Review: to studying employment contracts, "The messenger of civil law" editor: *M.M. Vinaverom,*СПБ, №

tice,[131] is the circumstance according to which after the agreement is signed, the principle of equality of the parties change because the employee[132] turns under the will of an emplpoyer, becomes dependent to the ones' orders and conditions determined by the contract[133] (to be more refined in case of long-run business relationship). The elemets of labor related subordination determines the intervening of the state to balance the interests and legal rights of the parties by performic specific legal actions from the state.[134] First of all, it means providing the guarantees for party interest protection by constitutional and labor code, which is the foundation of economic development of the country. The equality principle of in face of the internationally recognized law obliges Georgian state to create the legal acts for Georgian society, which ensures the participants of the labor to be subject of equal opportunities for the start.[135]

It would be inacceptable to appeal to discrimination of any form on the labor market. Discrimination is unacceptable, unjust treatment of people and in its essence it means violation of equality principle.[136] In the international act of international and civil rights, the term "discrimination" means differentiation, limitation or giving preference for some quality, the aim or side effect of which is the cancellation or aggrevation of the principle according to which all the people are empowered to enjoy the right of equality and liberties for all.[137] According to the labor code of Georgia, discrimination means creating such conditions for an individual, which directly or indirectly aggrevates her condition in comparison

5, 1913. Labor relations imply all the ones, where the organizational structure of the labor incurred for labor conditions in favor of one person, then another person in return for payment. *E. Qardava*, The labor and the Labor Contract, the interrelation issue, the journal "Law Journal" № 2, 2009, 211 (In Georgian).Labor contract between private law subjects, the agreement signed by an employee of the employer for the performance of work in exchange for payment of a fee, *N. Kvantaliani*, The law-court practice of labor disputes, collection: Labor Law, 1st volume, editor: *V. Zaalishvili*, coordinator: *G. Amiranashvili*, Tb., 2011, 68 (In Georgian).

131 Please contemplate *Takashvili S.* and *Gadrani T.,* Private-Law Nature of the Employment Contract labor Contract in the Legal Aspects of Collision in Georgian Private International Law, Professor *Zurab Akhvlediani's* 80th Anniversary Collection, editor: *Z. Dzlierishvili, S. Qavtaradze*, Tb., 2013 (In Georgian).

132 Prior to 2006, the Labor Code service provider of the job clearly referred to as a "worker". The Georgian Labor Code of the project originally envisaged the term "mercenaries", however, ultimately, in labor relations, service provider of the job listed as "employed*", Shudra T*., the employer's liability for damages caused by an employee, Collection: Labor Law, 2nd volume, editor: *B. Zoidze*, coordinator: *G. Amiranashvili*, Tb., 2013, 224 (In Georgian).

133 *Adeishvili L., Kereselidze D.,* The Draft of the Georgian Labor Code and Employment law, Some of the Basic Principles of the Continental countries, the journal "Georgian Law Review", № 1, 2003, 10. Indicated: *Dzimistarashvili U.,*Among Administrative Bodies and the Employed Peculiarities of the Regulation of Labor Relations, Collection: Labor Law, Vol. 2, editor: *B. Zoidze*, coordinator: *G. Amiranashvili*, Tb., 2013, 33 (In Georgian).

134 *Qardava E.,* The Issue of the Relationship between Labor and the Labor Contract, "Law Journal", №2, 2009, 219 (In Georgian).

135 *Kandashvili I.,* The Law Equal Rights for Guarantee Analysis Based on the Amendments to the Labor Code, the magazine "Lawyer", №2, 2013, 52 (In Georgian).

136 *Shvelidze Z*., About Employment Discrimination Dispute Resolution Characteristics of a Supreme Court ruling of 19.10.2010 based on the AS-549-517-2010 verdict, a collection of Labor Law, Vol. 2, editor: *B. Zoidze*, coordinator: *G. Amiranashvili*, Tb., 2012, 11 (In Georgian).

137 The Prohibition of Discrimination in Labor Relations, Collection: Labor Law, Vol. 1, editor: *V. Zaalishvili*, coordinator: *G. Amiranashvili*, Tb., 2011, 151 (In Georgian).

to other individuals in the same situation.[138]Another important form of labor related discrimination is discrimination of both direct and indirect character, which aims at creating the circumstance whcih would be intimidating, humiliating, afflicting or challenging the dignity of an individual.[139] Discrimination is thus unacceptable including the salary issue as well. Any salary amount, which is due to be paied, should be transacted according to the work of an employee and be element of the labor concepts.[140] All those who work must have the opportunity to receive just and appropriate wages, what conforms to their dignity.[141] Connection between equal pay and labor rights to maintain the proper standards of living should not be violated, while the last one is the right on its own, which is integral part of dignitary life of an individual, the foundation of the whole modern system of human rights.

Therefore, the state is responsible to care about alleviation of social contrasts. Once economic conditions are lost, individuals' self-esteem can lower as well and serious harm can be caused. The very feeling that a person is not in demand and especially in society where a person's value depends on her abilities to perform her professional duties, might lead the one to conscious or mental trauma.[142] Thus, the idea according to which the state is not liable to take upon responsibilities to regulate the process of citizens employement is not rights: Georgian constitution in paragraph 30 specified (concerning one case) that it was the one where the freedom of labor was fully interpreted (the person's right to manage her abilities regarding the work to be fulfilled or choose appropriate field of activity). In this regard, the court recognized labor relations as equal to the phenomenon of the contract related ones thus embodying with the autonomy of private principle.[143]

Constitutional freedom is the form of expressing the right of various kind and any kinds of freedom is the element of a specific right. Thus, there is no freedom without a legal content.[144]

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138 *Shvelidze Z.,* About Employment Discrimination Dispute Resolution Characteristics of a Supreme Court ruling of 19.10.2010 based on the AS-549-517-2010 verdict, a collection of Labor Law, Vol. 2, editor: *B. Zoidze*, coordinator: *G. Amiranashvili*, Tb., 2013, 12 (In Georgian).

139 *Shvelidze Z.,* About Employment Discrimination Dispute Resolution Characteristics of a Supreme Court ruling of 19.10.2010 based on the AS-549-517-2010 verdict, a collection of Labor Law, Vol. 2, editor: *B. Zoidze*, coordinator: *G. Amiranashvili*, Tb., 2013, 14 (In Georgian).

140 Instead of work adopted a broad definition of cash includes salary, bonus, and all other forms of payment envisaged by an employer to an employee as wages for labor, *Shvelidze Z.,* The Labor Code of the Employee's Legal Status Characteristics, collection: Labour Law, Vol. 1, editor: *V. Zaalishvili*, coordinator: *G. Amiranashvili*, Tb., 2011, 117 (In Georgian).

141 *Schwabe I.,* The German Federal Constitutional Court Decisions, translated from the German language by *E. Chachanidze*, scientific editors: *K. KublaSvili, T. Ninidze, B. Loladze, K. Eremadze,* Tb., 2011, 410 (In Georgian).

142 *Schwabe I.,*The German Federal Constitutional Court Decisions, translated from the German language by *E. Chachanidze*, Scientific editors: *K. KublaSvili, T. Ninidze, B. Loladze, K. Eremadze,* Tb., 2011, 315-316 (In Georgian).

143 Decisions of Georgian Constitutional Court, 1996-1997, Tb., 57-58 (In Georgian). Pointed: *Zoidze B.,* the Essence of the Labor Law in the Practice of Georgian Constitutional Practice, the complete works: The Labor-Law, first volume, edited by *V. Zaalishvili*, Coordinator *G. Amiranashvili*, Tb., 2011, 4 (In Georgian).

144 *Zoidze B.,* The Essence of the Labor Law in the Practice of Georgian Constitutional Practice, the complete works: The Labor Law, Vol. 1, edited by *V. Zaalishvili*, coordinator *G. Amiranashvili*, Tb., 2011, 4 (In Georgian).

14. The Right is Perceived through its Protection

”The quality of sensing the right is already an action and if it lacks the action, then it is void of power and turns rudimental. The ability to violate the right and power of action is the measurement of the right.”[145]

The protected (secured) right guarantees the moral conditions of itself.[146] Human rights are not ideology, nor are they system of views so as importan impact on social or human life is to be performed. Thus, they should grow into the action while recognition of human rights and the respect proper are integretated with the means to protect them. [147]

Without the guarantee for the basic rights, the person is taken away the possibility to arrange his or her life according to their views and thus she or he becomes exposed to exterior forces. The maintenance of the essence for basic rights serves the fact that the person is to remain as an individual and carrior of the dignity. The guarantees for the basic rights depend on the legal situation of the country while any rights indirectly represents the value determined by the legal order of the society.[148] At the same time, the recognition of any right would be pointless without the possibility to equally realize it as such.[149]

The European Convention of Basic Human rights is one of the most important international acts, which protects the fundamental rights and values of a person and at the same time determines the mechanisms for the proper applications of these values through the means of the European court.[150] According to the first paragraph of the conception, the states should ensure the protection of rights and liberties outlined by the Convention. Thus. the states, on the one hand, have the liability to refrain from the violation of the principle outlined in the document (negative right)[151] and on the other hand, they are liable to protect them so as the realization of the rights for the subject proper is not limited or violated by other individuals[152] (positive right). It needs to be noted that in the modern world the liability for the state to act more energetically to institutionally guarantee constitutional rights is more urgent along

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145 *Yering R*., Fighting for the Rights, The Forward and Translation from the Russian edition *Z. Nanobashvili*, editor: *Z. Zoidze*, Tb., 2000, 69 (In Georgian).

146 *Yering R*., Fighting for the Rights, The Forward and Translation from the Russian edition *Z. Nanobashvili*, editor: *Z. Zoidze*, Tb., 2000, 58 (In Georgian).

147 *Tulkens F.*, The European Court of Human Rights is fifty years old. Recent trends in the Court’s jurisprudence, the journal “Constitutional Law Review,” № 3, 2010, 4. Only Recognized by states the peculiarities of human rights, in the legal acts to strengthen does not mean their defence and reliability, The recognition of the human rights by the state does not automatically mean offering the guarantees of their maintenance of protection, *Chanturia L.,* Protection of Real Estate, Tb., 2001, 76 (In Georgian).

148 *Zoidze B*., The Principle of Maintenance of the Essence of Basic Rights, “Constitutional Review” magazine, N5, 2012, 144 (In Georgian).

149 *Eremadze K.,* The Balancing of the Interests in the Democratic society, Tb., 2013, 166 (In Georgian).

150 The Convention was signed in 1950, in Rome, in force since 1953, *Bokhashvili B.*, Georgian legislation with the European Convention on Human Rights from Article V, collection: European Standards and their impact on Georgian Human Rights Law and Practice, editor: *K. Korkelia*, Tb., 2006, 25 (In Georgian).

151 *Korkelia K.*, *Kurdadze I.,* The International Human Rights Law according to the European Convention of Human Rights, Tb., 2004, 14 (In Georgian).

152 *Menabde V.,* Disability Rights-Universal Challenge, collection: International Human Rights Standards and Georgia, editor: *K. Korkelia*, Tb., 2011, 153 (In Georgian).

with the traditional postulate of the government (state) and individual relationship in the frameworkd of individual freedom (negative liability).[153]

The aim of Georgian citizens is the embodiment of constitutional law which is the cause of existance of such a state existence, which first serves the embodiment of human rights, their protection and achievement of social good[154] and to achieving this goal, it guarantees the proper application[155] of the just laws (just meaning elaborating the mechanism of bias-free judgment and legal techniques applicable to all).[156]

[153] *Schwabe I.,* The German Federal Constitutional Court decisions, translated from the German language by *E. Chachanidze*, scientific editors: *K. KublaSvili, T. Ninidze, B. Loladze, K. Eremadze,* Tb., 2011, 209 (In Georgian).

[154] *Rassel,* The Opinion Indicated: *Kalinina E.V.*, *Romanovskaya V.B.,* The Ancient History of Constitutionalism: Bible experience. "Jurisprudence", № 3, 2011,181.

[155] *Gotsiridze E.,* Commentaries of the Georgian Constitution, Chapter 2, Georgian Citizenship, Human Rights and Basic Features, the Team of Authors: *Burduli I., Gotsiridze E., Erkvania T., Zoidze B., Irozia L., Kobakhidze I., Loria A., Macharadze Z., Turava M., Pirtskhalashvili A., Putkaradze I., Kantaria B., Tsereteli D., Jorbenadze S.,* Tb., 2013, 9 (In Georgian).

[156] *Radbrus G.*, Five Minutes of the Philosophy of Law translated by *D. Gegenava*, Journal ,,Review", № 1-2 (3-4), 2012, 248 (In Georgian).

Natia Chitashvili*

Adaptation of the Agreement to Changed Circumstances, as Legal Outcome of Hardship

1. Introduction

Any society establishes certain order of wealth and power. The contracts are of central significance in formation of the civil turnover. Hence, the contract law is the determinant of the order of wealth and power through regulation of civil turnover.[1] In the most societies the market relations are the most important mechanisms for production and distribution of the property.[2] Contract law establishes fundamental provisions for regulation of the market relations. Thus, stability of civil turnover and stability of commercial relations greatly depend on flexibility of the norms regulating fulfillment of the obligations emerged as a result of changed circumstances.

Legitimate contractual interest of fulfillment of the obligation is legally protected special asset in any law system. The principle of contract supremacy – *Pacta sunt servanda*[3] – is the fundamental provision of all system of laws,[4] it is the decisive principle of the contract law,[5] moral imperative,[6]

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1 *Collins H.,* The Law of Contract, Cambridge University Press, New York, 2003, 10-11.

2 Ibid, 1.

3 See *Surhone L.M., Timpledon M.T., Marseken S.F.,* Pacta Sunt Servanda: Brocard, Civil Law, Contract, Clause, Law, Good Faith, Peremptory Norm, Clausula Rebus Sic Stantibus, Betascript Publishers, 2010, elsewhere; *Houtte H.V.,*Changed Circumstances and Pacta Sunt Servanda: *Gaillard (ed.)*, Transnational Rules in International Commercial Arbitration (ICC Publ. Nr. 480, 4), Paris, 1993, elsewhere, <http://tldb. uni-koeln.de/TLDB.html>, [24.06.2014]; *Zimmermann R.,*The Law of Obligations, Roman Foundations of the Civilian Tradition, Oxford University Press, 1996, 576-581; *Sharp M.P.,* Pacta Sunt Servanda, Columbia Law Review, Vol. 41, 1941, <http://heinonline.org/HOL/Page?handle=hein.journals/clr41&div=55&gsent=1&collection=journals>, [24.06.2014]; *Draetta U., Lake R. B., Nanda V. P.,* Breach and Adaptation on International Contracts, An Introduction to Lex Mercatoria, Butterworth Legal Publishers, 1992, 178.

4 Basic principle of the continental law – *Pacta sunt servanda* – corresponds to the *Doctrine of Consideration* in Common Law. See *Hyland R.,* Pacta Sunt Servanda, A Meditation, Virginia Journal of International Law, Vol. 34, 1994, <http://heinonline.org/HOL/Print?collection=journals&handle=hein.journals/vajint34&id=417>, [24.06.2014].

5 *Candelhard R.,* Performace in Kind or Compensation of Damages: International Consensus? Anniversary Collection of Works: "Sergo Jorbenadze – 70", Tb., 1996, 103 (In Georgian); *Houtte H.V.,* Changed Circumstances and Pacta Sunt Servanda, in: *Gaillard E. (ed.),* Transnational Rules in International Commercial Arbitration (ICC Publ. Nr. 480, 4), Paris, 1993, 105, 107, 108, <http://tldb.uni-koeln.de/TLDB.html>, [24.06.2014]; *Liu Ch., Newman M.S. (ed.),* Remedies in International Sales, Perspectives from SISG, UNIDROIT Principles and PECL, JurisNet, LLC, Huntington, New York, 2007, 653; *Edlund H.E.,* Imbalance in Long-Term Commercial Contracts, European Review of Contract Law (ERCL), Vol. 5, Issue 4, 2009, 431.

6 *Ciematniece I.,* Contract Renegotiation and Adaptation, Concept of Contract Renegotiation and Adaptation in International Commercial Law Contracts, Lambert Academic Publishing, Saarbrücken, 2010, 8.

expression of the natural justice,[7] imperatively establishing obligatory nature of compliance with the contract terms and conditions for ensuring stability of civil turnover, contractual equilibrium[8] and legal clarity.[9] It is recognized as the transnational principle[10] of private law and cornerstone of international trade law.[11]

Rise of the changed circumstances in the contractual relations is a risk accompanying contemporary civil turnover and in such conditions, unlimited application of the principle of contract supremacy[12] results in undermining of the contractual equilibrium and justice[13] and contradicts with the requirements of good faithand fair exchange of the goods characteristic for civil turnover.[14]

The national legal systems and unified international private law recognize that emergence of the changed circumstances in contractual relations establishes the concepts of force majeure (*vis major* in Roman law) and fulfillment hardship – two fundamental conceptions[15] with the accompanying legal

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7 *Mascow D.,* Hardship and Force Majeure, The American Journal of Comparative Law, Vol. 40, 1992, 657-658, <http://www.heinonline.org/HOL/PDF?handle=hein.journals/amcomp40&collection=journals&section=36&id=667&print=section&sectioncount=1&ext=.pdf>, cited in: *Liu Ch., Newman M.S. (ed.),* Remedies in International Sales, Perspective from CISG, UNIDROIT Principles and PECL, JurisNet, LLC, New York, 2007, 653. See also, *Ciematniece I.,* Contract Renegotiation and Adaptation, Concept of Contract Renegotiation and Adaptation in International Commercial Law Contracts, Lambert Academic Publishing, Saarbrücken, 2010, 8.

8 Any contract establishes certain balance between its parties, with respect of distribution of the benefits and contractual risks. Hence, if one of the parties suffers material losses as a result of the contract, it receives the benefits of the similar, counter value. See *Roberts Th.E.,* Commercial Impossibility and Frustration of Purpose: A Critical Analysis, Can. J.L. & Jurisprudence, Vol. 16, 2003, 137, <http://heinonline.org/HOL/Page?handle=hein.journals/caljp16&collection=journals&page=129>, [24.06.2014].

9 *Puelinckxin A.H.,* Frustration, Hardship, Force Majeure, Imprévision, Wegfall der Geschäftsgrundlage, Unmöglichkeit, Changed Circumstances, 3 Journal of International Arbitration, No. 2, 1986, 47, <http://tldb.uni-koeln.de/TLDB.html>, [24.06.2014].

10 *Goldman B.,* The Applicable Law: General Principles of Law - the Lex Mercatoria: Lew ed., Contemporary Problems in International Arbitration, London, 1986, 125, <http://tldb.uni-koeln.de/TLDB.html>, [24.06.2014].

11 *Liu Ch.,* Changed Contract Circumstances, 2nd ed., 2005, <http://www.cisg.law.pace.edu/cisg/biblio/liu5.html>, [24.06.2014].

12 *Pacta Sunt Servarda* See *Surhone L.M., Timpledon M.T., Marseken S. F.,* Pacta Sunt Servanda: Brocard, Civil Law, Contract, Clause, Law, Good Faith, Peremptory Norm, Clausula Rebus Sic Stantibus, Betascript Publishers, 2010, elsewhere; *Houtte H.V.,*Changed Circumstances and Pacta Sunt Servanda: *Gaillard (ed.)*, Transnational Rules in International Commercial Arbitration (ICC Publ. Nr. 480, 4), Paris, 1993, elsewhere, <http://tldb.uni-koeln.de/TLDB.html>, [24.06.2014]; *Zimmermann R.,*The Law of Obligations, Roman Foundations of the Civilian Tradition, Oxford University Press, 1996, 576-581;*Sharp M.P.,* Pacta Sunt Servanda, Columbia Law Review, Vol. 41, 1941, elsewhere,<http://heinonline.org/HOL/Page?handle=hein.journals/clr41&div=55&gsent=1&collection=journals>, [24.06.2014]; *Draetta U., Lake R. B., Nanda V. P.,* Breach and Adaptation on International Contracts, An Introduction to Lex Mercatoria, Butterworth Legal Publishers, 1992, 178.

13 *Baranauskas E., Zapolskis P.,* The Effect of Change in Circumstances on the Performance of Contract, Mykolas Romeris University, 4 (118), 2009, 198, <http://www.mruni.eu/lt/mokslo_darbai/jurisprudencija/archyvas/dwn.php?id=226657>, [24.06.2014]. See also Decision of 6 July 2010 of the Department of Civil Cases of Supreme Court of Georgia, on case No: AS-7-6-2010 (In Georgian).

14 Decision of 25 November 2008 of the Department of Civil, Entrepreneurship and Bankruptcy Cases of Supreme Court of Georgia on case No: AS-466-707-08 (In Georgian).

15 *Lando O.,*Salient Features of the Principles of European Contract Law: A Comparison with the UCC, Pace International Law Review, Vol. 13, Issue 2, 2001, 27, <http://digitalcommons.pace.edu/pilr/vol13/iss2/4/>, [24.06.2014]; *Horn N.,* Changes in Circumstances and the Revision of Contracts in some European Laws and

outcomes. Hardship exists where impact of changed circumstances emerged after concluding of the contract[16] unexpectedly imposes unreasonably and unexpected heavy burden on the obliged party.[17] Hardship implies extreme hardship of performance of contractual obligation, which does not exclude possibility of objective fulfillment[18], and in such case, the primary legal mean for protection of the parties' interests is adaptation of the contract. Force majeure (non-faulty impossibility of fulfillment) results from different legal preconditions and its accompanying outcome is exemption from performance of the obligation.[19] Though according to the European Court of Justice[20] the concept of force majeure should not be limited to the concept of absolute impossibility of performance, rather it includes the unusual circumstances emerged beyond the party's control and irrespective of reasonable prudence and all relevant care could not be eliminated without extremely severe costs.[21]

Concepts of force majeure and fulfillment hardship have functionally different purposes: hardship provides basis for adaptation of the contractto the changed circumstances and performance of the contract remains the purpose of the parties.[22] Hardship does not unconditionally cause termination of the contract, rather it induces the requirement of modification of the contract terms and conditions and right to contract adaptation.[23] Parties, as the best judges of their case, should conduct contract negotiations based on the principle of good faith and if the negotiations can not have the goal of saving of the contract as the economic balance is substantially broken,[24] than terminate the con-

International Law in: *Horn N., (ed.)*, Adaptation and Renegotiation of Contracts in International Trade and Finance, Antwerp, Boston, London, Frankfurt a. M. 1985, 16, <http://translex.uni-koeln.de/113700/highlight_horn_changes_circumstances_and_the_revision_contracts_some_european_laws_and_international_law_horn_adaptation_and_renegotiation_contracts_inter_not_national_trade_and_finance/>, [24.06.2014]; *Ciematniece I.,* Contract Renegotiation and Adaptation, Concept of Contract Renegotiation and Adaptation in International Commercial Law Contracts, Lambert Academic Publishing, Saarbrücken, 2010, 9, 13.

16 *Yorio E., Thel S.,* Contract Enforcement, 2nd ed., Wolters Kluwer Law and Business, Aspen Publishers, 2011, 5-6.

17 *Sharpe R. J.,* Injunctions and Specific performance, 2nd ed., 1992, 10-10, 10-11, cited in: *Yorio E., Thel S.,* Contract Enforcement, 2nd ed., Wolters Kluwer Law and Business, Aspen Publishers, 2011, 5-6.

18 *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, 261.

19 *Rösler H.,* Hardship in German Codified Private Law – In Comparative Perspective to English, French and International Contract Law, Kluwer Law International BV/Printed in Netherlands, Eur. Rev. of Prv. L., Vol. 15, No. 4, 2007, 483, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1154004>, [24.06.2014].

20 European Court of Justice (ECJ).

21 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].

22 *Rimke J.,* Force Majeure and Hardship: Application in International Trade Practice with Specific Regard to the CISG and the UNIDROIT Principles of International Commercial Contracts, Reproduced with permission of Pace Review of the Convention on Contracts for the International Sale of Goods, Kluwer, 1999-2000, 200, <http://www.cisg.law.pace.edu/cisg/biblio/rimke.html>, [24.06.2014].

23 For contract adjustment to changed circumstances and parties' secondary rights. See *Schwenzer I.,* Force Majeure and Hardship in International Sales Contracts, VUWLR, Vol. 39, 2008, 721-725, <http://www.austlii.edu.au/nz/journals/VUWLawRw/2008/39.pdf>, [24.06.2014].

24 *Flechtner M.H.,*Issues Relating to Exemption ("Force Majeure") Under Article 79 of the United Nations Convention on Contracts for the International Sale of Goods ("CISG"), Legal Studies Research Paper Series, Pittsburgh, Pennsylvania, 2008, 8, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1118124>, [24.06.2014].

tract.[25] While force majeure is discussed in the context of non-fulfillment of the obligations, and is considered as the basis for suspension or termination of the contract.[26]

For clarification of the topic of the binding force of the contract, this work researches adjustment of the agreement to the changed circumstances, as the mostly applied means of legal protection in case of hardship and its legal outcome.

2. Hardship as a General Contract Principle and Precondition for Adjustment of the Contract to the Changed Circumstances

Anylegal order provides formation of the system of the grounds excluding the responsibility of the liable party.[27] Hence, in both, Continental and Anglo-American law, increasing attempts are made for unification ofthe concept of impediment of contract performance.[28]

The concept of hardship includes the substantial legal characteristics of this conception established by the national legal systems and as a result the conception became the general contractual principle.[29]

General contractual principles as unified and generalized legal conceptions[30], are applied in the sense of universally, internationally recognized regulations. General contract principles could be regarded as an effective mechanism for supplementing of the incomplete and open norms of the state internal legislation, as well as interpretation and completing of the contract terms and conditions. Hence, this issue is of great significance in doctrine and practical aspects.

In Georgian law, the problems related to the changed circumstances are not regulated by the institutes with the names of *force majeure* and *hardship*. Though the legislation provides for regulation of

25 *Lando O.,* Salient Features of the Principles of European Contract Law: A Comparison with the UCC, Reproduced with permission of 13 Pace International Law Review, 2001, 367, <http://www.cisg.law.pace.edu/cisg/biblio/lando.html#3iii>, [24.06.2014]. For legal outcomes of hardship see *Perillo J.,* Force Majeure and Hardship under the UNIDROIT Principles of International Commercial Contracts, Contratación internacional. Comentarios a los Principios sobre los Contratos Comerciales Internacionales del Unidroit, Universidad Nacional Autónoma de México - Universidad Panamericana, 1998, 130-132, <http://www.cisg.law.pace.edu/cisg/biblio/perillo3.html?>, [24.06.2014].

26 *Rimke J.,* Force Majeure and Hardship: Application in International Trade Practice with Specific Regard to the CISG and the UNIDROIT Principles of International Commercial Contracts, Reproduced with permission of Pace Review of the Convention on Contracts for the International Sale of Goods, Kluwer, 1999-2000, 201, <http://www.cisg.law.pace.edu/cisg/biblio/rimke.html>, [24.06.2014].

27 *Schwenzer I.,* Force Majeure and Hardship in International Sales Contracts, VUWLR, Vol. 39, 2008, 710, <www.austlii.edu.au/nz/journals/VUWLawRw/2008/39.pdf>, [24.06.2014].

28 *Shakiashvili B.*, Impossibility of Performance, dissertation work for award of the scientific degree of the Candidate of the Legal Sciences, Tb., 1997, 6 (In Georgian).

29 See *Brunner Ch.*, Force Majeure and Hardship under General Contract Principles, Exemption for Non-performance in International Arbitration, Kluwer Law International BV, The Netherlands, 2009, 109 with further references: *Magnus U.,* Force Majeure and the CISG, In The International Sale of Goods Revisited, Edited by *Sarcevic* and *Volken,* The Hague, 2001, 8; *Kessedjian C.,*Competing Approaches to Force Majeure and Hardship, International Review of Law and Economics, 25, 2005, 430, <www.cisg.law.pace.edu/cisg/biblio/kessedjian.html>, [24.06.2014]; *Barry N.*, Force Majeure and Frustration, American Journal of Comparative Law, 27, 1979, 231, <http://www.heinonline.org/HOL/PDF?handle=hein.journals/amcomp27&collection=journals&section=22&id=245&print=section&sectioncount=1&ext=.pdf>, [24.06.2014].

30 *Ciematniece I.,* Contract Renegotiation and Adaptation, Concept of Contract Renegotiation and Adaptation in International Commercial Law Contracts, Lambert Academic Publishing, Saarbrücken, 2010, 31.

the substantially similar conceptions under the names of insuperable force, non-malicious impossibility of fulfillment and changed circumstances.

Similarly, there is no conception of force majeure in German law, though German civil legislation establishes the most general principle linking existence of fault, or, at least, negligence, from the side of the liable party with the contractual responsibility, if the strict responsibility (guarantee) is not agreed upon[31] or is not the consequence of the obligation substance.[32] Hence, according to German law, responsibility for non-fulfillment of the obligation is excluded where the impediment is beyond the parties' control, where the obstacle is not related to even negligence to fulfillment of the obligations.[33] This regulation of the contractual responsibility corresponds to the legal outcomes of force majeure.

Thus, though German law does not include the conception of force majeure, it provides achievement of identical legal outcome through the other legal institute with different name. In particular, non-malicious non-fulfillment results in the legal outcomes of force majeure – exemption of the obligation of fulfillment excluding the right of claiming compensation of losses. As for the conception of hardship, in German law it is provided with the name of*economic impossibility*.

Regarding all abovementioned for the expression of the conception of the extreme hardship of fulfillment of the contractual obligation, the term *Hardship* will be used in this study.

3. Adjustment of the Contract to Changed Circumstances as a Mechanism for Ensuring Performance and Contractual Justice

Regulating of the issue of fulfillment of the obligations in case of changed circumstances through contract adaptation, is in the best interests of the parties and generally, the society, if formal adherence to the principle of binding force of the contract prevents realization of the abovementioned best interests.[34] In adjusting of the contract to changed circumstances the "contract stability"[35] and "contract flexibility"[36] must be balanced.

In the conditions of complicated civil turnover the long-term commercial contracts became particularly sensitive to the changed circumstances arisen in the contractual relations.[37]

Adjustment of the contract to the changed circumstances is regarded as a legal outcome of hardship.[38] Adaptation of the contract, usually, in long-term contractual relations, is used in case of

31 *Horn N., Kötz H., Leser H.G.,* German Private and Commercial Law: An Introduction, 1982, 93, 112.

32 German Civil Code - Bürgerliches Gesetzbuch, Bundesministerium der Justiz, Juris GmbH, Saarbrücken, 2005, §276 I.

33 *Horn N., Kötz H., Leser H.G.,* German Private and Commercial Law: An Introduction, 1982, 93, 112.

34 *Ciematniece I.,* Contract Renegotiation and Adaptation, Concept of Contract Renegotiation and Adaptation in International Commercial Law Contracts, Lambert Academic Publishing, Saarbrücken, 2010, 29.

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

36 Ibid.

37 *Ciematniece I.,* Contract Renegotiation and Adaptation, Concept of Contract Renegotiation and Adaptation in International Commercial Law Contracts, Lambert Academic Publishing, Saarbrücken, 2010, 5.

38 In German Law, *interference with the basis of the contract* derives the right to contract adaptation as an automatic legal outcome. See BGH, LM §242 (ba) BGB Nr. 38; BGH NJW 1972, 152. Italian legal doctrine shares this approach. See also: *Rimke J.,* Force Majeure and Hardship: Application in International Trade Practice with Specific Regard to the CISG and the UNIDROIT Principles of International Commercial Contracts, Pace Review of the Convention on Contracts for the International Sale of Goods, Kluwer, 1999-2000, 196-197, <http://www.cisg.law.pace.edu/cisg/biblio/rimke.html#7>, [24.06.2014].

emergence of imbalance between the economic interests of the parties[39] derived from changed circumstances, regarding maintenance of economic interests[40] to ensure future relations.[41]

According to the principle of contract supremacy, revision of the contract could be regarded as a danger to formal justice. Though invariability and non-violation of the terms and conditions of the contract can not be recognized as the main, supreme value of the contract law doctrine. New principles applicable to the contractual relations like proportionality, continuity and non-interruption are regarded to proof the lawfulness of contract adaptation.[42] Contract revision is a precondition for its stability and continuing of the relations. Sharing of the damages and benefits resulting from the risks and changed circumstances by the parties ("principle of sharing") provides prevention of injustice.[43]

Contract adjustment to the changed circumstances, compared with its termination or strict execution provides realization of the parties' interests to the significant extent. One more advantage of contract adjustment to changed circumstances is that the restoration of initial status and compensation of damages can not ensure regaining of the parties' initial positions. For example, if significant expenses were made for procurement of the articles which will be left unused after the exemption of the partyfrom contract performance.[44]

Contractors can increase the contract benefit if, in the period of relations, they maintain flexibility and thus save the costs of dispute in case of contractual crisis.[45] Therefore, usually, the parties, to restore the balance of interests, give preference to adjustment of the contract to changed circumstances, compared with the termination of relations.[46]

For this purpose, unified private law and most national legal systems provide for obligatory renegotiation between the parties for adjustment of the contract to changed circumstances.

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

40 *Ciematniece I.,* Contract Renegotiation and Adaptation, Concept of Contract Renegotiation and Adaptation in International Commercial Law Contracts, Lambert Academic Publishing, Saarbrücken, 2010, 37.

41 *Ciematniece I.,* Contract Renegotiation and Adaptation, Concept of Contract Renegotiation and Adaptation in International Commercial Law Contracts, Lambert Academic Publishing, Saarbrücken, 2010, 33.

42 *Mazeaud D.,* La révision du contrat. Rapport Français. In: Société de Législation comparée (Ed.), Le Contrat: Juornées Brésiliennes. Société de Législation comparée: Paris, 2008, 560-561, cited in: *Uribe M.,* The Effect of a Change Circumstances on the Binding Force of the Contracts, Comparative Perspectives, Intersentia, 2011, 239.

43 *Fried C.,* Contract as Promise: A Theory of Contractual Obligations, Harvard University Press: Cambridge, Mass, 1981, 69-73.

44 *Hubbard S.W.,* Relief from Burdensome Longterm Contracts: Commercial Impracticability, Frustration of Purpose, Mutual Mistake of Fact and Equitable Adjustment, Mo. L. Rev.79, Vol. 47, 1982, 103, <http://heinonline.org/HOL/Page?handle=hein.journals/molr47&div=26&g_sent=1&collection=journals> [24.06.2014].

45 *Hillman R.A.,* Court Adjustment of Long-Term Contracts: An Analysis Under Modern Contract Law, Duke Law Journal, 1987, 5-6, cited in: *Uribe M.,* The Effect of a Change Circumstances on the Binding Force of the Contracts, Comparative Perspectives, Intersentia, 2011, 238.

46 *Draetta U., Lake R. B., Nanda V. P.,* Breach and Adaptation on International Contracts, An Introduction to Lex Mercatoria, Butterworth Legal Publishers, 1992, 171; *Ciematniece I.,* Contract Renegotiation and Adaptation, Concept of Contract Renegotiation and Adaptation in International Commercial Law Contracts, Lambert Academic Publishing, Saarbrücken, 2010, 13.

4. Conceptual Approaches of Legal Systems

Degree of intervention of the legal systems into the area of contractual freedom through mechanism of contract adjustment differs significantly.[47] Anglo-American and continental laws have conceptually different approaches to the issue of contract adjustment[48] to changed circumstances: in common law, the legal outcome of the doctrines of impracticability and frustration of the contract is its termination. Unlike German law, English doctrine of frustration of the contract purpose does not provide for possibility of contract adaptation by the court.[49] Court intervention takes place for sharing of the losses and negative results between the parties and this is regarded as contract revision and in continental law, similar legal reality is equalized with typical case of contract termination, with obliging parties to compensate the losses.

Common law includes the principle of strict responsibility. For the purpose of avoiding application of the stated principle and also fulfillment of the extremely hard obligation with the strict accuracy, early termination of the contractual relations by the court is regarded as contract modification in the mentioned system.[50]

Thus, the goal of court intervention in case of contract frustration or impracticability of performance is contract termination but not ensuring future performance. In continental legal system contract revision implies fulfillment of the initial contractual obligations with changed terms and conditions but without transformation in the modebreach of contract and regime of secondary rights.

Uniform Commercial Code of the US (hereinafter UCC)[51] grants the authority to the court to fill the gaps in the contracts – decide the issue of additional fulfillment on the basis of good faith and reasonable judgment.[52] *Aluminum Co. of American vs. Essex Group, Inc., 449 F. Supp.53 (W.D. Pa.1980)* could be named as a significant decision with respect of contract adjustment to the changed circumstances, based on the doctrine of commercial impracticability, the court provided not traditional exemption from the obligations but rather contract adjustment to unforeseen changed circumstances through sharing of the risks and losses between the parties.[53]

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47 *Ciematniece I.,* Contract Renegotiation and Adaptation, Concept of Contract Renegotiation and Adaptation in International Commercial Law Contracts, Lambert Academic Publishing, Saarbrücken, 2010, 74.

48 Many terms are used in commercial contractual relations with the meaning of adjusting of the contract to changed circumstances: *adaptation, modification, adjusting, revision, change of the agreement,* etc. See *Ciematniece I.,* Contract Renegotiation and Adaptation, Concept of Contract Renegotiation and Adaptation in International Commercial Law Contracts, Lambert Academic Publishing, Saarbrücken, 2010, 17.

49 *Beale H., Hartkamp A. (eds.),* Cases, Materials and Text on Contract Law, Oregon, Hart Publishing Oxford and Portland, 2002, 607.

50 *Collins H.,* The Law of Contract. LexisNexis Butterworths: London, 2003, 294, reffered: *Uribe M.,* The Effect of a Change Circumstances on the Binding Force of the Contracts, Comparative Perspectives, Intersentia, 2011, 236.

51 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>, [24.06.2014].

52 *Hillman R.A.,* Principles of Contract Law, 2nd ed., The Concise Hornbook Series, West, 2009, 331.

53 *Halpern S.W.,* Application of the Doctrine of Commercial Impracticability: Searching for "The Wisdom of Solomon", University of Pennsylvania Law Review, Vol. 135, No.5, 1987, 1125, <http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=3961&context=penn_law_review>, [24.06.2014].

According to UCC, Section 2-209, the binding power of the agreement, providing for change of contract terms and conditions, can not be disputed. Though, such changes should be made in accordance with the principle of good faith. In addition, avoiding of compliance with terms and conditions of initial contract in breach of the good faith principle or forcing contract modification without commercial reasons and grounded interests would be regarded as violation of the good faith principle.[54] Though contract adjustment to the changed circumstances regulated by UCC is relatively rarely applied in the judicial practice.[55]

5. Contract Adjustment to the Changed Circumstances through Negotiations between the Parties

5.1 Influence of the Good Faith Principle on Development of the Law Institutes

In the legal systems of the most countries of Continental Europe the contact law recognizes and follows the fundamental principle that at the stage of formation and fulfillment of the contract the parties should follow the good faith principle, implying which, with its substance means ensuring of justice.[56] Doctrine of adjustment of the contract to changed circumstances, as the mechanism of realization of contractual interests emerged and formed on the basis of the good faith principle.

"Good faith principle considers the actions of individual in connection with the criteria offairness. It is some kind of limitation of freedom of action of the individual. In certain cases an individual distinguishes fair and unfair from point of view of "good faith" and compares his/her actions to the criterion of fairness. He/she should believe that he is acting fairly, i.e. so as this would be assessed as fair by the objective observer or unbiased person. Obligation of taking into consideration of the other person's interests by the subject results from the freedom of action subjected to the principle of good faith, to the extent not causing unreasonable restriction of his/her interests".[57]

"For the centuries numerous institutes of private law were established and developed on the basis for "bona fide provision".[58] The doctrine of adjusting the contract to changed circumstances is the consequence of this principle.[59]

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54 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>, [24.06.2014].

55 *Uribe M.,* The Effect of a Change Circumstances on the Binding Force of the Contracts, Comparative Perspectives, Intersentia, 2011, 235; *Goldberg V. P.,* Framing Contract Law, An Economic Perspective, Harvard University Press, Cambridge, Massachusetts and London, England, 2006, 326.

56 *Collins H.,* The Law of Contract, Cambridge University Press, New York, 2003, 216-217; See also Article 261, II of Georgian Civil Code.

57 *Kereselidze D.,* Most General Systemic Concepts of Private Law, Tb., 2009, 83.

58 Ibid, 84.

59 *Tallon D.* in the book*:Hartkamp A.S., Hesselink M., Hondius E.H., du Perron E., Joustra C., Veldman M.(eds.),*Towards a European Civil Code, 3rd ed., Kluwer Law International, 2004, 503; See also, *Chitashvili N.,* Hardship and Impossibility of Performaces Caused by Changed Circumstances, TSU publishing, "Journal of Law", #2, 2011, 139-142.

Different functions given to the principle of good faith in different law systems provides, at the same time, different meaning of this principle. In German law, the action in good faith is the primary obligation of the parties. Realization of all rights and obligations shall be based on the fundamental rule of the good faith.[60]

In German judicial practice and legal doctrine, Paragraph 242 of German Civil Code establishing the principle of good faith developed into the general provision and its application spreads beyond its literal sense and influences entire law system.[61]

Obligation of good faith under the influence of German law was established as universal principle[62] in number of provisions of Georgian Civil Codeand in the obligation law it was stated in Article 361 II.[63] Together with the introduction of the principle at the legislative level, it would be reasonable to increase the cases of operation of the mentioned principle in Georgian judicial practice and its "application for ensuring the fair results and at the same time, avoiding of the apparently unjust results".[64] Actual application of the principle of good faith for regulation of the civil law relations would ensure stability of civil turnover and fair distribution of the interests of its participants.

5.2 Obligation of Conducting Negotiations for the Purpose of Contract Adaptation to the Changed Circumstances Relying on the Principle of Good Faith

In the most European legal systems adjusting of contracts to the changed circumstances is provided mostly by the parties, though the mentioned authorityis given to the court as well. Role and degree of involvement of US judicial system is much higher, compared with the countries with continental jurisdiction.[65] If the court regards that imposing of the obligation of negotiating directly on the contractors would be ineffective, it provides contract adaptation.[66]

In the countries of continental Europe, adjusting of the contracts to changed circumstances is provided on the basis of the principles of good faith and fairness.[67] In case of hardship resulting from the changed circumstances, the principle of good faith obligates the parties to collaborate for the purpose

60 *Firoozmand M.R.,* Changed Circumstances and Immutability of Contract: a Comparative Analysis of Force Majeure and Related Doctrines, Bus. L. Int'l, Vol. 8, No. 2, 2007, 170, <http://heinonline.org/HOL/Welcome?message=Please%20log%20in&url=%2FHOL%2FPrint%3Fhandle%3Dhein.journals%2Fblawintnl2007%26div%3D17%26collection%3Djournals%26set_as_cursor%3D1%26men_tab%3Dsrchresults>, [24.06.2014].

61 *Palandt/Heinrichs*, 2003, § 242, RdNr. 16, cited in *Kereselidze D.*, General Provisions of the Civil Code, "Georgian Law Review", 7/2004-1, 34 (In Georgian).

62 Universal nature of this principle could be seen from Article 8, III of Georgian Civil Code, as provided in general part of Georgian Civil Code and is applicable to all civil law relations.

63 This article provides the obligation of contract performamce duly, in good faith, and at the time and place determined.

64 *Ioseliani A.,* Principle of Good Faith in Contract Law (Comparative Legal Study) "Georgian Law Review", Special ed., 2007, 12 (In Georgian).

65 *Ciematniece I.,* Contract Renegotiation and Adaptation, Concept of Contract Renegotiation and Adaptation in International Commercial Law Contracts, Lambert Academic Publishing, Saarbrücken, 2010, 18.

66 *Frick J.G.,* Arbitration and Complex International Contracts, Kluwer Law International, Schulthess, 2001, 183.

67 *Draetta U., Lake R. B., Nanda V. P.,* Breach and Adaptation on International Contracts, An Indtroduction to lex Mercatoria, Butterworth Legal Publishers, 1992, 183.

of contract adaptation and awards the court the authority to adjust it, as intended for explanation of the initial goal of the parties with respect of restoring of contractual fairness and balance.

In contemporary legal sphere the contracts are regarded as an agreement reflecting the parties' legitimate goals and interests and not merely a document strictly regulating the rights and obligations of the contractors.[68]

Participants of the contractual relations are subject to mutual cooperation obligation for ensuring fulfillment of the contract.[69] According to the Principles of European Contracts Law"[70] (hereinafter - European Principles),[71] non-compliance with the obligation of mutual cooperation, regarding its significance, establishes independent type of breach of contract and creates relevant corresponding remedies as legal protection mechanisms'[72] and the right of their application.[73] Negotiating for the purpose of contract adjustment should be regarded as the expression of the parties' duty to cooperate to give full effect to the contract.

Parties' obligation to negotiate, for the purpose of adjusting the contract to changed circumstances operates irrespectively, whether the mentioned obligation is provided for by the contract or not. The mentioned obligation is particularly strictly applicable to the employment contractual relations. Principle of obligatory negotiations is a substantial characteristic of the continental law system, as it is particularly oriented towards protection of the contractual relations and ensuring fulfillment of the obligations.[74]

Rules of International Chamber of Commerce dealing with contracts adaptation and UNCITRAL Rules dealing with conciliation procedures, while not providing for the concepts of force majeure and fulfillment hardship but they provide for obligation of negotiating for the purpose of contract adaptation.[75] Emergence of the changed circumstances does not automatically create the obligation of adaptation, rather it gives the right of demanding to conduct negotiations to a party.[76] Hardship causes obligation to the contractors of involvement into the negotiations for the purpose of contract adjustment. In case of non-fulfillment of the mentioned obligation contract adjustment is provided by the third party as a judge or arbitrator.[77]

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68 *Ciematniece I.,* Contract Renegotiation and Adaptation, Concept of Contract Renegotiation and Adaptation in International Commercial Law Contracts, Lambert Academic Publishing, Saarbrücken, 2010, 74.

69 Article 1:201 of European Principles.

70 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/>, [24.06.2014]. See also: *Lando O., Beale H.,* Principles of European Contract Law, part I and II, Kluwer Law International, The Hague/London/Boston, 2000.

71 Codifications of the so called "soft law" were developed by the private groups composed with the practitioners and scientists having no legislative power and therefore, the acts adopted by them are mentioned as "Principles" and not "Regulations". In this case, "Principles" have not significance of guiding standards but rather they express the universal, general nature of the provisions.

72 Including the right of claiming damages, note of N.Ch.

73 *Busch D., Hondius E., Kooten H.V., Schelhaas H.N., Schrama W. (eds.),* The Principles of European Contract Law and Dutch Law: A Commentary, Kluwer Law International, Ars Aequi Libri, Nijmegen, 2002, 52.

74 *Ciematniece I.,* Contract Renegotiation and Adaptation, Concept of Contract Renegotiation and Adaptation in International Commercial Law Contracts, Lambert Academic Publishing, Saarbrücken, 2010, 65.

75 Ibid, 38.

76 BGHZ 10, 44, 51; 350 F; BGH NJW 1967, 1081; BGH WM 1975, 769.

77 *Schwenzer I., Hachem P., Kee Ch.,* Global Sales and Contract Law, Oxford University Press, New York, 2012, 672-673.

Clausula rebus sic stantibus, in case of changed circumstances, provides for negotiations to ensure contract adaptation, revision of the contract terms and conditions so that continuation of fulfillment was possible.[78] Thus, in case of changed circumstances, the main goal of the parties shall be maintaining of the contract.[79]

In the unified private law, after extreme hardship of fulfillment resulting from changed circumstances the damaged party shall have the right of claiming involvement into the contractual negotiations to the contractor.[80]

Article III.-1:110(2)(d) ofDCFR obligates a party to achieve reasonable and fair adjustment of the norms regulating contractual obligations through negotiations in accordance with the principles of good faith and reasonability.[81] By virtue of European Principles and the UNIDRUIT Principles of International Commercial Contracts[82] (hereinafter UNIDRUIT Principles), unsuccessful contractual negotiations are regarded as a precondition for applying to the court by the parties[83], at the same time implying, at the same time, that mutual negotiations between the parties is the obligation of contractors provided by the law. Article 6.2.3 of UNIDRUIT Principles entitles a party to invite the contractor to negotiations and naturally, the respective obligation of the contracting party naturally corresponds to it. Many arbitration awards recognize the obligation of involvement into negotiations.[84]

Principle of good faith is the legal basis for the requirement of involvement of the contractor into the contractual negotiations in French Civil Code.[85] Paragraph 313 of German Civil Code does not directly specify obligations of involving into the negotiations, though in dispute resolution, advantages of contract adjustment to changed circumstances, compared with its termination points to existence of obligation of negotiations. German judicial practice recognizes the approach that a party is given the

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78 *Gogiashvili G.,* Clausula rebus sic stantibus, Dynamics and Statics in the Law, "Georgian Law Review", 9/2006-1/2, 110 (In Georgian).

79 *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, 264.

80 *Gabriel H.D.,* Contract for the Sale of Goods, A Comparison of Domestic and International Law, Oceana Publications, Inc, Dobbs, Ferry, New York, 2004, 221.

81 *Bar Ch., Clive E., Schulte-Nölke H., Beale H., Herre J., Huet J., Storme M., Swann S., Varul P., Vaneziano A., Zoll F. (eds.),* Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference, Study Group on a European Civil Code and Research Group on EC Private Law (Acquis Group), Sellier, European Law Publishers GmbH, Munich, 2009, 737, <http://ec.europa.eu/justice/contract/files/european-private-law_en.pdf>, [24.06.2014].

82 UNIDRUIT Principles of International Commercial Contracts (UNIDRUIT Contract Principles an UPICC), International Institute for the Unification of Private Law (Unidruit), Rome, 2004, See also: <http://www.unidruit.org/english/principles/contracts/principles2004/integralversionprinciples2004-e.pdf>, [24.06.2014].

83 *Gabriel H.D.,* Contract for the Sale of Goods, A Comparison of Domestic and International Law, Oceana Publications, Inc, Dobbs, Ferry, New York, 2004, 221.

84 2000 Arbitral Award ICC International Court of Arbitration (No.10021); December 2001 Arbitral Award ICC International Court of Arbitration (No. 9994), Centro de Arbitraje de México (CAM), 30.11.2006, <http://www.unilex.info/case.cfm?pid=2&do=case&id=1149&step=Abstract>, cited in: *Uribe M.,* The Effect of a Change Circumstances on the Binding Force of the Contracts, Comparative Perspectives, Intersentia, 2011, 209.

85 See Article 1134 of French Civil Code (French Civil Code, Translated by *Rouhette G*. with the assistance of *Rouhette-Berton A*., 2006)

right of sending notification and demanding contractual negotiations.[86] Practice of German Federal Court show that law gives preference to contractual negotiations based on the principle of freedom of will of the parties in the long-term contractual relations.[87] Before reform of German contractual law, German judicial practice recognized the obligatory nature of mutual negotiations on the basis of the principle of good faith, for the purpose of contract adjustment in case of destruction of the contract basis.[88]

In US legal doctrine the principle of good faith is regarded as the basis for imposing obligation of involving the contractor into negotiations, where, due to changed circumstances, the fulfillment of obligation is extremely hard for the other party, in particular, in accordance with paragraph 1-304 of UCC, any contract and obligation, in the process of its implementation and enforcement process, provides for compliance with the obligation of acting in good faith.[89]

According to the Italian legal doctrine, where conditions of fulfillment of obligations do not correspond to the "economic logic" existing at the stage of contract formation, the damaged party shall have the right to demand commencement of negotiations for the purpose of restoration of the contractual equilibrium.[90]

Regulation of the obligation of contractual negotiations at the legislative level would significantly stimulate using of the forms of peaceful resolution of the disputes, rather than the judicial procedures.[91] Unlike contract termination, only negotiations allow the parties to be flexible, contribute to formation of mutual trust and provide coordination, in the process of resolving of dispute complying with the principle of good faith,[92] to achieve the goal of contractual relations – fulfillment of the obligations.[93]

Contract is the instrument requiring from the parties, for realization of their legitimate expectations, permanent fulfillment of the obligation of cooperation and coordinated actions. Obligation of mutual

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86 *OLG Karlsruhe, DB 1980, 254* (Case is about long-term contract on electric power supply).

87 *Horn N.,* Changes in Circumstances and the Revision of Contracts in some European Laws and in International Law, 1985, 23 in: *Horn N.(ed.)*, Adaptation and Renegotiation of Contracts in International Trade and Finance, Deventer/The Netherlands, Kluwer Law and Taxation Publishers, 1985.

88 *Karampatzos A.,* Supervening Hardship as Subdivision of the General Frustration Rule. A Comparative Analysis with Reference to Anglo American, German, French and Greek Law, Eur. Rev. of Prv. L., Vol. 13, 2005, 134, <www.KluwerLawInternational.com>, [24.06.2014].

89 Approach of English law conceptually differs from the American approach, as it does not provide the concepts of good faith, loyalty and cooperation of the parties and hence, obligation of involvement into the contractual negotiations. See *Cartwright J.,* Negotiation and Renegotiation: an English Perspective. In: *Cartwright J.,Vogenauer S.,Whittaker S. (eds.),* Reforming the French Law of Obligations, Comparative Reflections on the Avant-Projet De Réforeme Du Droit Des Obligations Et De La Prescription ('the Avant-Projet Catala'), Hart Publishing: Oxford, 2009, 52, cited in: *Uribe M.,* The Effect of a Change Circumstances on the Binding Force of the Contracts, Comparative Perspectives, Intersentia, 2011, 221.

90 *Macario F.,* Adeguamento e rinegoziazione nei contratti a lungo termine. Jovene Editore: Naples, 1996, 312, cited in: *Uribe M.,* The Effect of a Change Circumstances on the Binding Force of the Contracts, Comparative Perspectives, Intersentia, 2011, 220.

91 *Uribe M.,* The Effect of a Change Circumstances on the Binding Force of the Contracts, Comparative Perspectives, Intersentia, 2011, 251.

92 *Macneil I.R.,* The New Social Contract: An Inquiry into Modern Contractual Relations, Yale University Press New Haven, CT., 1980, cited in: *Uribe M.,* The Effect of a Change Circumstances on the Binding Force of the Contracts, Comparative Perspectives, Intersentia, 2011, 219.

93 *Williston S., Lord R.A.,* A Treatise on the Law of Contracts. Thomson/West: Rochester, New York, §77:10, 1990, 306.

cooperation, as the guiding principle for the parties' action, regards the contractual renegotiations as the process unconditionally accompanying emergence of changed circumstances.[94]

5.3. Obligation of Claiming Negotiations for the Purpose of Contract Adaptation to the Changed Circumstances

According to Article 398 I of Georgian Civil Code, contract adjustment to changed circumstances is determined with the following legal preconditions: If the circumstances that constituted the grounds for execution of the contract have evidently changed after execution of the contract, and the parties, had they taken these changes into account, would not have executed the contract or would have executed it with different contents, then it may be demanded to adapt the contract to the changed circumstances. It should be also taken into consideration that such barriers to fulfillment of the obligations that a party could not be required (i.e. it would be unreasonable to require) strict compliance with the unchanged contract, regarding the principles of good faith and fairness, in the legal doctrine is regarded as necessary precondition of emergence of fulfillment hardships, as reasonability of fulfillment is considered as the criterion determining binding force of the contract.[95] In this case the "contract becomes not a mechanism for cooperation and free turnover but rather the instrument of subordinating one party by the another".[96] Hence, the "legislator found reasonable to exempt the person from binding force of the contract and performance who was damaged significantly and disproportionally due to the changed circumstances".[97] Such unreasonable performance would place the participants of civil turnoverin unequal conditions.

This, together with the other necessary preconditions for fully establishment of hardship, as a conception, unreasonability, irrationality of performance should be provided in the relevant legislative clause as one of the necessary preconditions forhardship rather than its accompanying outcome.

First sentence of the above-mentioned clause linksexistence of the above legal preconditions to the possibility of contract adjustment. First sentence is followed by the following statement: *otherwise, regarding certain circumstances, party to the contract can not be required of strict compliance with the initial contract terms.* The mentioned provision is unclear with respect of the legal outcomes and its substance has a significant gaps. It is interesting, what the term "otherwise" is applicable to. Undoubtedly, the latter does not imply existence of legal preconditions provided by the first party of the first sentence. Following this logic, it should be associated with the last part of the first sentence: *adjustment of the contract to changed circumstances could be required.* Hence, content of the last sentence is perceived as follows: *if adjustment of the contract to changed circumstances is not demanded, strict compliance to the unchanged (initial) contract can not be demanded from the party.* I.e. if a party does not demand adjusting of the contract, the debtor will be exempted from the binging contract and, as provided by Article 398 III, and will be entitled to terminate and avoid the contract.

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94 *Uribe M.,* The Effect of a Change Circumstances on the Binding Force of the Contracts, Comparative Perspectives, Intersentia, 2011, 238.

95 E.g. German Civil Code - Bürgerliches Gesetzbuch, Bundesministerium der Justiz, Juris GmbH, Saarbrücken, 2005, §313 I.

96 *Zoidze B.,* Reception of European Private Law in Georgia, Tinatin Tsereteli State and Law Institute of the Academy of Science of Georgia, Institute of Private Law, Tb., 2005, 281 (In Georgian).

97 *Chachava S.,* Competition of the Claims and Claim Bases in Private Law, Dissertation work, Tb., 2010, 68 (In Georgian), <http://tsu.edu.ge/data/file_db/faculty-law-public/sofio_chachava.pdf>, [24.06.2014].

Mentioned formulation of the article contradicts to the principle of contract adjustment requirement and obligatory negotiations, as it provides for the cases where adjustment of the contract to changed circumstances can not be demanded, rather direct termination of the contract.

Adaptation of the contract to changed circumstances serves to survival of the contract and its fulfillment. Therefore, as detailed above, the system of unified private law and most legal systems unambiguously recognize obligatory nature of conducting negotiations between the parties, for the purpose of adaptation of contract to changed circumstances. Thus, no cases can exist, where negotiations for contract adjustment to the changed circumstances are not required, as provided for in the last sentence of Article 398 I. Therefore, the phrase "otherwise" substantially changes regulation of the issue and should be removed from the provision of the mentioned Article. In addition, the statement "*Adjustment of the contract to the changed circumstances could be demanded*" should have imperative significance and possibly, should be stated as an obligation. The essence is that primarily, the attempt of adjusting of contract to the changed circumstances shall be made by the parties and only if they fail to achieve the results, the contract may be terminated through its abandoning.

Hence, the legislative provision could be formulated more exactly as follows: if the circumstances providing basis for making contract have apparently changed after formation of the agreement, the parties would not make the mentioned contract, or make it, but with the different content, if they could take these changes into consideration, *the requirement of adjustment of contract to changed circumstances emerge, if, regarding certain circumstances, a contract party can not be required strict compliance with the initial contract.*

5.4 Obligatory Nature of Negotiations' Requirement and Unacceptability of its Rejection

Article 398 of Georgian Civil Code is characterized with contradictive regulation. In particular, Sentence I of Section III, unlike Section I, determines the negotiations for the purpose of contract adaptation to the changed circumstances as the primary obligation of the parties: *at first the parties shall make attempts to adjust the contract to the changed circumstances.* "Goal of this is to support performance, reminding to the parties that they should not escape from the changed circumstances, rather they should do everything to adjust the contract to them. This would ensure both, maintaining of civil turnover stability and fulfillment of the contract."[98] Mechanism ensuring adjustment of the contracts to changed circumstances, is regarded to be the component of binding force of the contract,[99] intended to realize the principle – contract shall be fulfilled.

The remained part of Article 398 III of Georgian Civil Code provides for the regulation opposite to the abovementioned: *if the contract can not be adjusted to the changed circumstances, or the other party does not agree with this, the party whose interests were damaged may avoid the contract.* The mentioned legislative provision neglects the role of the court[100] in the process of contract adjustment to the changed

[98] *Zoidze B.,* Reception of European Private Law in Georgia, Tinatin Tsereteli State and Law Institute of the Academy of Science of Georgia, Institute of Private Law, Tb., 2005, 288-289(In Georgian).

[99] *Mekki M., Pelese M.K.,* Hardship and Modification (or 'Revision') of the Contract, 2010, 17, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1542511>, [24.06.2014].

[100] *Chanturia L., Zoidze B., Ninidze T., Shengelia R., Khetsuriani J. (ed.),* Comments to the Civil Code of Georgia, Book III, Tb., 2001, 407 (In Georgian).

circumstances, as associates, at the stage of contractual negotiations, impossibility of adaptation and absence of consent of one of the parties, with the right of abandoning of the contract and does not consider claiming of contract adjustment at the court as a stage following contractual negotiations while the institute of contract adjustment to changed circumstances is the sequence of case law, emerged within the judicial practice and further found its legislative regulation. "Even in the European law, the changed circumstances are mostly the circumstances established in the judicial practice".[101]

Critical note should be reasonably stated with respect of the legislative provisions automatically entitling the party to abandon the contract in case of absence of its consent on contract adaptation. Creditor's refusal to adjust the contract to changed circumstances should not be taken into consideration as it is opposed by the debtor's interest to be respected, the principle of restoration of the contractual equilibrium and balance of interests. A party shall assist the measures oriented towards saving of the contract and by virtue of the considered sentence of Article 398 III (*if contract adjustment to the changed circumstances is impossible, or the other party does not agree with it*), it can not be entitled to reject adjustment of the contract to changed circumstances ***without grounded legitimate reason***. Refusal to contract adjustment could be regarded as acceptable only if this can not ensure balancing of the parties' interests. Even in such case, final decision on the possibility of contract adaptation shall be entrusted to the court. In case of failure to achieve agreement on adjustment of contract to changed circumstances through negotiations, before realization of the right of contract avoidance, application to the court for contract adjustment, similar to additional performance, should be considered as a precondition for contract avoidance.

In case of economic impossibility, the obligation, though extremely hard for the debtor, such hardship is not significantly (non-proportionally) non-compliant with the creditor's contractual interest. There is no incompliance between the creditor's performance interest and the debtor's t hardship – fulfillment of the obligation is as hard for the debtor as obtaining of such performance is significant for the creditor. In such conditions, adjustment of the contract is always in the interests of the debtor, as a damaged party, for which, fulfillment with the initial terms and conditions is associated with the severe outcomes and heavy burden. For the creditor, contract performance with the initial terms and conditions is always preferable, as this significantly increases his contractual interest, contract price and utility. Despite abovementioned even contract adjustment to the changed circumstances would not result in hard economic outcomesfor the creditor, as adaptation of the contract by the court is guided by the principles of good faith (Articles 8 III, 361 II of Georgian Civil Code) and fairness (Article 325, Georgian Civil Code) to maximal possible extent.

5.5. Purpose and Preconditions of Negotiations

Contractual negotiations significantly reduce possibility of disputes and significantly contribute to regulation and strengthening of relations between the parties.[102] Contractual negotiations are the most effective and rapid means for dispute resolution, related with lower expenses and providing achievement

[101] *Chanturia L., Zoidze B., Ninidze T., Shengelia R., Khetsuriani J. (ed.),* Comments to the Civil Code of Georgia, Book III, Tb., 2001, 400 (In Georgian).

[102] *Gotanda J.Y.,* Renegotiation and Adaptation Clauses in Investment Contracts, Revisited. Vanderbilt Journal of Transnational Law, Vol. 36, 2003, 1469, cited in: *Uribe M.,* The Effect of a Change Circumstances on the Binding Force of the Contracts, Comparative Perspectives, Intersentia, 2011, 233.

of mutual agreement between the parties at the stage of fulfillment of contractual obligations.[103] Fulfillment of the obligation of conducting negotiations should be provided in the format of flexibility and cooperation.[104]

Reasonable and fair adjustment to the changed circumstances does not imply absolute restoration of the contractual balance in a form that existed at the stage of contract formation. Negotiations should provide for reducing of burden of performance for the debtor and ensuring contractual benefits and utility to the creditor. Thus, contractual negotiations should not provide for the full shifting of the contractual responsibility from one to the other party.[105]

Parties should conduct contractual negotiations with the actual intention of achieving agreement, in a constructive manner, not as a tactical mean.[106] Frequently, the honest participant of negotiations should apply the mediator's skills.[107]

Requirement of negotiations should be fulfilled in a reasonable time, relying on the legal grounds, accurate information about changed circumstances and degree of their impact on fulfillment of the obligations. In this respect, decision by the Arbitration Tribunal of Chamber of Commerce and Industry of Bulgaria[108], dealing with the issue of extremely hard performance is of significance. In particular, on the basis of actual circumstances, the defendant reasoned his non-participation in the negotiations by the arguments that the debtor has not declared to the supplier, what would be the degree of hardship caused by the impact of changed circumstances for fulfillment of obligations and hence, what should be the period of suspending of goods supply, etc.

Principle of good faith requires that the requirement of negotiating should be reasonably grounded and contain all information required for adequate assessment of situation by the contractor.[109] In addition, it is necessary that the reasonable term for contractual negotiations was set.[110]

It is significant that the request of negotiating was sent after emergence of the changed circumstances and further, was motivated within the reasonable term, with the proper basis.[111] According

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103 *Fox W.F.,* International Commercial Agreements, A primer on drafting, Negotiation and Resolving Disputes, 4th ed., Wolters Kluwer Law and Business, The Netherlands, 2009, 78.

104 *Hillman R.A.,* Court Adjustment of Long-Term Contracts: An Analysis Under Modern Contract Law. Duke Law Journal 1987, 17.

105 *Uribe M.,* The Effect of a Change Circumstances on the Binding Force of the Contracts, Comparative Perspectives, Intersentia, 2011, 208.

106 *Bonell M. J.,* An International Restatement of Contract Law. The UNIDROIT Principles of International Commercial Contracts, 3rd ed., Ardsley, New York: Transnational Publishers, Inc., 2009, 120.

107 *Sivigila P.,* Contracts and Negotiating for the Business Person (You and Your Lawyer), Carolina Academic Press, United States of America, 2007, 70.

108 Bulgarian Chamber of Commerce and Industry [BTTP (Bulgarska turgosko-promishlena palata), Case No. 11/96, 12 February 1998, <http://cisgw3.law.pace.edu/cases/980212bu.html#cd>, [24.06.2014].

109 *Uribe M.,* The Effect of a Change Circumstances on the Binding Force of the Contracts, Comparative Perspectives, Intersentia, 2011, 208.

110 *Bar Ch., Clive E., Schulte-Nölke H.,Beale H.,Herre J., Huet J., Storme M., Swann S., Varul P., Vaneziano A., Zoll F. (eds.),* Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference, Study Group on a European Civil Code and Research Group on EC Private Law (Acquis Group), Sellier, Eoropean Law Publishers GmbH, Munich, 2009, 741, <http://ec.europa.eu/justice/contract/files/european-private-law_en.pdf>, [24.06.2014].

111 *Baranauskas E., Zapolskis P.,* The Effect of Change in Circumstances on the performance of Contract, Jurisprudence, 2009, 4 (118), 209, <https://www.mruni.eu/en/mokslo_darbai/jurisprudencija/archyvas/dwn.php?-id=226356>, [24.06.2014]. See also Article 6.2.3 (I) of UNIDROIT Principles.

to the explanation of the Supreme Court of Georgia, requirement of adjusting of the contract to changed circumstances should rely upon the principle of good faith. With respect of one of the cases the court regarded that a party, which has submitted the requirement of contract adjustment to the changed circumstances 5 days (unreasonable term) earlier before the date of performance by the obligated party has expired, has committed gross violation of the requirement of good faith.[112]

Period of contractual negotiations and persistence of the negative outcomes may last for a long time. Therefore, for the purpose of maintaining of the contract, to prevent termination of the contract by the entitled party and applying of the rights of secondary claims, it is necessary that the damaged party, requiring negotiation, specified in his notification the minimal fulfillment, what he could ensure within the period of negotiations, to prevent damaging of the creditor's interests. If the party refuses to ensure minimal fulfillment, it could be claimed by the court. In addition, if the obligation of contractual negotiations is imposed on the basis of court decision, it should state the minimal fulfillment conditions and reasonable term of completion of the negotiations between the parties and achievement of the agreement.[113]

In addition, it is significant that in the process of contractual negotiations, the party's right to abandon the contract is restricted.

5.6. Contractual Clauses on the Obligation of Negotiations

Clauses on obligation of negotiating, for the purpose of contract adaptation are regarded as important segments of contract adaptation process. To maintain the contractual relations, instead of applying of the formal and radical means for disputes resolution,[114] parties could provide the contractual clauses on mutual obligations to conduct negotiations first, in case of emergence of changed circumstances.[115]

Regarding impossibility of pre-determination of the legal outcomes of hardshipof obligations, the contractual clauses mostly provide for the obligation of negotiating, rather than description of the outcomes of hardship and corresponding mutual responsibilities.[116] Such clauses serve to the purpose of ensuring stability of long-term relations, as well as reduction of the cases of contracts termination or breach[117] and

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112 Decision of 25 November 2008 of the Department if Civil, Entrepreneurial and Bankruptcy Cases of Supreme Court of Georgia, on case No: AS466-707-08 (In Georgian).

113 *Uribe M.,* The Effect of a Change Circumstances on the Binding Force of the Contracts, Comparative Perspectives, Intersentia, 2011, 228.

114 See *Fox W. F.,* International Commercial Agreements, A primer on drafting, Negotiation and Resolving Disputes, 4th ed., Wolters Kluwer Law and Business, The Netherlands, 2009, 77; *Ciematniece I.,* Contract Renegotiation and Adaptation, Concept of Contract Renegotiation and Adaptation in International Commercial Law Contracts, Lambert Academic Publishing, Saarbrücken, 2010, 6.

115 *Berger K.P.,* Renegotiation and Adaptation of International Investment Contracts: The Role of Contract Drafters and Arbitrators, Vand. J. Transnat'l L., Vol. 36, 2003, 1364, <http://www-prod.law.vanderbilt.edu/publications/journal-of-transnational-law/archives/volume-36-number-4/download.aspx?id=1888>, [24.06.2014]; *Draetta U., Lake R. B., Nanda V. P.,* Breach and Adaptation on International Contracts, An Indtroduction to lex Mercatoria, Butterworth Legal Publishers, 1992, 196.

116 *Ciematniece I.,* Contract Renegotiation and Adaptation, Concept of Contract Renegotiation and Adaptation in International Commercial Law Contracts, Lambert Academic Publishing, Saarbrücken, 2010, 66.

117 *Uribe M.,* The Effect of a Change Circumstances on the Binding Force of the Contracts, Comparative Perspectives, Intersentia, 2011, 223.

expresses the principle of the parties' contractual autonomy principle.[118]

Contractual clauses dealing with the changed circumstances, are mostly used in international agreements as they mostly provide for long-term, extendable contractual obligations periodically subject to fulfillment. In addition, in the international context, the economic environment is subject to quite rapid and frequent changes.[119]Clauses establishing the obligation of contract adaptation, as a rule, provide maintaining of the subject and main substance of the contracts.[120]Similar clauses comprise the self-enforcement mechanism in the contract ensuring preparing of the contracts for the future changes, for the purpose of its maintenance and surviving, in addition, with maintaining of the substantial elements of agreement.[121]

Contractual clauses dealing with negotiations establish the parties' obligation, to act in compliance with the principles of good faith, fairness and reasonability in the process of achievement of agreement, for the purpose of economic balance of the contract.[122]

Existence of obligation of negotiating, as such, does not imply the obligation to achieve agreement. There is no unified legislative or scientific position, with respect of the issue, whether the party is obliged to accept the reasonable offer corresponding to the interests of both contractors for the purpose of dispute resolution or not. In case of existence of such an obligation, criteria for assessment of the reasonability and prudency of the offered alternative would be of significance.[123] Agreement on "achievement of agreement" can not have the binding force.[124] Therefore, probably, this is obligation of involvement in the contractual negotiations for the purpose of contract adjustment for taking reasonable measures required for agreement (*obligation de moyenes*), rather than the one for achieving of the results (*obligation de résultat*). The main thing is that the parties made attempts to achieve mutual agreement in accordance with the principle of good faith. [125]

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118 *Moore H.,* Allocating Foreseeable Sovereign Risks in Infrastructure Investment in Indonesia: *Force Majeure* and Indonesia's Economic Woes, *PLI8,* 2001, cited in: *Mizrachi K.,* Force Majeure in Project Finance: A Comparative and Practical Analysis of Risk Allocation, The Journal of Structured Finance, Vol.12, No. 2, 2006, 78; *Karampatsos A.,* Supervening Hardship as Subdivision of the General Frustration Rule: A Comparative Analysis with Reference to Anglo-American, German, French and Greek Law, Eur. Rev. Private L., Kluwer Law International, The Netherlands, Vol. 13, No. 2, 2005, 112, <http://www.heinonline.org/HOL/Print?handle=hein.kluwer/erpl0013&div=13&collection=kluwer&set_as_cursor=0&men_tab=srchresults>, [24.06.2014]; *Trakman L.E*., Declaring Force Majeure: Veracity or Sham? Un. of New South Wales, 2007, 11, <http://works.bepress.com/leon_trakman/4>, [24.06.2014].

119 *Draetta U., Lake R. B., Nanda V. P.,* Breach and Adaptation on International Contracts, An Introduction to lex Mercatoria, Butterworth Legal Publishers, 1992, 170-171.

120 *Ciematniece I.,* Contract Renegotiation and Adaptation, Concept of Contract Renegotiation and Adaptation in International Commercial Law Contracts, Lambert Academic Publishing, Saarbrücken, 2010, 40.

121 Ibid, 41.

122 *Berger K.P.,* Renegotiation and Adaptation of International Investment Contracts: The Role of Contract Drafters and Arbitrators, Vand. J. Transnat'l L., Vol. 36, 2003, 1363-1364.

123 Ibid, 1367, <http://www-prod.law.vanderbilt.edu/publications/journal-of-transnational-law/archives/volume-36-number-4/download.aspx?id=1888>, [24.06.2014]; *Speidel R.E.,* Court-Imposed Price Adjustments Under Long-Term Supply Contracts. Northwestern University Law Review 76, 1981, 408-410, 416.

124 *Gaillard E., Savage J. (eds.),* Fouchard Gaillard Goldman on International Commercial Arbitration, 1st ed., Business & Economics, Kluwer Law International 1999, 830.

125 *Draetta U., Lake R. B., Nanda V. P.,* Breach and Adaptation on International Contracts, An Introduction to lex Mercatoria, Butterworth Legal Publishers, 1992, 197.

If, by the contractual clause, the parties excluded possible impact of the changed circumstances on the binding force of the obligation and the legal outcomes caused by this impact, the court is entitled to disregard such an agreement for the purpose of ensuring compliance with the principles of fairness and equal rights.[126]

Contractual clausesstipulating the obligation of negotiating and contract adjustment to the changed circumstances are mostly characteristic for the continental law system. Unlike the countries of Anglo-American law system, practice of use of such reservations is particularly widespread in Germany and the Netherlands. Possibly, the reason for this is the inflation processes in the continental Europe countries.[127]

Clauses providing obligation of conducting negotiations for contract adjustment significantly reduce the risks of disputes between the parties and termination of the contractual relations for this reason. Therefore, such reservations could be regarded as the mechanism for ensuring contract stability.[128] In addition, Clauses about obligation of negotiating provide also the criteria established for the negotiations process, which could be effectively used by the third person, resolving the dispute, for the purposes of contract adaptation.[129]

Thus, it is reasonable that the provisions about the obligation of negotiating included the following elements: a) scopes of the factual circumstances giving rise to the obligation of negotiating; b) in case of failure of negotiations, the authority the independent third party, body authorized to resolve the dispute and adjust the contract; c) guidance criteria required for realization of the parties' interests in the process of contract adjaptation to the changed circumstances.[130]

Inclusion of the contractual clauses providing obligation of negotiating into the contracts significantly secures the future of the contract and protects the parties from the expensive and long formal processes of dispute resolution.[131]

5.7. Limitation and Exclusion of the Contractual Responsibility or Applicable Legal Remedies by Contractual Agreement

Regarding specific nature of turnover in the commercial sphere, there always exists the risk of economic crisis.[132] It is notable that the risk of change of market prices in international commercial

126 *Brownlie I.,* Principles of Public International Law, 2nd ed., 1973, 599, cited in: *Ciematniece I.,* Contract Renegotiation and Adaptation, Concept of Contract Renegotiation and Adaptation in International Commercial Law Contracts, Lambert Academic Publishing, Saarbrücken, 2010, 32.

127 *Perillo J.,* Force Majeure and Hardship under the UNIDROIT Principles of International Commercial Contracts, Tul. J. Int'l & Comp. L., Vol. 5, 1997, 26-27.

128 *Salacuse J. W.,* Direct Foreign Investment and the Law in Developing Countries, Foreign Investment Law Journal - ICSID Review, Vol.15, Issue 2, 2000, 382, 387, <http://icsidreview.oxfordjournals.org/content/15/2/382.full.pdf>, [24.06.2014].

129 *Gotanda J.Y.,* Renegotiation and Adaptation Clauses in Investment Contracts, Revisited, Villanova University School of Law, Vand. J. Transnat'l L., Vol. 36, 2003, 1471, <http://works.bepress.com/cgi/viewcontent.cgi?article=1007&context=gotanda>, [24.06.2014].

130 *Ciematniece I.,* Contract Renegotiation and Adaptation, Concept of Contract Renegotiation and Adaptation in International Commercial Law Contracts, Lambert Academic Publishing, Saarbrücken, 2010, 73.

131 Ibid, 76.

132 Decision of 6 July 2010 Department of Civil Cases of Supreme Court of Georgia, on case No: AS-7-6-2010 (In Georgian).

relations is quite high, compared with the domestic civil turnover,[133] making the parties to restrict or exclude the responsibility for emergence of the circumstances within the sphere of such risks or undertake responsibility for emergence of the preventing circumstances. This should be assessed through interpretation of the contracts.[134] For example, on the basis of the contract, a party may:

- Undertake to perform the actions necessary for fulfillment of the obligations, rather than undertake the obligation to achieve specific results;
- Link the realization of his right of abandoning of the contract with emergence of specific circumstances;
- Limit or exclude the contractual responsibility for non-fulfillment of the obligations;
- State the contractual condition (*renegotiation clause*) intended to address the issue of regulation of the risk of contractual price change in the long-term relations;[135]
- Introduce flexible mechanism for setting of the contractual price, providing price regulation according to the changed circumstances rather than to determine fixed prices;
- Limit its obligations to dispatching of the goods, rather than to their delivery.

According to the general rule, the risk of seeking and obtaining of the generic goods required for fulfillment of the obligations is born by the seller, as long as the subject of contract is objectively available at the market or through the agreed supply source.[136] The debtor shall necessarily replace the subject of contract by the goods of similar type. If this could not be provided in a due time, than the party shall prove that delay in fulfillment of obligations with the fixed term was caused by the unforeseen event beyond his control.[137] Debtor's responsibility shall not be excluded based on non-fulfillment of the obligations by his vendor.[138] Though, the debtor shall have the right to claim compensation of damages by regression to the vendor.[139] This obligation of seller is opposed by the buyer's risk of loss of the benefits from the goods received by him, Buyer can not reject acceptance of performance on the basis that he can not sell the goods at desired price or is unable sell them at all. The fact that if the goods are useless for the buyer, or better or newer products are available at market could not become the basis for rejection of the fulfilled obligations.[140]

In this respect, decision by Hamburg Court of Appeal[141] is of significance. According to this decision, the seller bears the obligations and risks of seeking of the subject of contract from the supplier.

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133 *Uribe M.,* The Effect of a Change Circumstances on the Binding Force of the Contracts, Comparative Perspectives, Intersentia, 2011, 193.

134 *Schwenzer I.,* Force Majeure and Hardship in International Sales Contracts, VUWLR, Vol. 39, 2008, 715, <http://www.austlii.edu.au/nz/journals/VUWLawRw/2008/39.pdf>, [24.06.2014].

135 *Draetta U., Lake R. B., Nanda V.P.,* Breach and Adaptation of International Contracts, An Introduction to the Lex Mercatoria, Butterworth Legal Publishers, 1992, 172.

136 *Schlechtriem P., Schwenzer I.,* Commentary on the UN Convention on the International Sale of Goods (CISG), 3rd ed., Oxford University Press, 2010, 1074; *Brunner Ch.*, Force Majeure and Hardship under General Contract Principles, Exemption for Non-performance in International Arbitration, Kluwer Law International BV, The Netherlands, 2009, 148.

137 *Schlechtriem P., Schwenzer I.,* Commentary on the UN Convention on the International Sale of Goods (CISG), 3rd ed., Oxford University Press, 2010, 1074.

138 Ibid.

139 Ibid, 1076.

140 Ibid, 1077.

141 OLG Hamburg, Appellate Court Hamburg (Iron molybdenum case), 1 U 167/95, 28 February, 1997 (In Georgian), <http://cisgw3.law.pace.edu/cases/970228g1.html>, [24.06.2014].

The basis for exempting of the debtor from responsibility could be elimination or destruction of the similar or identical goods at market. The court included into the sphere of debtor's responsibility the risk of threefold market prices as the contract between the parties was regarded as the one with high degree of speculation. In the conditions of speculative agreement, the contract price could not be fixed. In such cases a party may be required to pay threefold market price. Such changes in prices are quite expectable and characteristic for the speculative deals.[142] Such responsibility of the seller, for seeking of the subject of fulfillment could be restricted only on the basis of clearly formulated contractual conditions, where the burden of proving is born by the seller.[143] Possibility of imposing responsibility for gaining the goods necessary for fulfillment on one of the contractors, within the scopes of contractual freedom, is mostly recognized by the judicial practice.[144]

With respect of force majeure provisions, it should be established, whether it provides for a party's freeing from the certain risks only or it restricts the debtor's responsibility as well.[145]

Article 7.1.6 of UNIDROIT Principles deals with the contract provisions exempting from the responsibility,[146] while Article 8:109 of European Principles deals with the contract terms limiting or excluding the remedies.[147] Article 8:109 of European Principles similar to the national legislation of many countries, declares unacceptability of exempting from responsibility for intentional non-fulfillment of the obligations by advance contractual agreement.[148] The courts are equipped with the wide discretional authorities, by virtue of which the clauses on limiting or excluding the legal remedies are not applicable if they, with their substance, are against the principles of fairness, good faith and care and breaks the contract balance.[149] Thus, contract provisions dealing with the limiting or excluding of the legal remedies shall not be applicable, if it, with its substance, is unfair and significantly changes the balance between the parties' interests.

Imposing of the contractual risk on a party by the contractual clauses not for emergence of the specific circumstances and their certain outcomes but rather providing for debtor's general responsibility for fulfillment of the obligations, irrespective of all changed circumstances is of particular interest. Such agreement can not have binding force as it can cause unreasonably heavy outcomes, with respect of the principles of good faith and fairness, for the responsible party. The legal doctrine recognizes distribution of the responsibilities and risks by contractual clauses only for the specific circumstances and not for the cases ofgeneral contingencies.[150] Hence, force majeure clauses are interpreted by the courts in a

142 *Schlechtriem P., Schwenzer I.,* Commentary on the UN Convention on the International Sale of Goods (CISG), third edition, Oxford University Press, 2010, 1076.

143 Ibid, 149.

144 Swiss Federal Tribunal, 05.04.2005, 5.1, 4C.474/2004, CISG-online No. 1012; BGH 12.01.1994, VIII ZR 165/92; BGHZ 49, 388 (1968).

145 *Brunner Ch.*, Force Majeure and Hardship under General Contract Principles, Exemption for Non-performance in International Arbitration, Kluwer Law International BV, The Netherlands, 2009, 156.

146 *Exemption Clauses.*

147 *Clause Limiting or Excluding Remedies.*

148 German Civil Code - Bürgerliches Gesetzbuch, Bundesministerium der Justiz, Juris GmbH, Saarbrücken, 2005 §276 (3); *Lando O., Beale H.,* Principles of European Contract Law, part I and II, Kluwer Law International, The Hague/London/Boston, 2000, 388-390.

149 *Lando O., Beale H.,* Principles of European Contract Law, part I and II, Kluwer Law International, The Hague/London/Boston, 2000, 388-390; Comment No. 5 on art. 7.1.6 UPICC.

150 *Böckstiegel K.H.,* Hardship, Force Majeureand Special Risks Clauses in International Contracts, 1985, 160, cited in: *Horn N.,(ed.)*, Adaptation and Renegotiation of Contracts in International Trade and Finance, Deventer/The Netherlands, Kluwer Law and Taxation Publishers, 1985.

very narrow sense and specifies, as a basis for exemption from responsibility the exact circumstances established by the parties' agreement, preventing possibility of application of any generalizations and similarities.[151] Basis for imposing responsibility on the party shall not be effective if the changed circumstances, in general, are caused by the reason of that party, for the benefit of which the above clauses was provided.[152]

5.8. Difference of the Clauses Stipulatingan Obligation of Negotiating and Force Majeure Clauses from the Legislative Grounds of Liability Exemption

Purpose of the clauses stipulating an obligation of negotiatingdiffers from that of the force majeure reservations, operating in case of emergence of circumstances preventing fulfillment and serving to temporary or permanent exemption from fulfillment of the contractual obligations for the period of persistence of force majeure circumstances,[153] rather than maintenance of the contract, through restoration of the balance of interests and contractual equilibrium.[154]

According to *Posner,* the force majeure clauses do not secure the party from the risks, naturally accompanying all contracts. For example, market change of the contract prices, for example, is a normal risk. Force majeure clauses exempt the parties from the outcomes of the risks of frustration of the substantial, central term and essence of the contract.[155]

According to the contractual clauses, provided in almost all long-term contracts,[156] the parties determine the circumstances giving rise to the obligation of negotiation, for the purpose of contract adjustment, description of the impact of these circumstances on the degree of hardship of performance and procedure of negotiating. In addition, the contractualclauses are applicable to the circumstances agreed by the parties. In case of all other hardships, the legal norms operating in the legal systems dealing with the exemption from responsibility shall be applicable.[157]

Contractual clauses differ from the legal grounds of liability exemption provided for by the legislation, having critical significance in long-term contractual relations as it is impossible to take all

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151 *Kel Kim Corp. v. Central Mkts., Inc., 519 N.E.2d 295, 296 (N.Y. 1987),* reference: *Hillman R.A.,* Principles of Contract Law, 2nd ed., The Concise Hornbook Series, West, 2009, 317.

152 *Uribe M.,* The Effect of a Change Circumstances on the Binding Force of the Contracts, Comparative Perspectives, Intersentia, 2011, 206.

153 *Espenschied L.E.,* Contract Drafting, Powerful Prose in Transactional Practice, American Bar Association Publishing, 2010, 60.

154 *Berger K.P.,* Renegotiation and Adaptation of International Investment Contracts: The Role of Contract Drafters and Arbitrators, Vand. J. Transnat'l L., Vol. 36, 2003, 1352, <http://www-prod.law.vanderbilt.edu/publications/journal-of-transnational-law/archives/volume-36-number-4/download.aspx?id=1888>, [24.06.2014]; *Al-Emadi T.A.,* The Renegotiating Clause in Petroleum International Joint Venture Agreements, University of Qatar, Oxford Student Legal Studies Paper No. 04/2012, 2012, 26, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2073340>, [24.06.2014]; *Strohbach H.,* Force Majeure and Hardship Clauses in International Commercial Contracts and Arbitration: The East German Approach', 1 JIA 39, 1984, 41.

155 *Speidel R.E.,* Contracts in Crises, Excuse Doctrine and Retrospective Government Acts, Carolina Academic press, Durham, North Carolina, 2007, 199.

156 *Fox W.F.,* International Commercial Agreements, A Primer on Drafting, Negotiation and Resolving Disputes, 4th ed., Wolters Kluwer Law and Business, The Netherlands, 2009, 77.

157 Ibid.

possible circumstances and their outcomes into consideration and stipulate them in the contract.[158] The rules of exemption from liability operate even where the contractual clauses are not stipulated by the parties in advance.[159]

5.9. Legal Outcomes of Violation of the Negotiating Obligation

Performance of the obligation of mutual negotiations by the parties for the purpose of contract revision could be regarded as the precondition for claiming legal remedies by the party in case of changed circumstances and a process accompanying the changed circumstances.[160]

Participation in the contract negotiations in good faith by the party is the precondition for implying legal remedies.[161] According to *DCFR*[162] a party, in the process of performance, execution of the right of claiming counter performance, implying legal remedies for non-fulfillment of obligation, execution of the right abandonthe contract, shall act in accordance with the principles of good faith and fairness. This obligation can not be limited or excluded by agreement or any other legal act. Failure to comply with the mentioned obligation would deprive a party the rights of execution of legal remedies.

If a party, in gross violation of the principle of good faith, without the reasonable business interests and any other good reasons, rejects or terminates the negotiations where a reasonable person would make significant efforts in similar circumstances,[163] the damaged party shall be entitled to claim compensation of losses suffered by him due to delay caused by the hope of joining of the contracting party to the negotiations or achievement of agreement.[164]

By virtue of Article 6:111 (3) of the European Principles, the court is entitled to impose compensation of losses to a party rejecting negotiations or wreck them in breach of the principle of good faith.[165] Providing

158 *Uribe M.,* The Effect of a Change Circumstances on the Binding Force of the Contracts, Comparative Perspectives, Intersentia, 2011, 224; *Karampatzos A.,* Supervening Hardship as Subdivision of the General Frustration Rule: A Comparative Analysis with Reference to Anglo-American, German, French and Greek Law, Eur. Rev. Private L., Kluwer Law International, The Netherlands, Vol. 13, No. 2, 2005, 112, <http://www.heinonline.org/HOL/Print?handle=hein.kluwer/erpl0013&div=13&collection=kluwer&set_as_cursor=0&men_tab=srchresults>, [24.06.2014].

159 *Fox W. F.,* International Commercial Agreements, A Primer on drafting, Negotiation and Resolving Disputes, 4th ed., Wolters Kluwer Law and Business, The Netherlands, 2009, 58.

160 *Uribe M.,* The Effect of a Change Circumstances on the Binding Force of the Contracts, Comparative Perspectives, Intersentia, 2011, 218.

161 *Bar Ch., Clive E., Schulte-Nölke H., Beale H., Herre J., Huet J., Storme M., Swann S., Varul P., Vaneziano A., Zoll F. (eds.),* Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference, Study Group on a European Civil Code and Research Group on EC Private Law (Acquis Group), Sellier, Eoropean Law Publishers GmbH, Munich, 2009, 741, <http://ec.europa.eu/justice/contract/files/european-private-law_en.pdf>, [24.06.2014].

162 See Article III.–1:103.

163 *Berger K.P.,* Renegotiation and Adaptation of International Investment Contracts: The Role of Contract Drafters and Arbitrators, Vand. J. Transnat'l L., Vol. 36, 2003, 1369, <http://www-prod.law.vanderbilt.edu/publications/journal-of-transnational-law/archives/volume-36-number-4/download.aspx?id=1888>, [24.06.2014].

164 *Uribe M.,* The Effect of a Change Circumstances on the Binding Force of the Contracts, Comparative Perspectives, Intersentia, 2011, 210.

165 See *Lando O., Beale H.,* Principles of European Contract Law, part I and II, Kluwer Law International, The Hague/London/Boston, 2000, 326; *Tallon D.* in *Hartkamp A.S.,Hesselink M., Hondius E.H., du Perron E., Joustra C., Veldman M.(eds.),*Towards a European Civil Code, 3rd ed., Kluwer Law International, 2004, 501;

for compensation of damages for non-fulfillment of the mentioned obligations by Georgian Civil Code would guarantee conducting of the negotiations in good faith by the parties.

Failure of the contractual negotiations does not automatically cause termination of the contract.[166] If the negotiations between the parties for contract adjustment failed, as a sanction, they could apply to the unbiased third party (court, arbitration etc.) with the requirement of adjusting of the contract to changed circumstances. The parties may regulate the scopes of the authorities of the court or arbitration by their contract, in the process of contract adjustment.[167]

If the contract can not be adjusted through negotiations, adjustment to the changed circumstances shall be provided by the court.[168] The issue of adjusting of contract to changed circumstances is discussed in the following chapter.

6. Adjustment of the Contract to Changed Circumstances by the Court

If the parties fail to achieve agreement through the process of contractual negotiations, then the court should make decision, whether the contract shall be fulfilled with the unchanged terms, should it be adjusted or full exemption from the contractual responsibility shall be provided.

Contract adjustment should reflect the agreed will, intention of the parties they would have in case of awareness of changed circumstances at the time of contract conclusion.[169]

In particular, if the parties fail to achieve agreement through negotiations procedure, the court can make four possible decisions: 1. it obligates the parties to continue negotiations for the purpose of adjustment of the contract to changed circumstances; 2. terminates the contract at the concrete time and with stated terms and conditions; 3. provides adjustment of the contract to changed circumstances by fair redistribution of the damages and benefits to the parties,[170] for the purpose of restoring of the initial contractual balance;[171] 4. leaves the contract terms and conditions with the initially agreed contents.

6.1 Goal of Ensuring the Contractual Fairness

Contract law is not an unchanged, but rather it is dynamic and is subject to changes with the new events. According to the opinion widespread in early 19th century, the autonomy of the parties' will was given absolute freedom, not subjected to limitation by the state. Later, it was recognized that the state

Ciematniece I., Contract Renegotiation and Adaptation, Concept of Contract Renegotiation and Adaptation in International Commercial Law Contracts, Lambert Academic Publishing, Saarbrücken, 2010, 39.

166 BGH LM §242 (Bb) BGB Nr. 57; BGH WM 1958, 700.

167 *Faruque A.,* Possible Role of the Arbitration in the Adaptation of Petroleum Contracts by Third Parties, Asian Int'l Arb. J., Vol. 2, 2006, 152, <www.heinonline.org/HOL/LuceneSearch?specialcollection=&terms=creator%3A%22%20Al%20Faruque,%20Abdullah%22&yearlo=&yearhi=&subject=ANY&journal=ALL&sortby=relevance&collection=journals&searchtype=advanced&submit=Search&base=js&all=true>, [25.06.2014].

168 *Ciematniece I.,* Contract Renegotiation and Adaptation, Concept of Contract Renegotiation and Adaptation in International Commercial Law Contracts, Lambert Academic Publishing, Saarbrücken, 2010, 65.

169 *Hillman R.A.,* Court Adjustment of Long-Term Contracts: An Analysis Under Modern Contract Law. Duke Law Journal 1987, 17.

170 See European Principles, Article 6:111 (3) "b".

171 *Ciematniece I.,* Contract Renegotiation and Adaptation, Concept of Contract Renegotiation and Adaptation in International Commercial Law Contracts, Lambert Academic Publishing, Saarbrücken, 2010, 13.

is entitled to intervene into the contractual relations, to ensure equal rights of the parties, vital public interests and fair results of the contracts through their adaptation to the changed circumstances.[172]

In the legal systems, contracts' adjustment to the changed circumstances is recognized as one of the means for legal protection of the parties and for this the court is awarded wide authority for the purpose of making decisions corresponding to the contractors' interests.

Necessity of court intervention into modification of the contents of contractual relations is caused by the necessity of ensuring fairness. A party can not be responsible for the risks, not undertaken by him. Therefore, the contractual injustice is caused by the fact that neither debtor has deserved the damages and nor the creditor has deserved the benefits arisen after making the contract.[173] Thus, intervention is reasonable with respect of prevention of imposing the negative outcomes on the damaged party and injustice caused by this, as imposing of the negative outcomes on one of the two equally faultless parties with respect of emergence of changed circumstances would undoubtedly cause violation of the principle of fairness. In addition, adjustment of the contract to changed circumstances based on the principle of goof faith and distribution of damages to the contractors[174] significantly protects the interests of the third parities depending on the debtor's financial situation.[175] Therefore, strict fulfillment of the contract terms and conditions could be for the detriment of not only debtor's, but also third party's interests and this, possibly, may cause undermining of stability of the entire economic system.

Adjustment of the contract to changed circumstances is the necessary mechanism of legal protection in case where the agreement is not providing social benefits and effectiveness any more. Parties – by the contractual agreement, or without thereof, by implication – distribute the risks and determine the contract terms and conditions.

6.2. Realization of Contracting Freedom and Execution of the Parties' Contractual Will

Any court intervention into the contents of contractual relations could limit the contractual freedom and the principle of autonomy of the parties' will. The issue, whether it is possible to adjust the contract to changed circumstances against the will of one of the parties and to what extent is of significance.[176]

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172 *Syquia E. P.,* The Revision and Adaptation of Contracts in Philippine Law – With a Comparative Look at the Law of other Asian Countries, 1985, 96-97, cited in: *Horn N.,(ed.)*, Adaptation and Renegotiation of Contracts in International Trade and Finance, Deventer/The Netherlands, Kluwer Law and Taxation Publishers, 1985; *Ciematniece I.,* Contract Renegotiation and Adaptation, Concept of Contract Renegotiation and Adaptation in International Commercial Law Contracts, Lambert Academic Publishing, Saarbrücken, 2010, 11.

173 *Speidel R.E.,* Court-Imposed Price Adjustments under Long-Term Supply Contracts, Nw. U. L. Rev., Vol. 76, 369, 1981-1982, 405-406, <http://heinonline.org/HOL/Page?handle=hein.journals/illlr76&div=19&g_sent=1&collection=journals>, [25.06.2014].

174 *Scott R.E.,* The Death of Contract Law, U. Toronto L.J., Vol. 54, 2004, 373, <http://heinonline.org/HOL/Print?collection=journals&handle=hein.journals/utlj54&id=382>, [25.06.2014].

175 *Trakman L.E.,* Winner Take Some: Loss Sharing and Commercial Impracticability, Minnesota Law Review, Vol. 69, 1984, 486, cited in: *Uribe M.,* The Effect of a Change Circumstances on the Binding Force of the Contracts, Comparative Perspectives, Intersentia, 2011, 240.

176 *Ciematniece I.,* Contract Renegotiation and Adaptation, Concept of Contract Renegotiation and Adaptation in International Commercial Law Contracts, Lambert Academic Publishing, Saarbrücken, 2010, 13.

In the process of adjusting contract to changed circumstances by the court, the principle of autonomy of the parties' wills and necessity of ensuring contract stability are opposed.[177]

Principles of good faith, cooperation and flexibility are regarded as the main basis for contract adjustment to the changed circumstances. Contract adaptation by the court actually means Adjustment of the contract to changed circumstances by the court implies use of the techniques of interpretations and filling of the gaps. During the contract revision the court always takes into consideration, together with the factual circumstances, identification of the parties' goals, through interpretations, in cases where the contract contains the gaps. Thus, contract modified according to the changed circumstances shall always reflect parties' the initial contractual interests and goals.[178] Goal of the court is that the modified contract should express the parties' wills in the changed situation. Modification of the contract by court mostly results in improvement of the contract terms and conditions, of the fairness is the guiding principle in the process of revision.[179] Adjustment of the contract to changed circumstances could be regarded as the type of additional performance realizing the contractual will and interests of the parties.[180]

Any commercial deal is based on the balance of mutual obligations of the parties to the contract.[181] In adjusting of the contracts to the changed circumstances, the degree of imbalance of mutual obligations of the parties and its outcomes should be assessed in the context of the principle of good faith. As the principle of good faith is the main mechanism for assessment of the relations, contract adaptation does not cause limitation of the freedom of contract rather it is intended to ensure natural and fair outcomes.[182]

Contract can not be considered without taking into consideration of the surrounding circumstances. Contract adjustment to significantly changed circumstances does not change the parties' wills but rather becomes the means for establishing the parties' initial intentions, their real will. Parties' will, at the stage of contract formation is its fulfillment and its adjustment to the changed circumstances is the precondition of contract fulfillment and hence, realization of the parties' will.

Thus, on the basis of the principle of equity, restoration of economic balance of the contract is realized by establishing of the initial will of the parties and its understanding in the context of changed circumstances.[183]

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177 *Faruque A.,* Possible Role of the Arbitration in the Adaptation of Petroleum Contracts by Third Parties, Asian Int'l Arb. J., Vol. 2, 2006, 152, <www.heinonline.org/HOL/LuceneSearch?specialcollection=&terms=creator%3A%22%20Al%20Faruque,%20Abdullah%22&yearlo=&yearhi=&subject=ANY&journal=ALL&sortby=relevance&collection=journals&searchtype=advanced&submit=Search&base=js&all=true>, [25.06.2014].

178 *Uribe M.,* The Effect of a Change Circumstances on the Binding Force of the Contracts, Comparative Perspectives, Intersentia, 2011, 237.

179 *Kull A.,* Mistake, Frustration, and the Windfall Principle of Contract Remedies, Hastings Law Journal, Vol. 43, 1991-1992, 38, <http://heinonline.org/HOL/Page?handle=hein.journals/hastlj43&div=11&g_sent=1&collection=journals>, [25.06.2014].

180 *Hillman R.A.,* Court Adjustment of Long-Term Contracts: An Analysis Under Modern Contract Law, Duke Law Journal 1987, 27, cited in: *Uribe M.,* The Effect of a Change Circumstances on the Binding Force of the Contracts, Comparative Perspectives, Intersentia, 2011, 242.

181 *ICC Arbitration Case No. 2291, 1976 Lunet 989 (1976).*

182 *Ciematniece I.,* Contract Renegotiation and Adaptation, Concept of Contract Renegotiation and Adaptation in International Commercial Law Contracts, Lambert Academic Publishing, Saarbrücken, 2010, 22.

183 *Karampatzos A.,* Supervening Hardship as Subdivision of the General Frustration Rule: A Comparative Analysis with Reference to Anglo-American, German, French and Greek Law, Eur. Rev. Private L., Kluwer Law International, The Netherlands, Vol.13, No. 2, 2005, 111, <http://www.heinonline.org/HOL/Print?handle=hein.kluwer/erpl0013&div=13&collection=kluwer&set_as_cursor=0&men_tab=srchresults>, [24.06.2014].

According to one of the opinions in Anglo-American doctrine, the court shall not be entitled to "rewrite the contract"[184] or other relevant competence.[185] This would limit the contracting freedom.[186] Though adjustment of the contract to changed circumstances by the court does not limit autonomy of the parties' will, as the parties could not have expressed their will with respect of regulation of the events and their outcomes, which could not be reasonably foreseen by them at the stage of contract formation. Hence, regulating of the changed circumstances is beyond the scopes of the contract contents and thus, it is possible that it was freely entrusted to the court as an unbiased third person.

Recovering of the contract gap by the court does not affect the parties' contractual will, as in case of presence of the gap there is no agreement between the parties about certain legally significant circumstances. And this could be regarded as implied consent of the parties on adjustment of the contract to changed circumstances by the court instead of them.[187]

In the process of adjustment of the contract to changed circumstances, the court shall be guided by the principles of fairness, reasonability and good faith.[188]

6.3 Authority of the Court in the Process of Adjustment of the Contracts to Changed Circumstances

It is the legal axiom that the court shall not be entitled to make substantially new contract terms and conditions instead of the parties.[189] Though if the judicial authority had no legal possibility to adapt the agreement, this would deprive the parties of motivation to agree through negotiations before intervention of the court into the contract-law relations. Authority of adjustment of the contract is the practical stimulus for the businessmen – agree upon the disagreement emerged in the long-term contractual relations.[190]

Court may have significant leverage to stimulate negotiations between the parties and adaptation of contract upon mutual agreement. With respect of one of the cases[191] the court, with the purpose of stimulation of negotiations between the parties, refused to determine the legal remedies in the conditions

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184 *Gotanda J.Y.,* Renegotiation and Adaptation Clauses in Investment Contracts, Revisited, Villanova University School of Law, Vand. J. Transnat'l L., Vol. 36, 2003, 1463, <http://works.bepress.com/cgi/viewcontent.cgi?article=1007&context=gotanda>, [25.06.2014].

185 *Hillman R.A.,* Principles of Contract Law, 2nd ed., The Concise Hornbook Series, West, 2009, 330.

186 Ibid, 331.

187 *Hillman R.A.,* Court Adjustment of Long-Term Contracts: An Analysis Under Modern Contract Law. Duke Law Journal 1987, 28, cited in: *Uribe M.,* The Effect of a Change Circumstances on the Binding Force of the Contracts, Comparative Perspectives, Intersentia, 2011, 242.

188 See article III 1:110 (2) (a) of DCFR, Article 1467 of Civil Code of Italy, Article 2-615 of Uniform Commercial Code.

189 *Ciematniece I.,* Contract Renegotiation and Adaptation, Concept of Contract Renegotiation and Adaptation in International Commercial Law Contracts, Lambert Academic Publishing, Saarbrücken, 2010, 30.

190 This mechanism of such an encouragement of the parties is discussed in case: *Aluminum Co. of American vs. Essex Group, Inc., 449 F. Supp.53 (W.D. Pa.1980).*

191 *Florida power & Light Company v. Westinghouse Electric Corporation, 517 F. Supp. 440, E.D. Va., 1981,* <http://openjurist.org/826/f2d/239/florida-power-light-company-v-westinghouse-electric-corporation>, [25.06.2014].

of changed circumstances with the motivation that the parties were best able to make fair and mutually beneficial decision.[192]

According to the court's explanation, in the process of contract adjustment to changed circumstances, the guidance for the court may be categorization of the reasons causing the damages to the spheres of risk for the parties and distribution of the negative outcomes in the relevant proportion to the contractors.[193]

Equal distribution of the damages to two faultless parties only if differentiation of their responsibilities is impossible by the different extents of risk spheres, could be regarded as one of the guiding principles.

In the process of adjustment of the contract to changed circumstances, where there is mismatch, imbalance, between parties' performances, the contract price could be modified within the legal regime of the initial contractual obligations, allowing continuation of the contract with the revised terms and conditions and on the basis of reduction of the contract price, balancing of the non-equivalent fulfillment by the parties.

Court is authorized to extend the term set for fulfillment, modify the contract price or scopes of fulfillment. In the process of contract adjustment the judge is not entitled to re-formulate the contract or change its legal nature, essence or purpose.[194] If restoration of the contractual balance implies change of the contract substance, then the court shall terminate the contract.[195]

Court shall distribute the negative outcomes caused by the changed circumstances by the principle that performance was reasonable burden for the debtor.[196] Naturally, contract adjustment does not mean absolute restoration of the contractual balance and full exemption by the court of the damaged party from the costs caused by changed circumstances.[197]

Court may extend the fulfillment term, increase or reduce the contract price or scopes of the counter performance. Modification of the contract obligation, of course, does not imply imposing of the obligations of absolutely new contents and different substance on the parties.[198] Ambiguity in the contract does not entitle the court to transform the contents in the process of seeking of justice.[199]

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192 *Ciematniece I.,* Contract Renegotiation and Adaptation, Concept of Contract Renegotiation and Adaptation in International Commercial Law Contracts, Lambert Academic Publishing, Saarbrücken, 2010, 28-29. See also *Florida power & Light Company v. Westinghouse Electric Corporation, 517 F. Supp. 440, E.D. Va., 1981,* <http://openjurist.org/826/f2d/239/florida-power-light-company-v-westinghouse-electric-corporation>, [25.06.2014].

193 *Hubbard S.W.,* Relief from Burdensome Long-Term Contracts: Commercial Impracticability, Frustration of Purpose, Mutual Mistake of Fact, and Equitable Adjustment.Mo. L. Rev., Vol. 47, 1982, 109, <http://heinonline.org/HOL/Print?collection=journals&handle=hein.journals/molr47&id=139>, [25.06.2014].

194 *Lando O., Beale H.,* Principles of European Contract Law, part I and II, Kluwer Law International, The Hague/London/Boston, 2000, 327.

195 Ibid.

196 *Brunner Ch.,* Force Majeure and Hardship under General Contract Principles: Exemption for Nonperformance in International Arbitration. Kluwer Law International: Alphen an den Rijn, 2009, 499.

197 See Article 6.2.1 of UNIDROIT Principles, Article 6:111 (1) of European Principles and Article III – 1:110 of DCFR.

198 *Flambouras D.*, Comparative Remarks on CISG Article 79 & PECL Articles 6:111, 8:108, May, 2002, <http://www.cisg.law.pace.edu/cisg/text/peclcomp79.html>, [25.06.2014].

199 *Goldberg V.P.,* Framing Contract Law, An Economic Perspective, Harvard University Press, Cambridge, Massachusetts and London, England, 2006, 347.

6.4. Impossibility of Adjustment to the Changed Circumstances and Contract Termination by the Court

Termination of the contract on the basis of hardship due to the changed circumstances by the court is applicable in the extreme situation.[200]It is the most severe legal mechanism[201] in the continental and particularly in the unified law system. In Anglo-American law, contract frustration results in its automatic termination and exemption of the parties from the obligation of fulfillment, with the responsibilities imposed on each of them. In addition, contract termination can not be the best means for protection of the parties' interests, where the contract maintenance serves also to the interests of the third parties or public interests.[202]

In process of contract performance, Georgian Civil Code allows peaceful coexistence of the interests. The respected interest becomes the basis for both, transformation of the contractual relation and its termination. While the status of interests is determined by the process of performance and the circumstances beyond it.[203] Contract termination may take place only where it ensures the mutual interests better than contract adaptation and in addition, such termination is not for the detriment of the public interests of those of the third persons.

The judge is entitled to terminate the contract withterms and conditions different from the general rules applicable to abandoning of the contract in general. In case of contract termination by the court, it determines the reasonable term for termination, to prevent damaging of the damaged party.[204] If neither contract adjustment to the changed circumstances nor its termination can ensure reasonable balancing of the parties' best interests, then the court may call for negotiations or leave the contract in force, with the initially agreed terms and conditions.

The main thing is that adjustment of the contract to changed circumstances, as well as exemption of the contractual obligations due to fulfillment hardship or impossibility, shall not prejudice the principle of freedom of contract.[205]

7. Conclusion

Within the scopes of the research the legal outcome of hardship, contract adjustment to changed circumstances, the mainly applied legal remedy was investigated. On the basis of this research the following conclusions were made:

200 *Ciematniece I.,* Contract Renegotiation and Adaptation, Concept of Contract Renegotiation and Adaptation in International Commercial Law Contracts, Lambert Academic Publishing, Saarbrücken, 2010, 64.

201 *Horn N.,* Standard Clauses on Contract Adaptation in International Commerce, 1985, 137 cited in: *Horn N.(ed.)*, Adaptation and Renegotiation of Contracts in International Trade and Finance, Deventer/The Netherlands, Kluwer Law and Taxation Publishers, 1985.

202 *Uribe M.,* The Effect of a Change Circumstances on the Binding Force of the Contracts, Comparative Perspectives, Intersentia, 2011, 255.

203 *Zoidze B.,* Reception of European Private Law in Georgia, Tinatin Tsereteli State and Law Institute of the Academy of Science of Georgia, Institute of Private Law, Tb., 2005, 300 (In Georgian).

204 *Lando O., Beale H.,* Principles of European Contract Law, part I and II, Kluwer Law International, The Hague/London/Boston, 2000, 327.

205 *Ciematniece I.,* Contract Renegotiation and Adaptation, Concept of Contract Renegotiation and Adaptation in International Commercial Law Contracts, Lambert Academic Publishing, Saarbrücken, 2010, 11.

- Contract law, establishing the fundamental provisions for regulation of the market relations, is the determinant of stability of commercial relations and the fair realization of the interests of participants of civil law relations through regulation of civil turnover. Hence, improvement of legislative regulation of the issue of hardship resulting from the changed circumstances in contract relations would provide stability of civil turnover and commercial relations to significant extent, ensure protection of public order established by the balance between the interests of civil turnover participants.
- In the process of formation of the system of liability exemption grounds, unification of the concept of the obstacles to contract performance acquires special significance. Substantial legal characteristics of the mentioned conceptionwere generalized and unified in the legal substance of the concept of hardship and formed as a general contact principle in international law systems. General contract principles could be regarded as the effective mechanisms for interpretation and supplementing of the incomplete and open norms of the internal national laws and contract terms and conditions.
- In Georgian law, issues related to changed circumstances are not regulated by the institutes named *force majeure* or *hardship*, though the legislation provides for regulation of substantially similar legal conceptions, named *superior power* and *faultless impossibility* of fulfillment and changed circumstances. Regarding the abovementioned, in this research, to express conception of extreme hardship of fulfillment of obligations the term *hardship* of performance was used, as the conception reflecting the general contract principle.
- Legitimate contractual interest of fulfillment of obligations is legally protected particular value in in any law system, ensuring realization of the above interests by means of one or another legal mechanism. In the conditions of hardship, the primary legal protection instrument for the parties' interests is adjustment of the contract to changed circumstances, as, in such case, the contractors' purpose is still fulfillment of the contract. Contract adjustment to the changed circumstances is a necessary legal protection mechanism, where the agreement does not provide social good and effectiveness. If the contractual negotiations fail to achieve the goal of saving of the parties' initial will and restoring balance between the parties' interests, then termination of relations, as the extreme mechanism of legal protection would operate. The mentioned purpose explains providing of the clauses dealing with the obligatory negotiations between the parties for contract adjustment to changed circumstances by different legal systems.
- Contract adaptation to the changed circumstances, compared with contract termination or strict compliance therewith, ensures interests of the parties to significant extent. Advantage of contract adjustment to the changed circumstances could be seen in the cases where restoration of the initial status and compensation of damages can not return the initial condition to the parties. Therefore, as a rule, the contractors give preference to adjustment of contract to changed circumstances for the purpose of restoring of the balance between their interests, compared with the contract termination. Contract adjustment to the changed circumstances could be regarded as a mechanism for fulfillment of the obligations and ensuring contractual justice.
- Historically, doctrine of adjustment of contracts to changed circumstances emerged on the basis of the principle of good faith. In case of hardship as a result of changed circumstances, the principle of good faith obligates the parties to cooperate for the purpose of contract adaptation and gives the court authority of contract modification, intended for interpretation of the parties' contractual purpose of restoring of the contractual justice and balance in the context of the principle of good faith. Negotiations for the purpose of contract adaptation should be interpreted as the obligation of the parties to perform concerted actions, as contract fulfillment requires permanent cooperation.

- Together with regulation of the principle of good faith at the legislative level, it would be reasonable to expand the practice of application of the mentioned normative principle in Georgian judicial practice and operate it for "gaining of fair legal outcomes and, at the same time, preventing of the unfair outcomes."[206] Actual application of the principle of good faith for regulation of the civil-law relations complicated as a result of changed circumstances, would ensure stability of civil turnover and fair distribution of the interests of its participants, in the process of restoring of the interests' balance and equilibrium.
- Georgian Civil Code together with establishing the key legal preconditions for contract adjustment to changed circumstances, considers "unreasonable" fulfillment as one more significant precondition for establishment, formation of hardship. The barriers to performance, where a party can not be required (i.e. it would be unreasonable) to strictly comply with the unchanged contract, regarding the principles of good faith and fairness, are given the force of precondition necessary for emergence of hardship, as fulfillment reasonability is regarded as one of the criteria determining the binding force of the contract. In such case the contract becomes not the instrument for cooperation and free turnover but rather the instrument for subordinating a party by the other party."[207] Consequently, the "legislator regarded that it would be just to exempt a party significantly and disproportionately damaged by changed circumstances from the binding force of the contract".[208] Such fulfillment would place the participants of civil turnover into unequal positions. Thus, unreasonability of fulfillment, its irrationality, together with the other necessary preconditions for full establishing of the fulfillment hardship, as a concept, should be regarded as one of the necessary preconditions, rather than its accompanying outcome.
- Article 398 I of Georgian Civil Code is against the requirement of contract adjustment and the principle of obligatory negotiations, as it takes into consideration the cases, where abandoning of the contract could be directly demanded, instead of contract adjustment to the changed circumstances.
- Contract adaptation to the changed circumstances is the mechanism for execution of the parties' agreement and realization of their interests. Therefore, most legal systems recognize obligatory negotiation between the parties for contract adaptation. Therefore, no cases can exist, where negotiations between the parties for contract adjusting to the changed circumstances are not required, as specified in the last sentence of Article 398 I. The substance is that the attempt of adjusting of the contract by the parties shall be made by the parties and only after completion of the said negotiations without any results the requirement of abandoning of the contact could be applied.
- Regarding the above discussion, the incomplete legislative provisions could be formulated more exactly as follows: if the circumstances providing basis for making contract, have apparently changed after contract execution and the parties would not make the contact or make it with the different contents, if they could take into consideration such changes, then the requirement of contract adjustment to the changed circumstances emerges, if, regarding certain circumstances, a contract party could not be demanded to strictly comply with the unchanged contract.
- Proper note should be made with respect of the provisions of Article 398 III of Georgian Civil Code, automatically entitling the party to abandon the contract in case of absence of his consent

[206] *Ioseliani A.*, Principle of Good Faith in the Contracts Law (comparative legal study) "Review of Georgian Law", special issue, 2007, 12.

[207] *Zoidze B.,* Reception of European Private Law in Georgia, Tinatin Tsereteli State and Law Institute of the Academy of Science of Georgia, Institute of Private Law, Tb., 2005, 28.

[208] *Chachava S.,* Competition of the Claims and Claim Bases in Private Law, Dissertation Work, Tb., 2010, 68, <http://tsu.edu.ge/data/file_db/faculty-law-public/sofio_chachava.pdf>, [24.06.2014].

to contract adaptation, Creditor's refusal to adjust the contract to the changed circumstances should not be taken into consideration, as it is opposed by the respected interest of the debtor, the principle of restoring of the contractual equilibrium and balance of interests. A party shall contribute to the measures intended for saving of the contract and by virtue of the sentence of Article 398 III (if the contract can not be adjusted to changed circumstances, or the other party does not agree with this), it can not be entitled to reject adjustment of the contract to changed circumstances, without good reason.

- In case of failure to ensure fair balance between the parties' interests, abandoning of the contract instead of its adjustment could be allowed. In this case, final decision on contract adjustment should be entrusted to the court. In the conditions of non-achievement of the agreement through negotiations, before realization of the right contract avoidance, application to the court with the request of contract adaptation, similar to additional performance, should be established as the precondition for abandoning of the contract at the legislative level.
- Reasonable and fair adjustment to the changed circumstances can not imply absolute restoration of the contractual balance in a form existing at the stage of contract formation. Negotiations should provide for reducing of the fulfillment burden for the debtor and ensuring the contract benefit for the creditor. Thus, the contractual negotiations can not provide for imposing of the full contractual liability on the other party.[209]
- Demand of negotiation should be performed in time and it should rely on the legal bases and accurate information about changed circumstances, degree of their impact on fulfillment of obligations and reasonable time for adjustment. In the process of contract renegotiation, a party's right to abandon the contract is restricted.
- Contract reservations shall not establish the debtor's general responsibility for fulfillment of obligations irrespective of revealing of any changed circumstances. Such agreement can not have the binding force, as this could cause unreasonably heavy outcomes for the responsible party, with respect of the principles of good faith and fairness. The legal doctrine recognizes distribution of responsibilities and the risks by contract reservations only in the specific circumstances and not in case of emergence of any contingencies, generally.[210]
- Fulfillment of the parties obligation of renegotiation for the purpose of contract revision could be regarded as the precondition for application of the legal remedies provided for by the law in case of changed circumstances, as well as the process accompanying the changed circumstances.[211] Obligation of contract renegotiation in good faith can not be limited or excluded by the agreement or any other legal act. Non-fulfillment of the mentioned obligation would deprive the party of the right of claim and use of the legal remedies.
- Good faith, fairness, mutual cooperation and flexibility are regarded as the main basis and guiding principles for contract adaptation to the changed circumstances. Contract adaptation to the changed circumstances by the court implies use of the methods of interpretations and recovery of

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209 *Uribe M.,* The Effect of a Change Circumstances on the Binding Force of the Contracts, Comparative Perspectives, Intersentia, 2011, 208.

210 *Böckstiegel K.H.,* Hardship, Force Majeureand Special Risks Clauses in International Contracts, 1985, 160 Book: *Horn N. (ed.)*, Adaptation and Renegotiation of Contracts in International Trade and Finance, Deventer/ The Netherlands, Kluwer Law and Taxation Publishers, 1985.

211 *Uribe M.,* The Effect of a Change Circumstances on the Binding Force of the Contracts, Comparative Perspectives, Intersentia, 2011, 218

gaps and assessment of the degree of imbalance between mutual obligations. Contract revision by the court, together with factual circumstances, should always provide for identification of the parties' goals through interpretation. Contract adaptation should reflect the parties agreed will, they would have, if they knew about changed circumstances at a time of contracting, with maintaining the initial contractual interest to maximal possible extent. Adapted contract should realize the parties fair interests in the new circumstances as well.

- Contract can not be considered without taking into consideration of the surrounding circumstances. Contract adjustment to significantly changed circumstances does not change the parties' wills but rather becomes the means for establishing the parties' initial intentions, their real will. Parties' will, at the stage of contracting is its fulfillment and its adjustment to the changed circumstances is the precondition of contract fulfillment and hence, realization of the parties' will.
- Adjustment of the contract to changed circumstances by the court does not limit autonomy of the parties' will, as the parties could not have expressed their will with respect of regulation of the events and their outcomes, which could not be reasonably foreseen by them at the stage of contract formation. Hence, regulating of the changed circumstances is beyond the scopes of the contract contents and thus, it is possible that it was freely entrusted to the court as an unbiased third person.
- In the process of adjustment of the contract to changed circumstances, where there is mismatch, imbalance, between parties' performances, with respect of fulfillment, the contract price could be modified within the legal regime of the initial contractual obligations, allowing continuation of the contract with the revised terms and conditions and on the basis of reduction of the contract price, balancing of the non-equivalent fulfillment by the parties. Equal distribution of the damages to two faultless parties only if differentiation of their responsibilities is impossible by the different extents of risk spheres, could be regarded as one of the guiding principles. Thus, the court is authorized to extend the term set for fulfillment, modify the contract price or scopes of fulfillment. In the process of contract adjustment the judge is not entitled to re-formulate the contract or change its legal nature or purpose.
- In case of impossibility of contact adjustment to the changed circumstances, termination of the contract by the court is the strictest legal mechanism applicable in the extreme circumstances. Contract termination may take place only where it ensures mutual interests of the parties compared with the contract adaptation and in addition, such termination does not harm the public interests of those of the third parties. If contract adaptation or its termination can not provide reasonable balancing of the interests, than the court may call for renegotiation or leave the contract unchanged, with the initially agreed terms and conditions.
- It is significant that contract adjustment to the changed circumstances, as well as exemption from the responsibility by the reason of hardship or impossibility does not prejudice the principle of will autonomy of the parties but rather this is expression of realization of the principle of freedom of contract.

By detailing and extension through legislative regulation of the legal regime of contract adjustment to the changed circumstances, scopes of its applicability, the bases and preconditions, contract adaptation conception will be recognized as the general contract principle, resulting in its wide application in practice. Contract adaptation to changed circumstances is the legal mechanism for execution of the binding force of the contract, ensuring maintenance of the contract with realization of the initial interests and economic benefits to maximal possible extent.

Nino Jibuti*

The Essence and the Importance of Sovereign Rating

1. Introduction

Rating, made up by Credit Rating Agencies, represents credit rating, expressing creditworthiness in Latin symbols. Several types of credit rating exists, but the purpose of this article is to consider one of them, namely – the sovereign rating.

In the case of observation, in various sources, on the official web site of the governments of different countries, including Georgia[1], information is provided on credit rating, awarded to the country – whether it has increased or decreased. Credit rating of the country is the same as sovereign rating, but the question arises – what is sovereign rating needed for? How is it drawn up? What is its advantage?

To obtain an answer to this question, the essence and the importance of the sovereign rating shall be clarified. Events are chronologically arranged in the article, providing complete picture about sovereign rating. It is important to know whether how drawing up of ratings historically started, what conditioned it, what facilitated its development, what problems were brought to financial market by its existence. The article can conditionally be divided into two parts: the first – historical part, where three significant crises are considered; the second – the process of drawing up of sovereign rating, criteria, importance;

Following the global financial crisis, the amount of literature related to rating companies, increased.[2] Nevertheless, it shall be mentioned that there is no magazine related to country risks, sovereign ratings.[3] The existence of the sovereign rating itself does not mean that all countries are given the rating; On the contrary, there is a number of countries, creditworthinessof which has not been evaluated by the Credit rating agencies. It is worth mentioning that scientific circles have not inquired – what the rating would be for still non-evaluated countries.[4]

The fact is notable that plural form is used in regard to the credit rating agencies in this article. I.e. we are speaking about the „ credit rating agencies“ and not about the „ credit rating agency“, as three leading companies - *Moody's*[5]*, Fitch*[6]*, and Standard and Poor's*[7] - are implied. These are the three credit rating agencies operating on the international market. Nevertheless, the rating market includes other credit rating agencies. For example: By 2013, there were 77 rating companies in the United States of

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1 E.g. <http://www.government.gov.ge/index.php?lang_id=geo&sec_id=35&info_id=33192>.

2 *Eijffinger S.C.W.,* Rating Agencies*:* Role and Influence of Their Sovereign Credit Risk Assessment in the Eurozone, JCMS: Journal of Common Market Studies, Vol. 5, Issue 6, 2012, 913.

3 *Hoti S., McAlee M.,* An Empirical Assessment of Country Risk Ratings and Associated Models, Journal of Economic Surveys, Vol. 18, No. 4, 2004, 542.

4 *Ratha D., De P.K., Mohapatra S.,* Shadow Sovereign Ratings for Unrated Developing Countries, World Development, Vol. 39, 2010, No. 3, 298.

5 *Moody's* <www.moodys.com>.

6 *Fitch* see: <www.fitchratings.com>.

7 *Standard & Poor"* < www.standardandpoors.com>.

America. Despite this fact only three above-mentioned credit rating agencies are still leading companies, occupying 95% of the market.[8] The regulation of activities of the credit rating agencies leaves general impression that it is directed towards regulation of activities of just these three main companies and the history of rating actually equals to the history of these rating companies.[9] This research, provided in the present article, in regard to general issues, covers all credit rating agencies, established in the world, and in regard to specific issues – only the three main credit rating agencies.

2. The Essence of Sovereign Rating and its Origin

Official definition of "rating" is provided by the credit rating agencies (CRA) themselves. In the definition, provided by them, rating is an "opinion" on the existing status of the issuer, in particular, on whether the emitter will be able to pay the interests and payables in due time, completely and in timely manner.[10] There are different types of credit rating: 1. Long-term and short-term rating; 2. Rating of issues and issuer; 3. Domestic and external consumption rating; 4. Voluntary and ordered rating; 5. Rating of specific spheres; 6. Sovereign rating. The object of research is sovereign rating, which represents evaluation of the state's creditworthiness and preparedness to fulfill financial liabilities.[11] This is the country's individual indicator related to its creditworthiness.[12]

To understand how the risk assessment of the country came up to present days, history shall be considered. Starting of risk assessment is related with inflow of international capital in countries. It is assumed that country's risk assessment was started by drawing up sovereign rating in 1800-ies. It is interesting that the first sovereign rating was issued by European International Bank, i.e. Lyonnais (province in France) in 1871. In 1919- 1939 West European countries could not be in the role of a creditor any more, which means that the states turned towards the United States of America for loans. The states, which earlier acted as creditors (Belgium, France, Great Britain, Ireland, Holland, Scandinavian countries, Switzerland) started seeking for funding for stabilization of currency, improvement of public and private capital, etc. The debtor states (Bolivia, Brazil, Bulgaria, Chile, Columbia, Costa Rica, Cuba, Germany, Greece, Hungary, Peru, Poland, Romania, Yugoslavia, Uruguay) for which almost all European market was closed, also applied to the United States of America. Australia, Canada, Japan,

8 *Santoni A., Arbia B.,* Assessing Rating Agencies' Ability to Predict Bank Bankruptcy - The Lace Financial case, Economic Notes, Vol. 42, Issue 2, 2013, 205.

9 *Reisen H., Maltzan J.,* Bomm and Bust and Sovereign Ratings, International Finance, Vol. 2, Issue 2, 2002, 275.

10 *Kohn M.,* Financial Institutions and Markets, New York Oxford 2004, 397. The mentioned definition of credit rating of credit rating agencies is disputable. In particular, how much credit rating represents "idea"/ "opinion", which is not followed by any legal outcome, is disputable. Primarily it was formed like that but in the course of time credit rating obtained great importance on financial market. Till 2013, it was accepted that credit rating is only the "opinion" on the issuer's creditworthiness. Consequently, credit rating companies were not responsible for incorrect ratings. The issue of responsibility of credit rating agencies is still problematic, but the year 2013 was important from the viewpoint that European regulator officially recognized that credit rating is more than just "opinio", on the basis of which a lot of decisions are made on financial market. Thus, the discussion of credit rating, as "opinion" was finished. Jibuti N. in the book *Makharoblishvili G., Kiria A., Zubitashvili N., Jibuti N., Jibuti S.,* Collection of Corporate Law II, Meridian, editor Burduli I., Tb., 2014, 197- 268.

11 *Williams G., Alsakka R., Gwilym O.,* The impact of sovereign rating actions on bank ratings in emerging markets, Journal of Banking & Finance 37, 2013, 565.

12 *Kim S.J., Wu E.,* International Bank Flows to Emerging Markets: Influence of Sovereign Credit Ratings and their Regional Spillover Effects, The Journal of Financial Research, Vol. XXXIV, No. 2, 2011, 332.

Palestine were also borrowing from the United States of America. As a result, the bond market shifted from London to New York. 1924- 1928 were the years of development of bank credits in the United States of America.[13]

Moody's was the first credit rating agency, which provided assessment of the bonds of the states outside America in 1918. Several years later *Standard and Poor's* and *Fitch*[14] joined it. *Standard and Poor's* issued sovereign rating in 1929 before the beginning of great depression.[15] 21 countries were awarded the sovereign ratings by *Poor's.*[16] By 1929 *Moody's* had issued about 50 sovereign ratings.[17]

During the great depression, the demand for the sovereign rating decreased and it continued through the period of the Second World War. In 1931 Brazil, Chile, Columbia, Costa Rica, Dominican Republic, Peru, and Turkey became insolvent. In same situation proved to be Austria, Bulgaria, El-Salvador, Germany, Greece, Hungary, Libya, Nicaragua, Panama, Paraguay, Yugoslavia, in 1932, Cuba, Guatemala, Uruguay, Romania in 1933 and Poland in 1936. During the Second World War, sovereign rating was granted only to the United States of America, Canada and several states of the South America. The need of assessment of creditworthiness of countries decreased.[18]

In 1934, "Johnson's Act"[19] was adopted, on the basis of which the United States of America forbade insolvent countries to sell securities to any US citizen or corporation. It meant that the United States of America also forbade private loans to the states, which did not pay the debt or were insolvent. The Second World War played important role in the history of sovereign rating. In 1940, leading credit rating agencies withdrew ratings issued to Austria, European and Asian countries and decided to evaluate only the bonds of South American and Latin American origin. It could be said the sovereign rating disappeared for certain period. Since 1970, alongside with revival of international bonds market, demand for sovereign ratings arose again. And since 1975, the use of sovereign rating was widely spread. In this period *Fitch*, for the first time, published sovereign rating, *Moody's* drew up sovereign ratings of only five countries (Australia, Canada, New Zealand, Panama, the United States of America), and *Standard and Poor's* issued only seven sovereign ratings (Australia, Austria, Canada, France, Japan, Norway, the United States of America).[20] For 10 years, there were only 15 countries, borrowing money on American capital market, and, consequently, needing credit rating. Only several financially strong countries had access to international capital through European market and without credit rating. Less creditworthy countries used to obtain credits mainly from banks. The demand for sovereign rating noticeably increases in 1980-90-ies. When weak credits penetrated into the international credit market.[21]

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13 *Schroeder K.S.,* The Underpinnings of Country Risk Assessment, Journal of Economic Surveys, Vol. 22, No. 2, 2008, 501-502.

14 *Gaillard N.,* What is the Value of Sovereign Ratings? German Economic Review, Vol. 15, Issue 1, 2013, 209.

15 *Schroeder K.S.,* The Underpinnings of Country Risk Assessment, Journal of Economic Surveys, Vol. 22, No. 2, 2008, 502.

16 *Ratha D., De K.P., Mohapatra S.,*Shadow Sovereign Ratings for Unrated Developing Countries, World Development, Vol. 39, 2010, No.3, 296.

17 *Canto R., Packer F.,* Professional Forum-Sovereign Risk Assessment and Agency Credit Rating, European Financial Management, Vol. 2, No. 2, 1996, 249.

18 *Schroeder K.S.,* The Underpinnings of Country Risk Assessment, Journal of Economic Surveys, Vol. 22, No. 2, 2008, 502.

19 "*Johnson Act"*.

20 *Gaillard N.,* What is the Value of Sovereign Ratings? German Economic Review, Vol. 15, Issue 1, 2013, 208-209.

21 *Cantor R., Packer F.,* Professional Forum-Sovereign Risk Assessment and Agency Credit Rating, European Financial Management, Vol. 2, No. 2, 1996, 249.

Compilation of sovereign ratings for developing countries started in 1980. By 1980, almost all high-income countries of Organization for Economic Cooperation and Development[22] were evaluated. By 1990, the number of evaluated countries increased significantly. The increase of sovereign rating in this period is provided in the Table 1.

The increase of sovereign rating business (according to Moody's and Standard and Poor's)		
Year	The number of sovereign ratings	Average level of the awarded rating
1975 and earlier	3	AAA/Aaa
1975-1979	9	AAA/Aaa
1980-1984	3	AAA/Aaa
1985-1989	19	A/A2
1990-1994	15	BBB-/Baa3

As per December 2006, 131 countries were evaluated, including 45 high-income and 86 developing countries.[24]

In 1970-80-ies, after the increase of opportunities for developing countries to take international loan, sovereign rating became the central issue of consideration for the international business community. The market-oriented economy and financial reform conditioned inflow of considerable amount of foreign capital into developing markets of South America, Latin America, Asia and Africa. This event gave the international investor the indication that globalization of trade and open capital market is a risk-containing element, which can threaten the international financial sector.

In this period (1990-1991) when the Soviet Union disintegrated, 15 independent states were created and little earlier, European socialist camp disintegrated; thus, the number of sovereign rating for developing countries increased. After the government first steps into the capital market, the starting point is made for the state. After that, the leading corporations and financial institutions existing inside the state, have the opportunity to follow it to the market. Consequently, the government orders credit rating frequently to have an access to the international capital market for the companies, domicile of which is inside this state. E.g., it was the motive of obtaining sovereign rating in the case of Chile in 1992, and Georgia in 1995. Often, American investors do not buy the bonds of developing countries, if they are not evaluated by the credit rating agencies, established in America.[25]

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22 *OECD:* The Organization for Economic Co-operation and Development. OECD member countries are: Australia, Austria, Belgium, Canada, Chile, Czekhia, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Israel, Italy, Japan, Korea, Luxemburg. Mexico, Holland, New Zealand, Norway, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden, Switzerland, Turkey, Great Britain, United States of America, <www.oecd.org> 26.04.2014.

23 Cantor R., Packer F., Professional Forum-Sovereign Risk Assessment and Agency Credit Rating, European Financial Management, Vol. 2, No. 2, 1996, 249

24 *Ratha D., De K.P., Mohapatra S.,* Shadow Sovereign Ratings for Unrated Developing Countries, World Development, Vol. 39, 2010, No. 3, 296.

25 *Langhor H.M., Langhor P.T.,* The Rating Agencies and their Credit Ratings: What They Are, How They Work and their Credit Ratings, England, 2008, 135.

Since September 11, 2001, the risk related to international relations increases considerably, consequently, it becomes more difficult to provide any analysis and prognosis for a decision-maker in economic, financial and political sector.[26]

Allocation of three periods, in particular, three crises is important in the history of sovereign rating: 1) Asian crisis; 2) Global financial crisis; 3) European debt crisis. These events played significant role in the history of sovereign rating, as well as the credit rating agencies in general. Before moving to consideration directly this period, it is important to mention that each crisis gave specific lesson to the regulator and, in general, the world, in regard to the credit rating agencies; nevertheless, learning from the obtained lessons and drawing of the relevant conclusions was always delayed in time. The last years, post-crisis period, once again demonstrated the importance of credit rating agencies and their decisive role in creation of the information, on the basis of which the investors make their decisions.[27] Against the background of Asian crisis, it was easy to notice that the power of credit rating agencies on financial market would increase more and more, that it was necessary to regulate them. However, it did not happen and CRAs obeyed only the voluntary rules of International Organization of Securities Commissions[28]. The result of this direction was the global financial crisis. European economy born serious financial expenses during the global financial crisis.[29] The mentioned financial crisis was not limited to the banking sector only in any way.[30] It had global character and touched all countries and all residents of the world, directly or indirectly.

In the course of criticism of credit rating agencies, we will often hear that they failed to forecast the crisis. In opposition to this criticism, it must be mentioned that it is not the goal of CRAs to determine when financial crisis occurs; its goal is to assess the probability of occurrence of financial crisis, i.e. "preliminary forecasting" is related to the time of occurrence of crisis, and the "probability" – with the assumption of occurrence of crisis. In general, there is no definition of "financial crisis". What does it mean? Is this a currency crisis, bank crisis, credit crisis, synthesis of some of them or something else? There is no consensus in this regard and this circumstance leaves economic vulnerable during such events.[31]

Asian Crisis 1997-1998

Rating companies failed to foresee Asian crisis. They decreased the credit rating of South Asian crisis countries more than it would be justified based on their economic indicators of that period. It shall be mentioned that for this reason, the credit rating agencies allegedly appeared to be conservative. Thus, they tried to recover their lost reputation and the damage they suffered due to failure to recognize a crisis. In this period, they were also specified as the reason of the crisis. It seemed like credit rating

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26 *Hoti S., McAleer M.,* An Empirical Assessment of Country Risk Ratings and Associated Models, Journal of Economic Surveys, Vol. 18, No.4, 2004, 539-540.

27 *Afonso A., Gomes P., Taamouti A.,* Sovereign Credit Ratings, Market Volatility, and Financial Gains, Computational Statistics and Data Analysis, 2013, 1.

28 "*IOSCO:* International Organization of Securities Commissions".

29 *Meti N.,* Sovereign risk contagion in the Eurozone, Economics Letters 117, 2012, 35.

30 *Alsakka R., Gwilym O.,* Rating Agencies' Signals during the European Sovereign Debt Crisis: Market Impact and Spillovers, Journal of Economic Behavior & Organization 85, 2013, 146.

31 *Schroeder S. K.,* The Underpinnings of Country Risk Assessment, Journal of Economic Surveys, Vol. 22, No. 2, 2008, 499.

agencies admitted their mistake, but still, they tried to clear themselves. They said that Asian crisis was characterized by different features, unlike past crises. In particular, the problem occurred in private sector. Consequently, in the words of the credit rating agencies, it was impossible to foresee the events, whereas they were basing rating checking on statistical model and could not take into account the fragile nature of private sector.[32]

Global Financial Crisis 2007-2008

Global financial crisis of 2007 made the issue of sovereign rating questionable. Rating companies again proved to be on the first place among the factors, causing the global financial crisis. However, the attitude changed and after the global financial crisis, the issue of the rating companies became the subject of particular study. During the crisis, it was decided to put them in the legal framework..[33]

Eurozone Crisis

The global financial crisis and its after-shock is the latest event in Europe, which reminds us of close relationship of sovereign rating and banking sector.[34]

In 2011- 2012 sovereign rating of Eurozone, in particular, the sovereign rating of Greece, Spain and in 2011 – the United State of America, after its decrease, proved to be in the center of attention. International Monetary Fund stressed in 2010 that sovereign rating represents the main threat to stability of global economy.[35]

The beginning of European debt credit crisis became noticeable in 2010.[36] In April and May 2010, three leading credit rating agencies: *Fitch*, *Moody's* and *Standard and Poor's* decreased, with great difference, the ratings for Greece, Spain, Portugal. It is interesting to ask a question: do investors learn any lessons from the actions of the rating companies? The answer to this question will clearly appear at the end of the study. In the course of criticism of activities of credit rating agencies, it is often mentioned that they tend to wait for the development of events on the market and then respond in accordance with the already occurred result.[37]

In 2010, the financial problem of Europe was so acute that European counties agreed to issue the loan of 80 billion Euro to Greece. In addition to that, International Monetary Fund issued 30 80 billion Euro. There was a threat of beginning of banking crisis in European Union. In 2010 the Ministry of

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32 *Ferri G., Liu L.G., Stiglitz E.J*, The Policyclical Role of Rating Agencies: Evidence from the East Asian Crisis, Economic Notes, Vol. 28, Issue 3, 2003, 335-336.

33 *Alsakka R., Gwilym O.,* Rating Agencies' Signals during the European Sovereign Debt Crisis: Market Impact and Spillovers, Journal of Economic Behavior & Organization 85, 2013, 147.

34 *Correa R., Lee K.H., Sapriza H., Suarez G.A.,* Sovereign Credit Risk, Banks' Government Support and Bank Stock Returns around the World, Journal of Money, Credit and Banking, Vol. 46, Issue 1, 2014, 96.

35 *Williams G., Alsakka R., Gwilym O.,* The Impact of Sovereign Rating Actions on Bank Ratings in Emerging Markets, Journal of Banking & Finance 37, 2013, 563.

36 *Mink M., Haan J.,* Contagion during the Greek sovereign debt crisis, Journal of International Money and Finance, 34, 2013, 102.

37 *Cavallo E., Powell A., Rogobon R.,* Do Credit Rating Agencies Add Value? Evidence from the Sovereign Rating Business, International Journal of Finance & Economics, Vol. 18, Issue 13, 2012, 240.

Finance of Germany, *Schäuble*[38] stated in his interview that they could not allow bankruptcy of the EU member country, Greece and its turning into the second *Lehman-Brothers*[39].[40]

Spain, experiencing economic regress as early as in 2008-2009, also was in a hard situation during European debt crisis. It continued through 2012. Unemployment indicator in the country was 7%; in 2012, it reached 25%.[41] On October 19, 2011, the decrease of sovereign rating of Spain, and even more unexpected decrease of sovereign rating of Austria, France, Italy on January 13, 2012 once more stressed the role of the credit rating agencies and the practice of reliance on their assessments on financial market.[42]

Three aspects shall be stressed in the period of European debt crisis. The first – the decrease and increase of credit rating seemed to be balanced. When the decrease of credit rating of the four states was reducing, five ratings were immediately increasing. The second – the decrease and increase of rating was noticed with high-rating countries (Canada, Switzerland – credit rating decreased; Ireland, New Zealand – credit rating increased), as well as will low-rating countries (Mexico and Pakistan credit rating decreased and Czekhia, India and Brazil – credit rating increased). The third – none of the states with investment class rating have been transferred to non-investment class.[43]

It is again considered that occurrence of crisis was facilitated by the credit rating agencies, as excessively quickly and improperly performed the decrease of sovereign rating of Eurozone. In general, to characterize the implemented and current regulation, it could be said that its goal is to reduce the dependence on credit ratings. However, the reality is still unchanged and sovereign rating is still important in decision- making process for the investors.[44]

The history has proven that the credit rating agencies better fit the role of the follower rather than the leader. Besides, there are several things that are to be considered in regard to the credit rating agencies: 1) We still have oligopolic market, where the three CRAs dominate, but with many drawbacks; 2) Credit Rating agencies are still not responsible for incorrect rating, i.e. are not responsible for the result of the credit rating; 3) External credit ratings are actively relied on.[45]

In 2011, the Committee of European Parliament[46] adopted „Resolution on Rating Agencies: Future Perspectives[47]". It considers various issues including the problem of excessive reliance on credit ratings,

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38 Wolfgang *Schäuble*

39 "*Lehman-Brothers*": Lehman-Brothers held credit rating of investment grade till the last days of bankruptcy, whereas it was known as early as since the end of May 2008 that the company's record-braking debt made about 613 billion USD. On September 15, 2008, American Investment Bank Lehman-Brothers went bankrupt. This day is considered the culmination of the global financial crisis.

40 *Mink M., Haan J.,* Contagion during the Greek sovereign debt crisis, Journal of International Money and Finance, 34, 2013, 103.

41 *Gruppe M., Lange C.,* Spain and the European Sovereign Debt Crisis, European Journal of Political Economy, 2013, 1-2.

42 *Eijffinger C.W.,* Rating Agencies: Role and Influence of Their Sovereign Credit Risk Assessment in the Eurozone, JCMS: Journal of Common Market Studies, Vol. 5, Issue 6, 2012, 912.

43 *Ferri G., Liu L.G., Stiglitz E.J*, The Policyclical Role of Rating Agencies: Evidence from the East Asian Crisis, Economic Notes, Vol. 28, Issue 3, 2003, 339.

44 *Alsakka R., Gwilym O.,* Rating Agencies' Signals during the European Sovereign Debt Crisis: Market Impact and Spillovers, Journal of Economic Behavior & Organization 85, 2013, 147.

45 *Eijffinger C.W.,* Rating Agencies: Role and Influence of Their Sovereign Credit Risk Assessment in the Eurozone, JCMS: Journal of Common Market Studies, Vol. 5, Issue 6, 2012, 918.

46 "*ECON*: Committee of the European Parliament".

47 "*Report on Credit Rating Agencies*: Future Perspectives".

the level of competition in credit rating sector and creation of foundation for European credit rating. The mentioned document also applies to the European Commission with request to create alternative method of risk assessment.[48]

When speaking about alternatives, the criticism towards the regulator is heard. Why did the issue of credit rating agencies become problematic? Are only they responsible for occurrence of the above considered crisis? Senator of Michigan state *Carl Levin* stated that global financial crisis was not a „naturally occurred disaster", but was an economic assault done by human hands. In his words, such things will repeat until fundamental rules are changed.[49] There is an opinion that the fundamental problem of the financial crisis was the circumstance that there was no independent institution, staffed with highly qualified personnel, which would assess financial regulations from the public viewpoint. Financial regulation mechanism, the regulator, does not act with consideration of public interests. How shall the society make the regulator to adopt regulations with consideration of public interest, when important information on operation and regulation of financial system represents a secret? Moreover, if even it is public, there is no institution in public sector, which could properly assess this information and determine the efficiency of financial regulations.[50]

Financial market did not learn the truth about credit rating agencies suddenly and accidentally.[51] The same mistake was made in regard to the credit rating agencies; why did CRA become so important? Till 1970, it represented quite an unimportant institution, selling information on cradit rating. In 1975, *NRSRO*[52] status was introduced, making obtaining of credit rating obligatory. The world began active usage of credit rating. Besides, the most tragic in regard to the credit rating agencies was that is was demanded to have a credit rating regardless the status of the CRA and the mistakes it was making. As a result, the credit rating agencies experienced no damage on the basis of these regulations.[53] Since 1990, when the risk of arising of the conflict of interests grew and in addition to the fact that the credit rating user was paying for own credit rating, bank was paying to the credit rating agency first for the recommendation how to package the structures financial product so that to obtain higher credit rating, and then was buying them. It should become the warning about the anticipated threats for the regulator. Nevertheless, the global regulator did nothing. On the contrary, credit rating agencies were protected and reliance on credit ratings continued. Consequently, it is impossible to speak about the activities of CRAs, their status without stressing facilitation by regulatory institutions.[54]

What alternative exists? It is considered that the market price incorporates more information than credit rating, or, at least, the market price does not incorporate less information than credit rating, as the market takes it into account. The problems, for which the credit rating agencies are often criticized, are

48 *Eijffinger C.W.,* Rating Agencies: Role and Influence of Their Sovereign Credit Risk Assessment in the Eurozone, JCMS: Journal of Common Market Studies, Vol. 5, Issue 6, 2012, 912.

49 *Levine R.,* The Governance of Financial Regulation: Reform Lessons from the Recent Crisis, International Review of Finance, Vol. 12, Issue 1, 2012, 50.

50 Ibid, 39-40.

51 *Grauwe P., Ji Y.,* Mispricing of Sovereign Risk and Macro-economic Stability in the Eurozone, JCMSL Journal of Common Market Studies, Vol. 50, Issue 6, 2012, 878.

52 *NRSRO:* Certain rating companies, unofficially, were awarded the status "Nationally Recognized Statistical Rating Companies" (NRSRO) by American SEC and only the ratings, obtained by such rating companies, were recognized. NRSRO status is very important for rating companies, as this status for companies is the main barrier on the rating market.

53 *Levine R.,* The Governance of Financial Regulation: Reform Lessons from the Recent Crisis, International Review of Finance, Vol. 12, Issue 1, 2012, 43-44.

54 Ibid., 45.

not related to the market price. Even the fact, that the consumer buys its rating, consequently, is the risk of biased evaluation of creditworthiness.

In favor of credit rating, obtained by CRA, should be said that it is more flexible and less explosive than the market. It could be the result of the circumstance that the credit rating agencies react more calmly than the market. The main problem in regard to the market data is that like credit rating or like market participants, the whole market could be mistaken in the assessment of the risk of creditworthiness. In the years, preceding the global financial crisis the market, like CRA, was optimistic in regard to creditworthiness risks assessment, e.g. in the case of the bonds of Greek government. However, it shall be mentioned that the market data precede the changes, made in credit rating by CRA. It was proven on the example of Greece as well. The market corrected its incorrect opinion in regard to the creditworthiness of Greece more rapidly than the credit ratin agencies did. The use of the market data can be prioritized at certain extent. Primarily, the market price does not reflect the factors, which are not countable and publicly observable. Secondly, the market has a long sight and it reflects the expectation of the market participants. Thirdly, at certain extent, the market indicator is a priority with the view that it provides information on daily basis, allowing faster prognostication of risk of creditworthiness.[55]

The following alternatives are considered: 1) Transformation of credit rating into a public service, i.e. nationalize the credit rating agencies and establish European credit rating agency; 2) Shifting of credit rating (including sovereign rating) compilation into the competence of the European Central Bank; 3) Increasing of competition among new and small credit rating agencies .The first alternative was proposed by European Parliament, but it was criticized. The critics argued that nationalization of credit rating would increase reliance on it. The third alternative was near reality, but the expenses related to the establishment of a credit rating agencies, entering into the market and earning of valuable reputation are very high; plus the expenses for registration and supervision, established by European Commission. The second alternative has the most supporters. It would be possible but not desirable, as there is a threat of the conflict of interests inside European Central Bank. It seems like European credit rating agency was the alternative for years, but we shall bear in mind that its establishment is also related to high expenses.[56]

3. Compilation of Sovereign Rating

The ability of credit rating agency to assess creditworthiness is stronger in the case of sovereign rating than in the case of corporate issuers.[57]

The process of compilation of sovereign rating has not fundamentally changed since 1990-ies. It, in itself, implies participation of an issuer, as well as CRA in compilation of rating. The credit rating committee, as a rule, consists of four to ten analysts. The risks, finally shown by sovereign rating, are the same since 1920; i.e. in the case of *Moody's,* it has not changed since 1918 and the final credit rating always used to reflect two risks: incapability to pay and preparedness to pay. However, the methodology

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55 *Karmann A., Maltritz D.,* Sovereign Default Risk and Recovery Rates: What Government Bond Markets Expect for Greece, Review of International Economics, 20 (4), 2012, 724-725.

56 *Eijffinger C.W.,* Rating Agencies: Role and Influence of Their Sovereign Credit Risk Assessment in the Eurozone, JCMS: Journal of Common Market Studies, Vol. 5, Issue 6, 2012, 919-920.

57 *Santoni A., Arbia B.,* Assessing Rating Agencies' Ability to Predict Bank Bankruptcy- The Lace Financial case, Economic Notes, Vol. 42, Issue 2, 20 Jun 2013, 204.

of compilation of credit rating, which relies on the number of criteria, is changing. It could be said that the criteria are subjective and besides, they are not publicly available. Complication of sovereign rating is not based on any mathematical formula.[58] Its compilation is not a simple process, but credit rating agencies, following their business practices, do not make the detailed methodology public. In general, criteria, which are taken into account by CRAs, are formed, but it is not known how they are assessed and taken to one symbol in practice.[59]

Credit rating is expressed by specific symbol. Credit rating agencies have different scale of creit rating, but there are certain similarities among them. Credit ratings of the highest category for all the three leading CRAs are expressed by "A" symbol, but with different variations: for *Moody* 's *Aaa,Aa1,...,A3* and *AAA, AA+,...,A-,* for the other two credit rating agencies. The next step is expressed by "B" symbol; for *Moody's Baa1,Baa2,...,B3* and *BBB+,BBB,...,B-* for *Fitch* and *Standard and Poor's*. There is a slight difference with non-investment class ratings. *Standard and Poor's* has six levels - *CCC+,CCC,...,D* in the first case and in the second case - *CCC,CC,....,D*. *Moody's* has five levels *Caa1, Caa2, Caa3, Ca* and *C*.[60] Earlier *Moody's* system was more similar to the rating scale of the two other credit rating agencies, but in 1982 *Moody's* has changed the rating system and add the figures 1, 2 3 to each rating category. This change was caused by *Moody'*s simple decision to shift from one system of rating to the other and was not related to any specific change of the content of rating or improvement.[61]

Since 1980 *Fitch, Moody's* and *Standard and Poor's* began active compilation of sovereign rating. They performed assessment of economic, financial and political risks, but provided their interpretation.[62] Assessment of sovereign rating is more difficult than compilation of company's credit rating. In the course of assessment of the risk of government, authority, credit rating agency shall consider not only the factors that may have an impact on creditworthiness, but also the factors, that may have an impact on the government's preparedness to pay the liabilities. These may be political, social, economic factors.[63]

In the course of time, the states with low and average income managed to enter the capital market and consequently, obtain credit rating from the leading credit rating agencies. As a result, since 1990, the number of high-income states in total number has substantially decreased. It triggered diversification of criterial of awarding sovereign ratings by CRAs.[64] Country risk was perceived, naturally, as the sovereign risk and the sovereign risk was related to the country's problems in regard to execution of obligations. Assessment of political risks was added in 1970-ies, after political upheaval in Iran, as well as the state's preparedness to pay the liabilities. The latter is considered when a country's creditworthiness becomes problematic. In 1970, the method of country risk assessment emerged and it is still used: in particular,

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58 *Gaillard N.,* What is the Value of Sovereign Ratings?, German Economic Review, Vol. 15, Issue 1, 2013, 210-211.

59 *Ratha D., De P.K., Mohapatra S.,* Shadow Sovereign Ratings for Unrated Developing Countries, World Development Vol. 39, 2010, No. 3, 297.

60 *Brooks R., Faff W.R., Hillier D., Hillier J.,* The National Market Impact of Sovereign Rating Changes, Journal of Banking & Finance 28, 2004, 236.

61 *Liu P. Seyyed F.J., Smith S.D.,* The Independent Impact of Credit Rating Changes - The Case of Moody's Rating Refinement on Yield Premiums, Journal of Business Finance & Accounting, Vol. 26, Issue 3-4, 2003, 339.

62 *Hoti S., McAleer M.,* An Empirical Assessment of Country Risk Ratings and Associated Models, Journal of Economic Surveys, Vol. 18, No. 4, 2004, 541.

63 *Cantor R., Packer F.,* Professional Forum-Sovereign Risk Assessment and Agency Credit Rating, European Financial Management, Vol. 2, No. 2, 1996, 253.

64 *Gaillard N.,* What is the Value of Sovereign Ratings? German Economic Review, Vol. 15, Issue 1, 2013, 211.

rating is made up on the basis of assessment of quantitative and qualitative indicators. Quantitative indicators broadly include the country's economic, political and social situation.[65]

Formally, these criterial may be characterized as follows:

Economic risk is assessing the country's actual economic strength and weakness. It includes:

1. Gross domestic product[66] per capita;
2. Real annual growth of gross domestic product;
3. Annual inflation level;
4. Budget balance.

Political risk implies:
1. Stability of the government;
2. Social- economic situation;
3. Investment profile;
4. In ternal conflicts;
5. External conflicts;
6. Corruption;
7. Military policy;
8. Religious tension;
9. Law and order;
10. Ethnic tension;
11. Level of bureaucracy.

Financial risk includes the following categories:
1. Stability of currency rate;
2. Foreign debt, as the percentage of gross domestic product;
3. Liquidity;[67]
4. Rapid growth of product in the country;
5. Non-productive investment of foreign capital;
6. Unjustified credits from foreign banks.

Under social factors, we can imply:
1. Unrest among population due to ideological differences;
2. Unrest among population due to unequal income;
3. Religious confrontations.[68]

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65 *Schroeder S.K.,* The underpinnings of Country Risk Assessment, Journal of Economic Surveys, Vol. 22, No. 2, 2008, 504.

66 ,,Gross Domestic Product (GDP) is the market value of all final goods and services, which are produced inside the country in given period of time". Manqew, G., Principles of Economy, Diogene, 2008, 507.

67 *Hoti S., McAleer M.,* An Empirical Assessment of Country Risk Ratings and Associated Models, Journal of Economic Surveys, Vol. 18, No. 4, 2004, 557-558.

68 Ibid., 541.

It is interesting that the three leading companies cannot often agree on credit rating. It should be caused by different methods of rating compilation. They never explain the power of this or that indicator in credit rating compilation. Consequently, it is impossible to clarify what role this or that indicator plays.[69]

As compared with previous period, the important change is that in 1918- 1939 credit rating agencies were issuing recommendations; and presently they do not issue recommendations. In the same period, the same source of income was the amount, earned by analytical activities, which should certainly be assessed positively.[70] Since 1990, the sovereign issuers became obliged to pay for their own credit ratings. It means that credit rating agencies stopped issuing credit ratings based on its desire and, instead, began compilation of credit ratings on the basis of the issuer's consent. This novelty, obviously, had an impact on credit rating process; if earlier " investor-pay model"[71] was operating, when there was no business contact between credit rating agency and the entity having sovereign rating, it shifted to "issuer- pay mode"[72], i.e., since 1991 the client, who orders credit rating, pays for it.[73]

The fact that the consumer pays for its credit rating, in its turn causes trade with credit rating;[74] i.e. there is a threat that the issuer will get involved in "rating-shopping"[75]. In such case, its reputation is central for credit rating agencies.[76] In relation to the so-called *rating-shopping* we should mention that in 2088 an agreement was concluded among the three leading CRAs and the Lawyer of New York *Andrew Cuomo*.[77] In accordance with this agreement, payment of amount for certain credit ratings by the issuer should be limited and besides, the issuer had to pay money before credit rating was issued, i.e. in advance. This ruling cannot eliminate *rating shopping*, as the issuer still can negotiate with credit rating agency, not to publish bad rating. In general, elimination of *rating shopping* is difficult, as informal agreement between credit rating agency and the issuer will always exist.[78]

In 2007- 2008 the issue of the conflict of interests in the process of credit rating compilation re-emerged. It is natural to ask – what else shall credit rating agencies do, whereas the main source of their income is the amount, received as a result of credit rating selling? The existence of potential conflict of interests proved to be in the center of particular attention during Asian crisis of 1997; it was followed by bankruptcy of Enron in 2001 and WorldCom in 2002, but it was not as obvious as during the last global financial crisis.[79] When the issuer is important for credit rating agencies, as it is a permanent client or has large issue, CRA tends to exaggerate its credit rating[80]; it could be called a "rating game".

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69 *Eijffinger C.W.,* Rating Agencies: Role and Influence of Their Sovereign Credit Risk Assessment in the Euro-zone, JCMS: Journal of Common Market Studies, Vol. 5, Issue 6, 2012, 914.

70 *Gaillard N.,* What is the Value of Sovereign Ratings? German Economic Review, Vol. 15, Issue 1, 2013, 212.

71 "*Investor-pay model"*.

72 "*Issuer-pay model"*.

73 *Gaillard N.,* What is the Value of Sovereign Ratings? German Economic Review, Vol. 15, Issue 1, 2013, 209-210.

74 *Eijffinger C.W.,* Rating Agencies: Role and Influence of Their Sovereign Credit Risk Assessment in the Euro-zone, JCMS: Journal of Common Market Studies, Vol. 5, Issue 6, 2012, 913.

75 "*Rating shopping"*.

76 *Bolton P., Freicas C., Shaprio J.,* The Credit Ratings Game, The Journal of Finance, Vol. LXVII, No. 1, 2012, 109.

77 *Andrew Cuomo*

78 *Bolton P., Freicas C., Shaprio J.,* The Credit Ratings Game, The Journal of Finance, Vol. LXVII, No. 1, 2012, 105.

79 Ibid., 85.

80 Ibid., 89.

The greatest move for credit rating is when it shifts from the investment class to non-investment or vice versa.[81] Although CRA checks credit rating, in practice credit rating changes only in exceptional cases, when credit rating agency discovers fundamental change in the level of country's credit;[82] i.e., when credit rating wasn't checked according to some established rule, but it was requested by the country (and, consequently, it would pay for it) or some circumstance or noticeable change was obvious, which would make credit rating agency check the rating of this or that country. In practice, when one credit rating agency raises/ lowers rating, it is shortly followed by similar changes by other credit rating agency.[83]

4. The Importance of Sovereign Rating

Sovereign rating has several important functions. It can facilitate elimination of asymmetry of information. When there is an asymmetry of information on the market, it complicates market transactions. Independent business, assessing companies and products, can overcome this problem. Well-informed *stakeholder* can make better decision when buying this or that product, also decide which securities to invest in and which company to have business relation with. Credit rating, compiled by independent companies can influence the investor's and consumer's actions.[84]

In general, a state tries to obtain credit rating in order to have better access to international capital market, where the investor, mainly American investor, gives priority to the security, which is granted credit rating. Earlier states were trying to obtain credit rating only for their bonds in foreign currency. However, since the number of international investors increased, the demand grew for the bonds, issues in the currency, other than traditional. Recently more and more sovereigns obtained credit rating for bonds in local currency. Sovereign rating is also important because it has an impact on the debtors of the nationality, origin. Credit rating agencies, in general, do not grant credit rating, higher than the sovereign rating, to public and private sector issuers. Consequently, the sovereign rating affects credit rating of the governments of local municipalities, provinces, private companies.[85] In developing countries, credit rating greatly influences credit rating of companies and banks. This phenomenon in theory is referred to as *sovereign ceiling,* which implies that other consumers of credit rating have no possibility to obtain the higher credit rating than the sovereign rating.[86] The sovereign rating is granted only to the bond, issued by a state; as for credit rating of non-sovereign issuers, it is obtained by adding this instrument to the sovereign rating.[87] As it was mentioned above, the company cannot be granted the

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81 *Correa R., Lee K.H., Sapriza H., Suarez G.A.,* Sovereign Credit Risk, Banks' Government Support and Bank Stock Returns around the World, Journal of Money, Credit and Banking, Volume 46, Issue s1, 2014, 114.

82 *Kim S.J., Wu E.,* International Bank Flows to Emerging Markets: Influence of Sovereign Credit Ratings and their Regional Spillover Effects, The Journal of Financial Research, Vol. XXXIV, No. 2, 2011, 335.

83 *Ratha D., De K.P, Mohapatra S.,* Shadow Sovereign Ratings for Unrated Developing Countries, World Development Vol. 39, 2010, No. 3, 296.

84 *Chatterji K.A., Toefel W.M.,* How Firms Respond to Being Rated, Management Journal, Vol. 31, Issue 9, 2010, 917.

85 *Cantor R., Packer F.,* Professional Forum-Sovereign Risk Assessment and Agency Credit Rating, European Financial Management, Vol. 2, No. 2, 1996, 248-249.

86 *Ratha D., De K.P., Mohapatra S.,* Shadow Sovereign Ratings for Unrated Developing Countries, World Development Vol. 39, 2010, No.3, 296.

87 *Schroeder K.S.,* The Underpinnings of Country Risk Assessment, Journal of Economic Surveys, Vol. 22, No. 2, 2008, 509.

higher credit rating than a state. However, it shall be taken into consideration that such limitation applies only to the countries with high risk. This limit does not apply to the corporations, established in low-risk countries and the corporations, represented throughout the world and, consequently, the sovereign rating is different for them.[88]

The sovereign rating determines the number of potential investors.[89] Credit rating influences the dynamics of capital market and the capital value.[90]

Credit rating is very important in regard to the expenses of funding; besides, it does not matter whether it is a private company or sovereign debtor.[91] Security represents favorable method of funding for a company. A borrower relies on financial strength of a company, expressing its ability to pay the liability. The company is more interested in this type of funding, as it is cheaper than a bank loan; consequently, for obtaining of short-term funding through securities, the company is interested to maintain the relevant, high-class credit rating. Besides, the company, having the perspective of attraction of investments, may be more interested in having credit rating, than the company without such perspective.[92]

Credit rating, compiled by the three leading credit rating agencies, influences entrance of the sovereign or the company to the capital market. By 2010, about 65 developing countries, mainly poor countries and 12 high-income states had credit rating, granted by the leading CRA. In general, it is considered that absence of credit rating may bring worse to the state as it can be assessed as bearing higher risk than in reality.[93]

The country, which does not have credit rating, is either insolvent, or excessively rich for borrowing. It considers itself as such or is considered as such by the market.[94] Nevertheless, the country, which is not assessed, has theoretical chance of having higher credit rating than it is considered to have.

5. Conclusion

Sovereign rating has long history. It does not represent the creation of the 21st century. Its compilation first started in Europe, although, the sovereign rating, compiled by credit rating agency comes from the United States of America. During the period of the Second World War, the demand for sovereign rating decreased. Since 1970, the demand for the sovereign rating starts rapid growth. It is compiled by CRAs, mainly, the leading credit rating agencies. It shall be mentioned that during the whole period of its existence, the sovereign rating is accompanied by problems. It is permanently criticized; criticism was the most important during Asian crisis, global financial crisis and European debt crisis. It is often pointed out that credit rating agencies facilitated occurrence of the crisis as they

88 *Langhor M. H., Langhor T.P.,* The Rating Agencies and their Credit Ratings: What They Are, How They Work and their Credit Ratings, England, 2008, 270.

89 *Ferri G., Liu L.G., Stiglitz E.J.,* The Policyclical Role of Rating Agencies: Evidence from the East Asian Crisis, Economic Notes, Vol. 28, Issue 3, 2 Dec 2003, 335.

90 *Williams G., Alsakka R., Gwilym O.,* The Impact of Sovereign Rating Actions on Bank Ratings in Emerging Markets, Journal of Banking & Finance 37, 2013, 565.

91 *Eijffinger C.W.,* Rating Agencies: Role and Influence of Their Sovereign Credit Risk Assessment in the Eurozone, JCMS: Journal of Common Market Studies, Vol. 5, Issue 6, 2012, 912.

92 *Kemper J.K., Rao P.R.,* Do Credit Ratings Really Affect Capital Structure?, Financial Review, Vol. 48, Issue 4, 2013, 578-579.

93 *Ratha D., De K.P., Mohapatra S.,* Shadow Sovereign Ratings for Unrated Developing Countries, World Development, Vol. 39, No. 3, 2010, 295.

94 Ibid., 301.

failed to foresee it. To strengthen the opinion that credit rating is not absolutely error free, they argue that credit rating agency was able to absolutely foresee the future, only two credit ratings "will be able to pay" and "will not be able to pay" would exist instead of different types of credit rating.[95]

Until the global financial crisis of 2007, the failure of fulfillment of sovereign liabilities was considered the problem of poor and developing countries. But recently this problem touched well-developed European countries – Latvia, Hungary, as well as Greece, besides, Span and Italy face the risk of failure of fulfillment of liabilities. Although other European countries do not face such risk. They were negatively affected all the above mentioned, as they had to fund the support package. Moreover, all the above stated indicates that the assessment of solvency is important not only for the risk-bearing countries.[96] Compilation of the sovereign rating is not an easy process. Basically, in the process of its compilation, the close contact existing between credit rating agency and credit rating consumer and the fact that the consumer buys its own credit rating, are criticized. The conflict of interests is obvious. Like a medal, credit rating has two sides and at certain extent, it is important for a country. It is considered that having low cedit rating is better for the country than not having it at all, as the sovereign rating still represents the important source of information for the investors to make decision. If we look through the regulation of activities of the rating companies, we will see that its goal is to change this practice, i.e. to reduce the reliance, as much as possible, on external ratings, compiled by credit rating agencies. The sovereign ratings are used because obtaining of certain profit is related to it. If credit rating is not important, it will result into lack of interest towards credit rating and it may be stated that the rating will not be used.[97]

[95] *Langhor M. H., Langhor T.P.,* The Rating Agencies and their Credit Ratings: What They Are, How They Work and their Credit Ratings, England, 2008, 332.

[96] *Karmann A., Maltritz D.,* Sovereign default Risk and Recovery Rates: What Government Bond Markets Expect for Greece, Review of International Economics, 20 (4), 2012, 723.

[97] *Langhor M. H., Langhor T.P.,* The Rating Agencies and their Credit Ratings: What They Are, How They Work and their Credit Ratings, England, 2008, 307.

Sergi Jorbenadze*

The Notion of Freedom of Contract

1. Introduction

Human wishes are boundless nowadays. For realization of their wishes throughout the world, establishment of contractual relations are required, on the basis of which the opinions of the parties will be formed and the relevant action will be performed.[1]

In general, concluding of contract is based on the requirement of the parties to establish the legal relation, which will facilitate origination of conscious requirement in compliance with the necessary circumstance in the future. In psychological science the requirement for certain subject or action indicates to the wish of performance of activity, with to trigger the action, forcing a human to take some kind of action.[2]

Contractual law is based on the relation of the parties and freedom of contract,[3] it "is the pre-condition of legal turnover, development of economic life and personal initiative".[4] In its turn, the freedom of contract reveals a person as a subject, bearing property rights,[5] as, on the basis of the mentioned right, the possibility of free action is given to the person.[6]

The goal of the present article is **to define the notion of the freedom of contract**. For this purpose, primarily, definition of legal nature of contract is important, which can be viewed on the basis of the legal regulation of the **notion of contract**. The essence of the notion of contract is based, on the one hand, on the definition of the law norms, and on the other hand, on its legal bases, like the issue of private autonomy or freedom. Consequently, it's important to define **the essence of freedom and its direct relation with contractual law**.

The Constitution, existing in the country, is the pre-condition of each legal institution's compliance with its rule of conduct. The above mentioned form the basis of the **issue of consideration of constitutional bases of freedom of contract** in the paper, and important aspects of constitutional bases will be formed in accordance with it.

The final part of the paper will summarize each of them, supreme judicial practice of Georgia in regard to the legal nature of freedom of contract will be defined which will finally formulate the notion of freedom of contract.

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1 *Kötz H.,* Vertragsrecht, 2. Auflage, Mohr Siebeck, Tübingen, 2012, 12.

2 *Kakabadze V.,* The Psychology of Demand, Tb., 1988, 21 (In Georgian).

3 Ruling № as-1359-1197-2010 dated March 22, 2011 of the Supreme Court of Georgia, descriptive part – decision of the City Court of Tbilisi dated April 27, 2009 (In Georgian).

4 *Tchanturia L.,* General Part of the Civil Law, Tb., 2011, 31 (In Georgian).

5 *Zoidze B.,* Reception of European Perivale Law in Georgia, Training Center of Publishing, Tb., 2005, 269 (In Georgian).

6 Ibid.

2. The Notion of Contract

Contract as a central and important legal institution, developed in the XIX c.[7] It represents **legal instrument for granting the relevant authorities, through legal document, to the parties for realization of their will.**[8] For this purpose application of contract shall be defined in legally determined space,[9] within the boundaries of which the parties will be able to act on the basis of the agreed content.

In regard to the notion of contract, several aspects could be outlined, according to which, on the one hand, it's important to determine the definition of the notion of contract, dominating in legal science, and, on the other hand, define it on the basis of certain contractual relations directly.

A contract is concluded on the basis of law; consequently, it has the power of law.[10] On the basis of a contract parties regulate the code of conduct, obligatory nature of fulfillment of which is determined by themselves. In the term "the parties" we may imply two or more persons, which, consequently, will present the contract – as one of the types of transaction – bilaterally or multilaterally. In practice a contract, more often, is concluded on the basis of bilateral agreement,[11] which is the primary manifestation of practical significance of the legal institution under consideration.

The Civil Code of Georgia (hereinafter CCG), or any other legal norm, don't know the notion of a contract separately. If we, e.g. take the Common Administrative Code of Georgia (hereinafter CACG), the notion of administrative contract is defined in sub-paragraph "g" of p. 1 of the Article 2, however it indicates to civil law contract.[12] The same problem is encountered in the practice of common courts of Georgia. The latter doesn't define contracts in its decisions/ rulings and limits only by definition of individual types of contracts.[13]

Thus, for definition of legal institution of a contract it is required, primarily, to draw its legal aspects to the front line and form the preconditions of action, provided by Georgian legislation. In this regard, definition of basic principles of a contract (freedom of contract) is important; e.g. the issue of concluding of a contract – the fact of concluding of a contract is the result of human imagination, it represents necessary condition of creative participation,[14] through which the issue of monetary liability

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2 *Brinkmann* in *Prütting/Wegen/Weinrich*, BGB Kommentar, 1. Auflage, Verlag Luchterhand, Neuwied, 2006, vor §145ff, Rn. 12.

8 *Reul A.,* Grundrechte und Vertragsfreiheit im Gesellschaftsrecht, Deotsche Notar Zeitschrift (DNotZ), 2007, Heft 3 (Seite 161-240), 2007, 185.

9 *Zoidze B.,* Reception of European Perivale Law in Georgia, Training Center of Publishing, Tb., 2005, 126 (In Georgian).

10 *Zoidze B.,* The Attempt of Perception of Practical Existence, Prevalently in the Aspect of Human Rights, Essays, Tb., 2013, 57 (In Georgian).

11 Comp. E.g. *Musielak H. J.,* Grundkurs BGB, 8. Auflage, Verlag C. H. Beck, München, 2003, 19.

12 As a parallel, it can be defined that the definition provided in CACG only confirms the obligation of existence of the parties to the contract in the case of such legal relation, within which minimum two persons shall be parties to it (one of the parties shall implement public-law authorities).

13 See e.g. Ruling №3k/210-01 dated April 11, 2001 of the Supreme Court of Georgia: descriptive part – Ruling dated October 24, 2000 of the Appeal Chamber of Tbilisi Precinct Court for Civil, Entrepreneurial and Bankruptcy Cases.

14 *Gogichaishvili T.,* The Course in General Psychology, Tb., 2006, 118 (In Georgian). In psychologucal science imagination is uinderstood as a pre-condition, necessary condition for implementation of specific action. On the basis of imagination the expectation of obtaining the desired result arises in the person, and obtaining of the result is impossible without having some king of binding instrument, e.g. – contract. On the basis of the

or other type of obligation can be determined, e.g. if we take monetary liability, it represents the type of liability, the object of which is a certain amount of money.[15] In this case, on the basis of definition of money, as all types of valuables,[16] certain rights and obligations will arise for the parties. The above example has not a single-time nature in present-day practice; it will serve as the method of stressing the importance of the legal institution of a contract.

Primarily, for clarification of the legal nature of a contract, it is interesting to discuss the issues of relation of actions in Roman law and present-day practice, which will enable us clearly see the role and the purpose of a contract, as a civil law institution on every stage.

2.1 The Legal Institution of a Contract in Roman Law (In General)

A contract in Roman court was understood as agreement of two or more persons, arising obligations between them.[17] The above mentioned was divided into several types: contracts of strict law, which were based on honesty, verbal, i.e. oral, literal, i.e. written, real, i.e. arising from real word and consensual i.e. arising from general opinion.[18]

In each case, certain requirements were set in regard to contractual relations, in compliance with which it was to be concluded on the basis of agreement of the parties. The contract had to be adjusted to the existing norms of that period. It shouldn't contradict the norms of morals.[19]

The principles of contractual law, specified in Roman law were further developing in contemporary epoch.[20] However, together with development of mankind, on the basis of development of contractual law, other types of contracts were delimited, like: rental and leasing,[21] etc. Its clear example is meeting of requirement in the case of takings a loan: if, in Roman law, abjuration was important,[22] nowadays legal institutions of a pawn, mortgage, etc. are playing important role.[23]

2.2 Legal Institution of a Contract in Present Epoch

The role of the institution of contractual law in present epoch developed together with change of social conditions[24] and, from the viewpoint of social purpose, it took the role of central right,[25] ex-

contract the person will be able to require implementation of specific action, or restraining from it, from the other party, which will lead to the final result. Concerning scientific definition of imagination – see the specified paper, 118- 123.

15 *Dzlierashvili Z.,* The Peculiarities of Fulfillment of Monetary Obligations, Tb., 2005, 23 (In Georgian).

16 Ibid.

17 See e.g. *Rodinadze K.,* Roman Private Law, 1st ed., Bt., 2009, 54 (In Georgian).

18 Ibid.

19 *Metreveli V.,* Roman Law (Fundamentals), Tb., 2012, 72 (In Georgian).

20 See e.g. *Nadareishvili G.,* Roman Civil Law, Tb., 2009, 99 (In Georgian).

21 *Nadareishvili G.,* Roman Civil Law, Tb., 2009, 100 (In Georgian).

22 Ibid.

23 *Tchanturia L.,* Credit Security Law, Tb., 2012, 15 (In Georgian).

24 *Shengelia I.,* Contractual Freedom, as the Principle of Civil Law, the Essence and the Meaning, "Justice and Law", №4 (23)'09, Tb., 2009, 49 (In Georgian).

25 *Bruns* in Münchener Kommentar zum VVG, 1. Auflage, vor §§307-309 BGB, 2010, Rn. 1.

pressing in close contacts with economic issues.[26]/[27] On the basis of the above mentioned, certain type of contracts arose, which obtained special significance for the society.[28]

When speaking about establishing of contractual relations in present-day practice, it is necessary to mention the issue of existence of the so-called "electronic contracts", which are concluded through the e-mail and represent new form of concluding of contract.[29] By the above mentioned, the party to a transaction is able to perceive the text of a contract from an electronic document.

The Article 328 of CCG provides possibility of performance of such action,[30] e.g. signing of a contract through the e-mail or social media. Both play significant role in present-day business;[31] however in certain cases it is not as protected as signing of a printed out contract, by the parties.[32]

2.3 Validity of Contract in Practice

During the contract validity the basic contractual aspect, specified in its content, are important: the subject, rights and obligations, settlement procedure, terms, etc.[33] E.g. the issue of terms. Its consideration in the process of concluding the contract by the parties is one of the most important issues.[34] And the reason of the above mentioned could be civil right, implementation of which is significantly related with the time factor. [35]

There are cases, when the content, specified in the contract is not corresponding to the title of the contract. In such case the issue of the rights and obligations of the parties, the subject of the contract, etc. is attached significance for settlement of disputes arisen on the basis of contractual relations[36]; it makes the significance of the content of the contract even more actual.

Determination of the main contractual conditions is the implementation of realization of the principle of freedom of contract,[37] and its formation in the contract, turning it into legal obligation of manifestation of the will. Besides, On the basis of contractual obligations, the parties determine the procedures of action and the obligations, fulfillment of which is targeted towards its fulfillment,[38] af-

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26 Comp. *Kötz H.,* Vertragsrecht, 2. Auflage, Mohr Siebeck, Tübingen, 2012, 12.

27 Comp. also: *Kittner M.,* Schuldrecht, Rechtliche Grundlagen – Wirschaftliche Zusammenhänge, 3. Auflage, Verlag Franz Vahlen, München, 2003, 46 and further.

28 E.g. *Jorbenadze S.,* Franchise Agreement, Tb., 2000, 6 (In Georgian).

29 *Ioseliani N.,* Definition of a Contract, Tb., 2008, 43 (In Georgian).

30 *Akhvlediani Z.,* The Law of Obligation, 2nd ed., Tb., 1999, 21(In Georgian).

31 Comp. *Berdzenishvili A., Tsuladze L., Esebua P., Kakhidze I., Macharadze N., Kvintradze A., Kldiashvili D.,* The Development Trends of Social Media in Georgia: Real Virtual Authority? Tb., 2013, 58 (In Georgian).

32 Sead. *Schlechtriem/Schmidt-Kessel* in Schlechtriem/Schwenzer, Kommentar zum einheitlichen UN Kaufrecht, CISG, 5. Auflage, Verlag C. H. Beck, München, 2008, Art. 11 Rn. 4.

33 E.g. *Jorbenadze S.,* Placement of Advertisement in TV Broadcasting Company, Tb., 2013, 174- 179 (In Georgian).

34 Comp. *Dzlierashvili Z.*, Assumed and Reasonable Schedule of Fulfillment of Obligation, Akaki Labartkava's 80the Unniversary Collection, Tb., 2013, 179 (In Georgian).

35 *Zarandia T.,* The Place and Terms of Fulfillment of Contractual Obligation, Tb., 2005, 30 (In Georgian).

36 See Decision № 2/6092-11 dated January 17, 2013 of Tbilisi City Court (In Georgian).

37 Comp. *Tchanturia L.,* Comments to the Civil Code of Georgia, Vol. III, Article 319, 2001, 60 (In Georgian).

38 *Todua M., Willems H.,* The Law of Obligation, Tb., 2006, 82 (In Georgian).

ter implementation of which both parties obtain benefit.[39] Obtaining benefit depends on civil turnover, which is based on contractual relations, existing in the practice.[40]

When speaking about practicality of contract, we can touch its legal power and meaning, realized in practice. The above mentioned opinion can be based on the legal nature of international contracts. In legislation of some countries a contract equals to constitutional law.[41] It is concluded by one state with another state or international organization.[42] It shall be mentioned that according to the constitution of some countries, in legal hierarchy is stands higher than internal legislation[43] and it is regulated by international norms,[44] e.g. conventions.[45] In the mentioned contract, the state can make the position, formulated by it, compliant with the law, raise the desired rights (including obligations)[46] and make them mandatory for fulfillment for individual subjects on legal level.[47]

Unlike international contracts, if we consider the contracts, concluded between the subject of private law of different countries, we will notice that in such case, they can determine legal regulation according to the legislation of one, as well as several countries,[48] which will clearly show the issue of the freedom of contract in this aspect too.[49] The freedom of such choice follows directly from the principle of private autonomy of the parties[50] and the parties directly have the authority to determine the content of the contract.[51]

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39 *Kötz H.,* Vertragsrecht, 2. Auflage, Mohr Siebeck, Tübingen, 2012, 12.

40 *Zoidze B.,* Reception of European Private Law in Georgia, Training Center of Publication, Tb., 2005, 271 (In Georgian).

41 *David R.,* The Present Basic Legal Systems, translated by *T. Ninidze (edit.) and E. Sumbatashvili,* Tb., 2010, 109 (In Georgian).

42 *Gegenava D., Kantaria B., Tsanava L., Tevzadze T., Macharadze Z., Javakhishvili P., Erkvania T., Papashvili T.,* Constitutional Law of Georgia, Manual, Tb., 2013, 46 (In Georgian).

43 *David R.,* The Present Basic Legal Systems, translated by *T. Ninidze (ed.) and E. Sumbatashvili,* Tb., 2010, 149 (In Georgian).

44 *Gegenava D., Kantaria B., Tsanava L., Tevzadze T., Macharadze Z., Javakhishvili P., Erkvania T., Papashvili T.,* Constitutional Law of Georgia, Manual, Tb., 2013, 46 (In Georgian).

45 *Dzlierashvili Z.,* Legal Nature of Contracts on Handing over the Property into Ownership, Tbilisi, 2010., 10 (In Georgian).

46 Comp. *Khubua G*., The Theory of Law, Tb., 2004, 143 (In Georgian).

47 See *Kereselidze D.,* The most General Systemic Notions of Private Law, publication of the Institute of European and Comparative Law, Tb., 2009, 51-53 (In Georgian). The author develops the opinion, according to which, an international agreement is the legal document, binding a state, making the possibility of its implementation by individual persons doubtful. The present paper touches directly the legal aspect of international agreement in regard to the freedom of contract, consequently, its legal relevance for definition of action of individual persons isn't considered.

48 *Ioseliani A.,* Contractual Collision Law, Tb., 2011, 38 (In Georgian).

49 Comp. *Shengelia I.,* Contractual Freedom, as the Principle of Civil Law, the Notion and Importance, "Justice and Law", №4 (23)'09, Tb., 2009, 46 (In Georgian).

50 Comp. *Spickhoff* in Beck'scher Onlinekommentar BGB (EGBGB), Internationales Privatrecht, Art. 3, Hrsg: *Bamberger/Roth*, Stand: 01.02.2013, Edition: 28, C. H. Beck, 2013, Rn. 1.

51 *Reiner S., Reinhard Z. (Hrsg.),* Basistexte zum Europäischen Privatrecht. Textsammlung, 2. Auflage, Baden-Baden, 2002, S. 463, indicated, *Zoidze B.,* Reception of European Private Law in Georgia, Training Center of Publication, Tb., 2005, 268.

2.4 Definition of the Notion of Contract Determined in Legal Science

2.4.1. Contractual Relation, as Relative Right

The definition of the notion of contract in legal science is considered in manifestation of will[52] by the parties, and on the one hand, in the aspect of the relevant offer and accept[53], for the existence of which, achieving agreement on the basis of the expressed will is the basis for occurrence of legal result.[54] The agreed will express the limits of actions of the parties,[55] in regard to which individual obligations rise for the parties.[56]

A contract belongs to the category of relative rights, which implies imposition of obligations only on certain persons.[57] In particular, only certain person, as the person with such rights and obligations, oppose the holder of the relative right.[58]

2.4.2. Contract, as a Due Phenomenon

In order to fit the contract to one of these two terms, established in the theory of law, it is necessary to follow the general principles of law: the law is a due phenomenon,[59] due nature of which is the bindingness of its fulfillment for its nullification.[60] Bindingness doesn't provide for what is happening in the moment of action, but it regulates the area of action and periodicity of fulfillment.[61]

However, when can a contract be defined as due? For development of the mentioned opinion we shall consider the law in general, as a due phenomenon. **Contract is the part of law; it is the individual law of the participants of relative relation.**

The subject of the contract in direct, as well as in indirect understanding, is the primary basis for existence of a contract. Following the practical loading, its coming into force or the possibility of implementation of further action is based just on its subject. Consequently, if we follow this opinion, we will see the contract in two aspects: a) physical actions, intended for concluding of a contract, is the sphere of the essence,[62] and b) the procedure of actions specified in the contract is the due part, as it becomes the part of law after signing by the parties and is presented in the form of the relevant transaction.[63]

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52 *Eckert H.-W.* in Beck'scher Onilne-kommentar BGB, Hrsg: *Bamberger/Roth,* Stand: 01.08.2013, 28th ed., §145, Rn. 1.

53 *Busche* in Münchener Kommentar zum BGB, 6. Auflage, 2012, §145, Rn. 1.

54 *Jauering* in Jauering, Bürgerliches Gesetzbuch, 14. Auflage, 2011, §145, Rn. 1.

55 *Zoidze B.,* The Attempt of Perception of Practical Existence of Law, Predominantly in the Aspect of Human Rights, Essays, Tb., 2013, 57 (In Georgian).

56 Comp. *Cippelius R*., Teaching of Juridical Methods, the 10th edited publication, Munich, 2006, 3.

57 *Vacheishvili A.,* General Theory of Law (second edition, the first edition is dated by 1926 (In Georgian). The editors of the second edition: *O. Gamkrelidze and M. Marianashvili)* 2010, 186 (In Georgian).

58 *Zoidze B.,* Georgian Material Law, 2nd ed., Tb., 2003, 4 (In Georgian).

59 *Khubua G.,* The History of Law, Tb., 2004, 39 (In Georgian).

60 Comp. ibid, 40.

61 E.g., *Leisner-Egensperger A.,* Hans Kelsens Reine Rechtslehre, Juristische Arbeitsblätter (JA), Heft 7, 2005, 556.

62 E.g., signing of contract, e.g. legal formation of manifestation of will.

63 Comp. *Gril P.,* Recht und Ordnung, Zeitschrift für Rechtspolitik (ZRP), Heft 4, Verlag C. H. Beck, München, 2001, 185.

Contract is the part of law, and the essence of the law is still under consideration by the scientists.[64] Still, it's not disputable that the contract validity is based on jurisdiction of the relevant norms. Consequently, if individual law arises between the parties by concluding the contract, its consideration in legal aspect will lead us to the due understanding of the contract, as the mandatory document, as the procedure, specified in the law, as well as in the contract, shall be necessarily followed.[65]

2.5 The Rode of Contract in Public Law Relations

Fundamental legal bases of contract are provided in CCG, which is one of the spheres of private law. However, the above mentioned doesn't mean consideration of a contract only in one aspect, as the result of establishment of civil-law relations. In addition to the private law, contractual relation often occurs in public law.

Number of opinions is expressed in legal literature in regard to delimitation of private and public law relations.[66] The main goal of each of such opinions is to clearly demonstrate their distinctive signs. These can be, e.g. in private law – existence of subordination relations at less extent, which doesn't imply dependence on the will of public institution as the starting point of legal relation.[67] However, in the case of public as well as private-law relations, establishment of contractual relations often occur.

The most substantial manifestation of the meaning of contractual relation in public law is the legal institution of administrative contract regulated by CADG. It is one of the bases of origination of administrative-legal relations.[68]

3. The Notion of Freedom

Freedom exists in all sphered, and the state has the obligation of protecting it. Without absence of protection of freedom the existence of social state would be impossible[69] as it represents important pre-condition for existence of social goods like security,[70] etc.

The freedom is based on the law,[71] however, the law cannot make freedom free; it is its obligation to limit it. **Freedom cannot be absolute.**[72] Establishment of the boundaries of its limitation is the

64 See e.g. *Dreier R.,* Der Begriff des Rechts, Neue Juristische Wochenschrift (NJW), Heft 14, Verlag C. H. Beck, München, 1986, 894. The author differentiates sociological, philosophic and theoretical aspects of law and considers that the problem of definition of law shall be resolved on the basis of consideration of each case.

65 Comp. *Kelzen H*., What is the Pure Theory of Law? Translation by L. Bregvadze, "The Law Magazine", №2, 2011, Tb., 2011, 297 (In Georgian).

66 In regard to the above mentioned see e.g. *Tchanturia L.,* Ownership of Immoveble Subjects, 2nd ed., Tb., 2001, 23-31 (In Georgian).

67 *Tchanturia L.,* General Part of Civil Law, Tb., 2011, 2 (In Georgian).

68 See Article 65 I of the CACG.

69 See the Decision №1/2/434 dated August 27, 2009 of the Constitutional Court of Georgia on the Case the Public Defender of Georgia vs. The Parliament of Georgia (In Georgian).

70 About the above mentioned see *Di Fabio U.*, Sicherheit in Freiheit, NJW, Heft 7, Verlag C.H. Beck, München, 2008, 421-425.

71 *Lloyd D.,* The Idea of the Law, trandlated from English, *M.A. Yumasheva, Y.A. Yumashev, Yumashev, M., Yugona, N., M.*, 2002, 158.

72 *Di Fabio U.*, Sicherheit in Freiheit, NJW, Heft 7, Verlag *C.H. Beck,* München, 2008, 422.

primary obligation of the law, practical implementation of which shall occur when implementation of freedom may violate the right of a third party.[73]

Freedom is a general notion, its regulation on legislative basis determined only broad rule of conduct. In this case the area of its regulation doesn't cover how person acts for realization of freedom;[74] for the law, regulating freedom, it is crucial that the person doesn't go beyond these boundaries and violate the right of the third parties.

Freedom can't be understood separately from the law. In Kant's opinion, the human is free when he/she obeys the law. In such case the person may be limited, but implement this limitation for obtaining his/her own freedom.[75]

Freedom is defined in the law norm. Only legal norm can be the basis of origination of legal relation,[76] i.e. freedom depends on the content of the law norm and implementation of its validity. Following the above mentioned, it's important to consider the issue concerning the notion of freedom in jurisprudence.

Freedom is the freedom of doing of what is permitted by the law.[77] If always follow from the basic law,[78] however, it shall not be understood like a person cannot freely, without any limitations, implement his/ her own will.[79] E.g. following the norm of freedom of entrepreneurship, he/she can implement any action, corresponding to his/ her will. Implementation of such action, limitation of freedom may follow from the public (state) importance,[80] which will be expressed in absolute observance of the existing legislation.

Freedom is determining the equality of a person in specific issues[81] and represents the legal precondition of realization of human knowledge in the life.[82] By contract and moreover, written contract, the parties see the realization of their own freedom just in contractual relation.[83]

Implementation of freedom is important in private as well as in public- law relations. To obtain it, a person shall share the law and the pre-conditions of its action.[84] In both cases the interests of the per-

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73 Comp. *Singer R.,* Vertragsfreiheit, Grundrechte und der Schutz des Menchen vor sich selbst, Juristiscgen Zeitung (JZ), 50. Jahrgang, 1. 1995, 23, 1133.

74 *Lloyd D.,* The Idea of the Law, trandlated from English*, M.A. Yumasheva, Y.A. Yumashev, Yumashev, M., Yugona, N., M*., 2002, 159.

75 *Zoidze B.,* The Attempt of Perception of Practical Existence of Law, Predominantly in the Aspect of Human Right, Essays, Tb., 2013, 57 (In Georgian).

76 *Khubua* G., Comments to the Constitution of Georgia, Fundamental Human Rights and Freedoms, Tb., 2005, 2003 (In Georgian).

77 *Montesquieu S. L.,* The Reason of Laws, translated from French by *R. Peikrishvili,* Tb., 1994, 180 (In Georgian).

78 Comp. *Bäurele M.,* Vertragsfreiheit und Grundgesetz, 1. Auflage, Nomos Verlagsgesellschaft, Baden-Baden, 2001, 121.

79 *Montesquieu S. L.,* The Reason of Laws, translated from French by *R. Peikrishvili,* Tb., 1994, 213 (In Georgian).

80 See BVerfG, 1 BvR 924/12 vom 18.9.2013, Absatz-Nr. 12.

81 Comp. BverfG, 2 BvQ 55/13 vom 6.12.2013, Absatz-Nr. 8.

82 *Montesquieu S. L.,* The Reason of Laws, translated from French by *R. Peikrishvili,* Tb., 1994, 214 (In Georgian).

83 Ibid, 224.

84 Comp. *Zoidze B.,* The Attempt of Perception of Practical Existence of Law, Predominantly in the Aspect of Human Right, Essays, Tb., 2013, 58 (In Georgian).

sons, who participate in the mentioned legal relations, shall be protected[85], because otherwise realization of freedom by the person will be impossible.

4. The Freedom of Contract

The history of the freedom of contract is not the oldest legal institution; its formation as a legal institute counts only several centuries.[86] The USA is considered to be one of the key facilitators of development of the doctrine of freedom of contract.[87] The necessity of limitation of realization of such right was conditioned by creation of large commercial organizations, which required free area for action.[88] Consequently, it developed together with the development of the society. The opinion, which could be formulated in the following words, is provided in legal literature: "The history of freedom of contract is the history of your limitations".[89] The above opinion represents the legal basis for the freedom of contract, as absolute right.[90]

Legal institution of freedom is one of the main fundaments of contractual relations. Like in most of legal institutions, **freedom is not unlimited in contractual relations,**[91] which is conditioned by the only factor: it aims at stable and safe provision of free activities. [92] This rule applies not only to civil-law, but to private- law contractual relations on the whole; e.g. establishment of labor relations, based on the principle of freedom of labor, implies the will of the subject to dispose his/her own abilities in labor activities[93] and form his/her own will following the principles of the freedom of contract.

Limitation of freedom in contractual law is based on the principle of free expression of will.[94] It, on the one hand, may be determined by the parties, or, on the other hand, the law may directly regulate the basic aspects of the content of contract.[95]

The freedom of contract represents the ability of the parties to establish order. It is used by the representatives of each profession. Moreover, the opinion is expressed in legal literature, according to which, without the existence of the freedom of contract, market economy cannot exist, which, in its turn,

85 Comp. *David R.,* The Present Basic Legal Systems, translated by *T. Ninidze (edit.) and E. Sumbatashvili,* Tb., 2010, 80 (In Georgian).

86 *Killian W.,* Kontrahierungszwang und Zivilrecht, ACP 180 (1980), 48.

87 *Lloyd D.,* The Idea of the Law, trandlated from English by *M.A. Yumashev, Y.A. Yumashev, Yumashev, M., Yugona N*., M., 2002, 163.

88 Comp. ibid.

89 *Von Jan B.* (Jus Privatum, Bd. 40), Tübingen, Mohr Siebeck 1999. XXIV, 722 _ indicated: *Meder S.,* Privatautonomie und Kontrahierungszwang, NJW, Heft 4, Verlag C. H. Beck, München, 2002, 279.

90 Comp. *Meder S.,* Privatautonomie und Kontrahierungszwang, NJW, Heft 4, Verlag C. H. Beck, München, 2002, 279.

91 E.g. in joint stock company, in the aspect of determination of the relevant action by the shareholders. In regard to the above mentioned, see *Altmeppen* in Münchener Kommentar zum Aktiengesetz, 3. Auflage, Verlag C. H. Beck, München, §291, Rn. 31.

92 *Tchanturia L.,* General Part of Civil Law, Tb., 2011, 88 (In Georgian).

93 See Ruling №2/33/1 dated November 4, 1997 of the Constitutional Court of Georgia on the case Nino Ioseliani vs. The State Appointee of President in Samtskhe- Javakheti Region and the Parliament of Georgia (In Georgian).

94 *Tchanturia L.,* General Part of the Civil Law, Tb., 2011, 89 (In Georgian).

95 The mentioned issue will be discussed in details in other chapter of the paper, where both aspects of limitation of the freedom of contract will be considered.

created uniform chain in the form of authorities granted by the constitution[96] and by which the parties have the possibility of realization of their own abilities.[97]

The freedom of contract depends on the ability of assessment of his/ her own behavior by the person, understanding of the relevant result, which, in its turn, is the basis of realization of power and capacity.[98] The above mentioned represents the pre-condition of establishment of legal order.[99]

There is an opinion, according to which "the freedom of contract is one of the manifestations of freedom",[100] which represents limited right of a civil-law subject.[101] If occurs in CCG in objective form. The will, expressed by the parties is required for its formation. In other words, for the realization of the right of freedom of contract, a person himself/herself chooses the norm and determined the required procedures and the content of contractual relations. In general, any legal norm[102] grants the society the opportunity of performance of specific action,[103] which is expressed in the action of the society itself to get involved in the situation, regulated by the mentioned norm.[104] The freedom of contract implies the opportunity of just such action and impossibility of interference (as well as protection) by the state.[105] On its basis, the freedom of the parties to determine specific conditions themselves and state them in the contract as they deem them proper, is strengthened.[106] In this regard, we can quote the practice of the Supreme Court of Georgia, which considers determination of the content, agreement on form and the possibility of selection of counter-agent as the freedom of contract.[107] However, the latter is not expressed only in concluding the contract by the parties. On the basis of the above mentioned right the parties can also not conclude the contract[108] if the basis of limitation, provided by the law is not present, which is also one of the constituent elements of the freedom of contract.[109]

Binding power of the freedom of contract may follow from different contractual relations. It may

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96 *Bäurele M.,* Vertragsfreiheit und Grundgesetz, 1. Auflage, Nomos Verlagsgesellschaft, Baden-Baden, 2001, 306 _ Nipperdey's opinion in indicated on the mentioned page, it is cited as partial quotation.

97 Comp. *Shengelia I.,* Contractual Freedom as the Principle of Civil Law, Essence and Importance, "Justice and Law", №4 (23)'09, Tb., 2009, 46 (In Georgian).

98 Comp. *Kereselidze D.,* The Most General Systemic Notions of Private Law., Tb., 2009, 117 (In Georgian).

99 Comp. von Thur, AT I, 1910, §22 III, 378; *Larenz/Wolf,* AT des Bürgerlichen Rechts, 2004, §6, RdNr. 1 ff – indicated: *Kereselidze D.,* The Most General Systemic Notions of Private Law., Tb., 2009, 117 (In Georgian).

100 *Zoidze B.,* The Attempt of Perception of Practical Existence of Law, Predominantly in the Aspect of Human Rights, Essays, Tb., 2013, 57 (In Georgian).

101 *Jorbenadze S.,* Action of Individual Legal Institutions of the Civil Code in regard to the Labor Code, "Sarchevi" №1-2 (2012), Tb., 2013, 19 (In Georgian).

102 Legal norm, provided by the Law is implied, which doesn't follow from judicial practice only (on the example of the countries of general law).

103 Comp. *David R.,* The Present Basic Legal Systems, translated by *T. Ninidze (edit.) and E. Sumbatashvili,* Tb., 2010, 94 (In Georgian).

104 Ibid.

105 *Shengelia I.,* Contractual Freedom as the Principle of Civil Law, Essence and Importance, magazine "Justice and Law", №4 (23)'09, Tb., 2009, 45 (In Georgian).

106 *Kötz H.,* Vertragsrecht, 2. Auflage, Mohr Siebeck, Tübingen, 2012, 18.

107 See Ruling №as-149-142-2013 dated June 10, 2013 of the Supreme Court of Georgia: descriptive part, Decision dated December 4, 2012 of Tbilisi Appeal Court.

108 *Tchanturia L.,* Comment to the Civil Code of Georgia, Vol. III Article 319, Tb., 2001, 60 (In Georgian).

109 Comp. *Bydlinski F.*, Zu den dogmatischen Grundfragen des Kontrahierungszwanges, Verträge, gehalten auf der Tagung der Zivilrechtslehrervereinugung am 18. 1979 in Bern, ACP 180 (1980), 5.

be more strictly binging, e.g. insurance on care-taking[110], etc. In each case the parties shall determine legal boundaries of their application. Violation of the rights of the third parties is inadmissible. This opinion can be formulated in other words: **the freedom of contract ends where its realization will be impossible following the contractual conditions and the law.**[111]

4.1 The Importance of Private Autonomy in the Freedom of Contract

Legal formation of private autonomy is primarily realized in the freedom of contract.[112] It is the most important basis of concluding of a contract and has direct impact on contractual relations. With the consideration of just the above mentioned, when speaking about the freedom of contract in the present paper, private autonomy shall be touched primarily. Constitutional bases will be considered only in the next chapter, constitutional rights have indirect impact on civil law, including the freedom of contract.[113]

One of the manifestations of private autonomy is the autonomy of the will, which is based just on the above mentioned legal institution.[114] It defines the authorities of the parties to implement any, legally non-prohibited action[115] and, inter alia, conclude a contract.[116] On the one hand, such actions is the result of mental attitude of a human, to determine subjective factors of the will, manifested in conformity with the law,[117] and on the other hand, the party to the contractual relations, following the freedom, granted by the law, sees binding on the basis of the contract in the belief of his/ her own security.[118] Besides, binding in the case of contractual relations occurs not only in regard to one person, but with the relevant binding of the other person,[119] which follows from the essence of natural need of a human[120] and on the basis of which relations are established in the form of subjective right and the relevant obligations[121]

In its turn, **binding, based on the own will, is the result of free performance of action by a person.** On the basis of the above mentioned, certain obligations are imposed on the person, which are imposed by the responsibility of performance of action,[122] i.e. the person imposes on himself the responsibility in the form of performance of certain action.

Self-binding shall not be understood like the person- participant of contractual relations shall perform some forced actions. Any person, of whatever age, cannot avoid participation in contractual relations and will always be bound in specific aspect with certain periodicity, following the contractual relations directly. Presently, there may exist a person who has not concluded written contract, however,

110 BGH, Urteil vom 7.12.2011 – IV ZR 105/11.
111 BGH, Urteil vom 4.2.2013 – II ZR 134/11.
112 *Tchanturia L.,* General Part of the Civil Code, Tb., 2011, 91.
113 Ibid, 84.
114 Comp. Ioseliani A., Contractual Collision Law, Tb., 2011, 13 – On the Issues of Theories Related to the Nature of Autonomy of Will. See p.p. 12-15 of the same paper.
115 *Tchanturia L.,* General Part of the Civil Code, Tb., 2011, 90 (In Georgian).
116 *Tchanturia L.,* Comment to the Civil Code of Georgia, Vol. III Article 319, Tb., 2001, 57 (In Georgian).
117 Comp. *Naneishvili G.,* The Issues of Law Philosophy, 1992, 56 (In Georgian).
118 *Montesquieu S. L.,* The Reason of Laws, translated from French by *R. Peikrishvili,* Tb., 1994, 213 (In Georgian).
119 *Kereselidze D.,* The Most General Systemic Notions of Private Law, Tb., 2009, 80 (In Georgian).
120 *Tchanturia L.,* General Part of the Civil Code, Tb., 2011, 90 (In Georgian).
121 *Kereselidze D.,* The Most General Systemic Notions of Private Law, Tb., 2009, 80 (In Georgian).
122 Comp. *Tchanturia L.,* General Part of the Civil Code, Tb., 2011, 92 (In Georgian).

throughout the world, the persons who have not concluded oral contract, make only rare exceptions. Each such action, performed by them is just the manifestation of private autonomy. As a legal basis for the above mentioned, we can quote p. 2 of the Article 10 of CCH, which identifies the possibility of performance of an action, non-prohibited by the law and p. 3 of which regulates the possibility of realization of such rights in the cross-section of protection of others' freedom. On the basis of the above mentioned the relation of private autonomy to the legal institution of freedom, including the freedom of contract, can be defined.

Consequently, **the freedom of contract will not be present, if the persons, bearing it, are able to legally realize their own rights. Its participants have the possibility of such realization just following the principle of private autonomy.**

4.2 Constitutional Bases of the Freedom of Contract

The Constitution of Georgia is the legal norm of the country, standing on the highest stage, which establishes fundamental principles of legal order.[123] All other norm shall comply with it. The above mentioned is defined by p. 1 of the Article 2 of CCG.[124] This reservation indicates to the fact that if a norm is incompliant with the Constitution, it will not have obligatory power.[125] The freedom of contract, as one of the most important legal institutions provided by CCG, defined wide area of action in legal aspect, the issues of non-constitutionality of which has not been risen to the Constitutional Court by anybody.[126] However, this statistical fact cannot become the criterion, determining Constitutional connection of the freedom of contract. In order to clarify the pre-condition of action of the legal institution, it is important to define its constitutional bases following the basic rights.

The freedom of contract, as a legal institution, is not directly regulated in the Constitution of Georgia. In this regard, parallel can be made with the constitutions of continental law countries, according to which the mentioned issue is not directly provided in the constitution.[127]

As a result, the opinion of the Constitutional Court, according to which the issue – with which constitutional norm[128] the legal institution of the freedom of contract[129] is compliant - can be explained, is important. From the viewpoint of relative- legal analysis, it's important to review several opinions of the Constitutional Court of Germany. In particular, the latter considers the issue of the freedom of

123 *Kereselidze D.,* The Most General Systemic Notions of Private Law, Tb., 2009, 51 (In Georgian).

124 Ibid, 50. On Hierarchy of norms and CCG and compliance of various norms of the Civil Code and Private Law with the Constitution.

125 *Jorbenadze S.,* Comment to the Civil Code of Georgia, Vol. I, Article 2, Tb., 1999, 30 (In Georgian).

126 *Tugushi T., Burjanadze G., Mshvenieradze G., Gotsiridze G., Menabde V.,* Human Rights and Constitutional Judicial Practice (judicial practice of 1996- 2012), joint project of the Constitutional Court of Georgia, Public Defender of Georgia and Young Lawyers' Association, Tb., 2013 (In Georgian).

127 E.g., the Constitution of German Federal Republic, where the law doesn't speak about contractual relations. On the above mentioned, see e.g. *Reul A.,* Grundrechte und Vertragsfreiheit im Gesellschaftsrecht, Deutsche Notar Zeitschrift (DNotZ), 2007, Heft 3 (Seite 161-240), 2007, 185.

128 The issue of compliance is important as far as the Constitutional Court shall determine the constitutional bases of the freedom of contract or differentiate these bases and determine one of them, as the primary constitutional basis.

129 Comp. *Reul A.,* Grundrechte und Vertragsfreiheit im Gesellschaftsrecht, Deutsche Notar Zeitschrift (DNotZ), 2007, Heft 3 (Seite 161-240), 2007, 185.

contract in several aspects: the right of free development of a person (the freedom of action);[130] the opportunity of free choice of profession,[131] etc.

Let's make a parallel with the Constitutional Court of Georgia. When considering contractual relations, it predominantly acts in the cross-section of the Article 21 of the Constitution, on the basis of which it considers the legal nature of the conditions of concluding of a contract in regard to the right of ownership.[132]

Consideration of constitutional bases is important for establishment of general principles of the freedom of contract. General principles, on the one hand, may exist without the law and be taken into account in the case of consideration of specific legal institution,[133] and, on the other hand, it may be defined from the viewpoint of compliance with the supreme law of the country. Such differentiation must conform to the specific governance existing in the country.[134]

The right of freedom of a person can be considered as the main constitutional basis of the freedom of contract, as well as almost all stages of legal **relations.** It concerns almost all spheres of human life.[135] The above mentioned shall not be understood like other constitutional rights follow from just this norm,[136] however its existence in the primary pre-condition of free performance of the relevant activity.

In addition to the above mentioned, the following rights can be understood as constitutional bases for the freedom of contract: **the right of free development of the own person, the right of expression and speech, the right of ownership, the freedom of intellectual creation, the right of free entrepreneurship (the freedom of labor), the freedom of movement, equality of persons and the right of marriage.**[137] In the present paper, separate sub- section will be dedicated to *the rights of equality under the law and the freedom of free development of a person*, and the other constitutional rights, as the constitutional bases of the freedom of contract, will be regulated in uniform sub-section.

4.2.1 Equality Under the Law, as the Primary Constitutional Basis of the Freedom of Contract

Equality under the law implies the right of enjoying equal rights and privileges by everyone.[138] Following the essence of civil-law relations, based on the equality of persons, it can be referred to as the primary constitutional basis of the freedom of contract.[139] On the basis of the above mentioned the

130 BVerfG, Beschluss vom 16. 5. 1961 - 2 BvF 1/60, NJW 1961,1395.

131 BVerfG, Beschluss vom 25-03-1992 - 1 BvR 298/86, NJW 1992, 2621.

132 E.g. Decision №2/31-5 dated March 25, 1997 of the Constitutional Court of Georgia on the Case Levan Purtskhvanidze vs. the Parliament of Georgia (In Georgian).

133 Comp. *David R.,* The Present Basic Legal Systems, translated by *T. Ninidze (edit.) and E. Sumbatashvili,* Tb., 2010, 149 (In Georgian).

134 *Montesquieu S. L.,* The Reason of Laws, translated from French by *R. Peikrishvili,* Tb., 1994, 59 (In Georgian).

135 Comp. *Hofmann* in *Hofmann/Schmidt-Bleitbreu/Hopfauf,* Kommentar zum Grundgesetz (GG), 11. Auflage, Verlag Carl Heymanns, Köln, München, 2008 Art. 2 Rn. 31 da Semdgomi.

136 The above mentioned opinion is based on the Decision №2/1/41 dated April 6, 2009 of the Constitutional Court of Georgia on the case the Public Defender of Georgia vs. The Parliament of Georgia (In Georgian).

137 Comp. *Tchanturia L.,* General Part of Civil Law, Tb., 2011, 82-83 (In Georgian).

138 *Gotsiridze E.* (the group of authors), Comments to the Constitution of Georgia, Chapter II, Citizenship of Georgia, Fundamental Human Rights and Freedoms, Tb., 2013, 59 (In Georgian).

139 Comp. *Di Fabio* im *Maunz/Dürig,* Grundgesetz-Kommentar, 69. Ergänzugslieferung 2013, GG Art. 2, Rn. 108.

parties can freely establish contractual relations.[140] The specified condition is based on the constitutional right of a human to independently determine future activities,[141] which is expressed in selection of the contract, having the relevant counter-agent or content.[142]

The term itself – **the freedom of contract, unifies the issue of equality of persons and justice from the sphere of human rights,**[143] which, from the viewpoint of fulfillment of the relevant obligations, is the most important pre-condition for the participants of contractual relations, which is protected in the law itself on the basis of the principle of private autonomy.[144]

4.2.2 The Right of Free Personal Development, as Constitutional Basis for the Freedom of Contract

The right of free personal development covers all spheres of public relations,[145] including contractual relations,[146] which follow from the universal freedom of conduct, existing on the basis of this norm.[147] To support the mentioned statement, we can refer to the practice of the Constitutional Court of Georgia, according to which, the Article 16 of the Constitution of Georgia provides for the Principle of autonomy of the parties.[148] Consequently, **the freedom of contract can be referred to as one of the parts of the right of free development of person**.[149]

In the opinion of Constitutional Court of German Federation, the legal basis of the freedom of contract is private autonomy, and the latter, on the basis of the right of person's free development, follows from the right of free action.[150] As a parallel, we can mention the opinion, existing in Georgian legal literature, according to which the freedom of contract is the instrument of the so-called "self-intention" and protection,[151] i.e. the fact of concluding of contract, which can also be referred to as the part of

140 BverfGE 8, 274 (328); 88, 384 (403); 89, 48 (61); 95, 267 (303 f.); Manssen, Privatrechtsgestaltung durch Hocheitsakt, 1994, 119 _ indicated: Ibid, Rn. 109.

141 Comp. *Lang* im Beck'scher Online-Kommentar GG, Hrsg: *Epping/Hillburger*, Stand: 15.05.2013, ed. 18, Art. 2, Rn. 3.

142 Comp. *Di Fabio* im *Maunz/Dürig*, Grundgesetz-Kommentar, 69. Ergänzugslieferung 2013, GG Art. 2, Rn. 109.

143 *Shengelia I.,* Contractual Freedom, as the Principle of Civil Law, the Essence and the Significance, "Justice and Law", №4 (23)'09, Tb., 2009, 49 (In Georgian).

144 Comp. *Schmidt* im Erfurter Kommentar zum Arbeitsrecht, 14. Auflage 2014, GG, Art. 2, Rn. 14.

145 *Kublashvili K.,* Fundamental Rights, Tb., 2008, 96 (In Georgian).

146 Comp. E.g. Ruling №1/7/454 dated December 19, 2008 of the Constitutional Court of Georgtia on the case: the Citizen of Georgia Levan Sirbiladze vs. the Parliament of Georgia (In Georgian).

147 *Khubua* G., Comments to the Constitution of Georgia, Fundamental Human Rights and Freedoms, Tb., 2005, 2005, 77 (In Georgian).

148 Ruling №1/2/458 dated June 10, 2009 of the Constitutional Court of Georgtia on the case: the Citizens of Georgia A. Macharashvili and D. Sartania vs. the Parliament of Georgia and the Ministry of Justice of Georgia (In Georgian).

149 *Brinkmann* in *Prütting/Wegen/Weinrich,* BGB Kommentar, 1. Auflage, Verlag Luchterhand, Neuwied, 2006, vor §145ff, Rn. 13.

150 BverfG v. 7. 2. 1990, BverfGE 81, 242, 254 f.; BverfG v. 6. 2. 2001, NJW 2001, 957 ff. _ indicated: *Thüsing G.,* Angemessenheit durch Konsens – Zu den Grenzen der Richtigkeitsgewähr arbeitvertraglicher Vereinbarungen, `Recht der Arbeit~ (RdA), Heft 5, 2005, 258.

151 *Shengelia I.,* Contractual Freedom, as the Principle of Civil Law, the Essence and the Meaning, "Justice and Law", №4 (23)'09, Tb., 2009, 45 (In Georgian).

performance of specific action by a person.[152] Just such action is the part of the freedom of contract and constitutional right – personal development of a person.[153]

4.2.3 Other Constitutional Bases of the Freedom of Contract

As it was mentioned above, there were some other constitutional bases of the freedom of contract, in addition to the equality of persons and the right of free personal development. Each of them will be considered in the present chapter just in regard to the legal institution of the freedom of contract.

The first and the most essential constitutional norm for the practice, could be understood in the context of the freedom of contract, is the freedom of **expression and speech**. If forms the constitutional basis for contractual relations as far as the issues of authority of the parties are regulated on the basis of the principles of private autonomy to perform any contractual action, not prohibited by the law.

The state shall not interfere in contractual relations. Interference of the state in the freedom of expression and speech may be expressed in determination of the relevant content for a person,[154] which will go beyond legal frames. In parallel with the above mentioned, application of certain impact in regard to the principle of the freedom of contract by the state shall be considered as the issue of interference in the above specified fundamental right. In particular, the parties to the contractual relations, following the principle of private autonomy, enjoy equal rights to formulate any legally non-prohibited desire in words and thus realize their own constitutional right – to express their will.

Most of contractual relations are based on the disposal of the right of ownership. In this regard, the role of the freedom of contract is crucial for practical realization of this legal institution, on the basis of which the **right of ownership,** specified in the Constitution, forms one of the most important constitutional bases. It implies existence of freedom in the property-related rights of a person, according to which he/ she can independently direct his/her life[155], which forms the basis for possible manifestation of the freedom of contract in protection of the right of ownership, its realization.[156]

In parallel with the right of ownership, the **right of freedom of intellectual creative work** shall be considered, which is one of the types of ownership.[157] On the basis of the mentioned right, a person is protected in the process of dissemination of the created piece of art,[158] allowing the person to reflect it in the contract, conclude free contract and dispose his/ her own property- related rights according to his/ her own will.

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152 *Gotsiridze E.* (the group of authors), Comments to the Constitution of Georgia, Chapter II, Citizenship of Georgia, Fundamental Human Rights and Freedoms, Tb., 2013, 23 (In Georgian).

153 BverfG v. 7.2. 1990, BverfGE 81, 242, 254 f.; BverfG v. 6. 2. 2001, NJW 2001, 957 ff. _ indicated: *Thüsing G.,* Angemessenheit durch Konsens – Zu den Grenzen der Richtigkeitsgewähr arbeitvertraglicher Vereinbarungen, `Recht der Arbeit" (RdA), Heft 5, 2005, 258. _ `Diese Abschlussfreiheit ist Bestandteil der Vertragsfreiheit und als Teil des Rechts auf freie Entfaltung der Persönlichkeit (Art. 2 Abs. 1 GG) verfassungsrechtlich gewährleistet~. The court also indicates to the practice of Constitutional Court: BVerfGE 8, 274, 328.

154 *Kublashvili K.,* Fundamental Rights, Tb., 2010, 219 (In Georgian).

155 *Izoria L.,* Comments to the Constitution of Georgia, Fundamental Human Rights and Freedoms, Tb., 2005, 147 (In Georgian).

156 *Zoidze B.,* Constitutional Control and Order of Values in Georgia, Tb., 2007, 20 (In Georgian).

157 Comp. *Jorbenadze S.,* (group of authors), Comments to the Constitution of Georgia, Chapter Two, Citizenship of Georgia, Fundamental Human Rights and Freedoms, Tb., 2013, 237 (In Georgian).

158 *Kublashvili K.,* Comments to the Constitution of Georgia, Fundamental Human Rights and Freedoms, Tb., 2005, 183 (In Georgian).

Out of the constitutional norms, based on the equality of persons, **recognition and protection of marriage and family** may also be considered as the basis of the freedom of contract. On the one hand, its regulation is based on the equal right,[159] and on the other hand the manifestation of the will of the parties shall be necessarily present, i.e. the agreement on marriage and creation of a family.[160] In addition to the above mentioned, as norm definition, we can refer to the freedom of concluding of marriage contract,[161] by which the spouses, during their life, can regulate legal relations by relative, i.e. contractual property relations, in addition to the law.[162]

The right of establishment of public unions and the freedom of movement can also be considered as the constitutional basis of the freedom of contract. The example to the former can be establishment of a legal entity, performed by contractual relations,[163] and in the case of the latter, the Article 668 and further articles can be defined, realization of which is impossible without the freedom of movement, as constitutional guarantee.

Consideration of the constitutional basis of the freedom of contract is also possible following the Article 30.[164] It refers to the **oblation of the state to develop free entrepreneurship and competition,** implementation of which is possible on the basis of private-law relations.[165]

4.2.4 Intermediate Result

The purpose of constitutional norm is not establishment of certain dogma.[166] Its action in civil law is of indirect nature.[167] The above mentioned follows from the pre-condition of validity of the norm, specified in the constitution, according to which one of its addressees is the state and it undertakes the obligation of execution of fundamental constitutional rights.[168]

Incompliance of specific norm of contractual law (correspondingly, the Civil Law) with the Constitution means that this norm shall not be applied in the practice,[169] i.e. such norm is unconstitutional.

Legal institution of the freedom of contract follows from constitutional norms, even if the norm is not directly specified in the Constitution.[170] Following the non-absolute nature of the freedom of contract, each of its constitutional bases represents limited right. The above mentioned, in its turn, corresponds to the issue of human right, the possibility of limitation of which is provided by constitutional

159 *Korkelia K.,* Ibid, 305.

160 On the above mentioned, please see the practice of European Court of Human Rights: *Hamer vs. United Kingdom*, 10.06.2009, 3002/03, 23767/03.

161 The Article 1172 and further of CCG.

162 *Shengelia R., Shengelia E.,* Family Law, Tb., 2009, 183 (In Georgian).

163 Comp. *Tchanturia L., Ninidze T.,* Comment to the Law on Entrepreneurs, 3rd ed., Tb., 2002, 30 (In Georgian).

164 *Zoidze B.,* Reception of European Private Law in Georgia, Tb., 2005, 269- 270 (In Georgian).

165 Comp. *Putkaradze I.,* (the group of authors), Comment to the Constitution of Georgia, Chapter II, Citizenship of Georgia, Fundamental Human Rights and Freedoms, Tb., 2013, 372 (In Georgian).

166 Comp. *Willoweit D.,* Grundbegriffe des Bürgerlichen Rechts, NJW, Heft 17, C. H. Verlag, München, 1983, 925.

167 *Tchanturia L.,* General Part of the Civil Law, Tb., 2011, 84 (In Georgian).

168 Ibid, 84.

169 Comp. *Ninidze T.,* The Structure of the First Article of the Civil Code, Jubilee Collection Dedicated to the 80th Anniversary of Akaki Labartkava, Tb., 2013, 160 (In Georgian).

170 *Thüsing G.,* Angemessenheit durch Konsens – Zu den Grenzen der Richtigkeitsgewähr arbeitvertraglicher Vereinbarungen, `Recht der Arbeit~ (RdA), Heft 5, 2005, 258.

boundaries.[171] This opinion is based on constitutional definition of human right, which is not absolute and, in the case of existence of strict constitutional bases, interference with it is admissible.[172]

The right of equality of persons shall be considered as the main constitutional basis of the freedom of contract. The above mentioned may be the primary constitutional guarantee of the Civil Code on the whole, which will come into compliance with the Article 1 of CCG. In accordance with the mentioned Article, the Civil Code, in addition to family and property relations, also regulates private relations, based on the equality of persons; even if its participant is a public institution, following the civil- law relations, it has equal conditions with the other party.[173] **If the issue of equality of persons is not observed in contractual relations, full-value realization of the right of free personal development will be impossible.** Besides, with the exception of the right specified in the Article 16 of the Constitution of Georgia, protection of the rights like the freedom of expression and speech, freedom of intellectual creative work, etc. will be impossible, however equality under the law, as the legal good, supported by the Constitution, doesn't imply the fact that it covers all other constitutional rights and each of them follows just from it.

When speaking about the freedom of contract, for formulation of its definition we shall follow from consideration of legal institutions specified in the Constitution. In this regard, the state shall represent the guarantor of freedom just following the constitutional norms,[174] which, in its turn, will be reflected in observance of private autonomy. Consequently, **the freedom of contract shall be primarily understood as the right, and the definition of the right shall be defined as the authority, belonging to the sphere of human freedom and subjected to its will.**[175]

4.3 The Basic Principles of the Freedom of Contract (in General)[176]

The basic principle of the freedom of contract[177] is formulation by the parties of their own interests through the contract,[178] which they reflect in certain limitations. However it shall be taken into consideration that they use this limitation for obtaining for their own freedom,[179] manifestation of which is such reservation, made on the basis of the law;[180] e.g. reservation on the costs of sale of movable

171 Comp. *Kublashvili K.,* Fundamental Rights, Tb., 2010, 133 (In Georgian).

172 Decision №2/1/415 dated April 6, 2009 of the Constitutional Court of Georgia on the case the Public Defender of Georgia vs. the Parliament of Georgia (In Georgian).

173 *Tchanturia L.,* General Part of the Civil Law, Tb., 2011, 4 (In Georgian).

174 See Decision №3/1/512 dated June 26, 2012 of the Constitutional Court of Georgia on the case the Citizen of Denmark Heinke Cronqwist vs. the Parliament of Georgia; on legal justification of the above mentioned decision see the opinion expressed in legal literature: *Gegenava D., Gegenava A*., "The Citizen of Denmark Heinke Cronqwist vs. the Parliament of Georgia" and normative starving of legislation, publication, dedicated to the 60th anniversary of Besarion Zoidze, Tb., 2013, 176- 193 (editor) (In Georgian).

175 *Chachava S.,* The Competition of Demands and the Basis of Demand, Tb., 2011, 3 (In Georgian).

176 In the present chapter, the principles of the freedom of contract are discussed in general form, as one of the paragraphs of the same paper considers it in details.

177 Only the primary principle is mentioned, through which the importance of the freedom of contract in law is outlined. Details on the principles of legal institution – see chapter 3.2 of this paragraph.

178 Comp. *Busche* in Münchener Kommentar zum BGB, 6. Auflage, 2012, vor §145, Rn. 6.

179 *Zoidze B.,* The Attempt of Perception of Practical Existence of Law, Predominantly in the Aspect of Human Rights, Essays, Tb., 2013, 57 (In Georgian).

180 *Zoidze B.,* Reception of European Private Law in Georgia, Tb., 2005, 126 (In Georgian).

item,[181] where the costs to be borne by the seller and the buyer are specified and the law makes indication of other regulation in the case of the rule specified in the contract.

The freedom of contract is determined by several aspects:[182] the freedom of formation of the contract content,[183] the possibility of selection of a counter-agent,[184] the freedom of selection of the form of a contract,[185]/[186] the freedom of selection of the contract type[187] and the freedom of concluding of a contract.[188] Realization of each of them represents the result of implementation of the rights of the parties to a contract, which, in its turn, is primarily defined by establishment of legal relations based on the autonomy of the will of the parties.

5. The Notion of the Freedom of Contract in the Practice of the Supreme Court of Georgia

It's important to begin speaking about this issue with consideration of inhomogeneity of the legal terminology, used by the Supreme Court of Georgia. In one part of the decision/ ruling the topic under consideration is referred to as the **freedom of contract,**[189] and in some decisions and rulings it is referred to as **contractual freedom.**[190] In this regard the court shall introduce one specific term, which it will use in each case to be considered in homogeneous form. Still, terminological irregularity doesn't involve any kind of legal implication, and the both terms focus on one and the same legal institution, but its consideration by the Appeal Court is important for future development of legal science.[191]

In decisions and rulings of the Supreme Court of Georgia[192] we don't meet the definition, different from the opinions, expressed in legal science. Moreover, with the exception of several cases, Appeal Court doesn't provide differentiation or practical definition of the principles of the legal institution of

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181 The Article 478 of the CCG.

182 In the case of each of them the type of contractual relation, established by the person with the counter-agent has decisive importance. See e.g. *Hertin Paul W.,* Uhreberrecht, Verlag *C. H. Beck*, München, 2004, 116 and further, where the types of contracts, and, consequently, the content, speficied in the contract are divided in accordance with the specific contractual relation.

183 E.g. *Looschelders D.,* Schuldrecht, Allgemeiner Teil, 8. Auflage, Verlag Franz Vahlen, München, 2010, 22.

184 E.g. *Kötz H.,* Vertragsrecht, 2. Auflage, Mohr Siebeck, Tübingen, 2012, 11.

185 E.g. *Musielak H. J.,* Grundkurs BGB, 8. Auflage, Verlag C. H. Beck, München, 2003, 47.

186 The freedom of selection of the form of contract shall be considered only following the contractual relations, which don't imperatively provide for the specific form for concluding of contract – e.g. the Article 183 of CCG.

187 On the above mentioned differentiation, see e.g. *Fikentscher W.,* Schuldrecht, 8. Auflage, Walter de Gruyter & Co., Berlin, 1992, 79.

188 E.g. *Tchanturia L.,* General Part of Civil Code, Tb., 2011, 92 (In Georgian).

189 E.g. Ruling № as-1300-1320-2011 dated March 27, 2012 of the Supreme Court of Georgia (In Georgian).

190 E.g. Ruling № as-863-809-2012 dated October 30, 2012 of the Supreme Court of Georgia (In Georgian).

191 Selection of one of the above specified terms (the freedom of contract and contractual freedom) is implied. Considering that the title of the Article 319 of the CCG is: The Freedom of Contract, in my opinion, the court shall choose the mentioned term.

192 Only the cases of the Supreme Court of Georgia, which were adopted for the Appeal Chamber for substantial hearing, were specially found for this paper. This sub-section doesn't touch the rulings, made on the basis of inadmissible appeals.

the freedom of contract. Notwithstanding the above mentioned, systemization of the opinions existing in judicial practice and their consideration in the form of summary.

The first and the most essential thing, which could considered out of judicial practice, is the judgment of the Appeal Court on legal nature of the freedom of contract, according to which it considers that the freedom of contract, regardless its great importance in civil law, can be limited on the basis of imperative norms.[193] The above mentioned reservation is the primary basis of definition of the principle of the freedom of contract.

According to the definition of the Supreme Court of Georgia, the main characteristic feature of the freedom of contract is free formation of the will, manifested by the parties, which lies in the possibility of concluding of the contract of the desired content, not directly envisaged by the law.[194] The mentioned right is considered by the court as a legal pre-condition of the freedom of concluding of contract.[195/196] Nevertheless, like the theory, the court considers the issue of the freedom of contract as a limited right and explains that it shall be implemented in the environment of contractual fairness.[197]

The legal institution under consideration acts within the limits of fairness, which implies protection of the party, which doesn't have the status dominating person on the market and which, e.g. doesn't determine the interest rate for establishing certain legal relations.[198] The above mentioned follows from the obligation of the party not to create unequal conditions for the other party to contract relations,[199] and the mentioned action is the legal basis for limitation of the freedom of contract, which shall be determined only on the basis of imperative norms.[200] As an example of the above mentioned, the court considers the right of privileged purchase,[201] on the basis of which the party, following the law, has limited right of choosing a counter-agent.

The opinion of the Supreme Court of Georgia is in absolute compliance with the opinions expressed in theory concerning the freedom of determination of the content, as one of the principles of the freedom of contract. In particular, the court considers that by free determination of the content the parties independently agree on all important issues of a contract,[202] which is the manifestation of the principle of autonomy of the parties.[203] In this regard the court considers the will of the parties as decisive factor in realization of contractual freedom, however it explains that turning of will into arbitrariness doesn't fit legal framework.[204]

In judicial practice the attention is focused on several contractual aspects, the opportunity of determinations of which is considered by the court as the authority of the parties. E.g. determinations of

193 See *Nachkebia A.*, Definitions of Civil- Law Norms in the Practice of the Supreme Court (2000-2013), 2014, 119 (In Georgian).
194 Ruling №as-1300-1320-2011 dated March 27, 2012 of the Supreme Court of Georgia (In Georgian).
195 Decision №as-839-890-2011 dated November 8, 2011 of the Supreme Court of Georgia (In Georgian).
196 Also, Ruling №as-382-691-05 dated November 9, 2005 of the Supreme Court of Georgia (In Georgian).
197 Decision №as-7-8362-07 dated June 5, 2007 of the Supreme Court of Georgia (In Georgian).
198 Ruling №as-1139-1385-05 dated May 4, 2006 of the Supreme Court of Georgia (In Georgian).
199 Decision №3k-631-02 dated June 12, 2002 of the Supreme Court of Georgia (In Georgian).
200 Ruling №3k-681-03 dated November 21, 2003 of the Supreme Court of Georgia (In Georgian).
201 Ruling №as-154-579-06 dated November 21, 2006 of the Supreme Court of Georgia (In Georgian).
202 Ruling №3k-681-03 dated November 21, 2003 of the Supreme Court of Georgia (In Georgian).
203 The same Ruling.
204 Ruling №as-505-889-06 dated February 13, 2007 of the Supreme Court of Georgia (In Georgian).

contractual terms;[205]/[206] determination of the amount in the contract[207] if such action (amount) isn't prohibited by the law;[208] the right of agreement on price;[209] agreement of the parties on the schedule, form and place of fulfillment of their obligations.[210]

As it was mentioned above, the court defines the example of limitation of contractual freedom as material transaction.[211] In the case of existence of the above mentioned the freedom of contract is limited, as the parties have to comply with imperative rules, established by the law.[212] The example of the above mentioned could be observed on the basis of existence of servitudes.[213]

In one of the cases the court considered legal regulation of the assumption of the parties to the contract on the basis of the freedom of contract, concerning which it explains that the mentioned legal institution doesn't provide the legal right protecting assumption on concluding the contract and the freedom of concluding cannot originate from the factor that such right is granted to the parties by the law.[214]

In one of the legal cases the Appeal Chamber doesn't define the issue of the freedom of contract properly.[215] In particular, the court considers the norms, regulating the contract on purchase as the principle of the freedom of contract, which cannot be deemed as justified argument. According to its explanation: if regulation of action of the parties isn't determined by the contract, the principle of freedom of contract shall prevail." The court identifies the rule of conduct provided by the Article 477 of the CCG with the principle of the freedom of contract and considers that if the rights and obligations of the parties are not specified in the contract, the issue shall be resolved following the principle of the freedom of contract.

The freedom of contract represents legal basis of establishment of contractual relations and the norms of the CCG, regulating specific contract, are valid only after that.[216]

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205 Ruling №as-250-235-2010 dated July 13, 2010 of the Supreme Court of Georgia (In Georgian).

206 Determination of the time frames in contract shall be in compliance with the law. In the case, specified in the previous footnote, the issue of determination of the time frames was considered in the aspect of authorities of the parties, according to which they are characterized by absolute freedom.

207 Ruling №3k/461-01 dated June 20, 2001 of the Supreme Court of Georgia (In Georgian).

208 Ruling №3k/429-01 dated June 13, 2001 of the Supreme Court of Georgia (In Georgian).

209 Ruling №as-863-809-2012 dated October 30, 2012 of the Supreme Court of Georgia (In Georgian).

210 Ruling №as-1070-1337-2010 dated February 3, 2010 of the Supreme Court of Georgia (In Georgian).

211 The court also explains the rule of forcing of contracting, as one of the aspects of limitation of the freedom of contract, however, the attention isn't focused on it in the present sub-section on purpose. The issue of forcing of contracting, to which separate chapter will be dedicated (when speaking about the types of limitation of contract), will be considered individually.

212 Ruling №as-1283-1538-09 dated May 25, 2010 of the Supreme Court of Georgia (In Georgian).

213 Ruling №as-1108-1312-05 dated July 18, 2006 of the Supreme Court of Georgia (In Georgian).

214 Decision №as-221-213-2012 dated July 24, 2012 of the Supreme Court of Georgia (In Georgian).

215 Ruling № as 1363-1381-2011 dated January 31, 2012 of the Supreme Court of Georgia (In Georgian).

216 E.g. the Ruling № 3k- 1156-02 dated March 21, 2003 of the Supreme Court of Georgia (In Georgian).

6. Conclusion

The freedom of contract is the right, granted by the CCG, for the parties to undertake the obligations in regard to the actions they will perform in the future. **The above mentioned is referred to as contractual self-binding,**[217] which is expressed in determination of the desired content in the contract and concluding of contract with the desired counter-agents by the parties.[218]

The notion of a contract - all parties to it are bound by the obligations, taken under the contract, and in addition to the respect towards the rights of the other party, they are obliged to perform legal actions. In this regard, moral factors don't have as important role as the content, specified in the contract, however respect towards its rights can be implemented by protecting its rights.[219] In number of cases a contract can bear the importance of entering of a new competitor on the economic market of the country, on the basis of which legal relation may turn out to be the bearer of economic loading.[220] In the case of existence of such, the will of the state – to extend the area of its action in such form – may be necessary. The significance of the issue of the freedom of contract on the state level is proven by each company by establishing several types of contractual relations. This right was granted to them by the state on the basis of the CCG; e.g. furniture shop concludes contract not only with the buyer, but its employees, bank, etc.[221] Consequently, such action represents legal relation with diverse nature and the state obtains certain profit from each of such actions.

CCG doesn't contain full list of the types of contracts, which is one of the manifestations of the principle of the freedom of contract.[222] Moreover, on the basis of this legal institution the number of contracts, not representing classical contract types, increases in the world. Following the nature of a contract, it may apply to two specific persons individually,[223] as well as to the broader circle of persons. **A contract shall be deemed as a legal instrument for formation of the will of the parties to the contract.**

The circumstance that a judge cannot interfere in contractual relations and in a contract itself by his/her opinion on what is fair and reasonable in the content, determined by the parties, is an integral part of the principle of the freedom of contract.[224] The above mentioned, in its turn, is observance of the freedom of the parties to the contract by the judge, demonstration of respect of such rights. **What can be implied under freedom?** Freedom is the action, or restraining from the action, in compliance with the wish and will of a person. It is characteristic for the countries with democratic regime, to specify the area of general application of freedom and legally delegate specific issues to the relevant individual.

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217 *Tchanturia L.,* General Part of the Civil Code, Tb., 2011, 91 (In Georgian).

218 Comp. *Kötz H.,* Vertragsrecht, 2. Auflage, Mohr Siebeck, Tübingen, 2012, 18.

219 Comp. *Zoidze B.,* The Attempt of Perception of Practical Existence of the Law, Predominantly in the Aspect of Human Rights, Essays, Tb., 2013, 79 (In Georgian).

220 E.g. *Jorbenadze S*., Franchising Agreement, Tb., 2000, 6 (In Georgian).

221 Comp. *Kötz H.,* Vertragsrecht, 2. Auflage, Mohr Siebeck, Tübingen, 2012, 12-13.

222 Comp. *Shengelia I.,* Contractual Freedom, as the Principle of the Civil Law, Essence and Importance, "Justice and Law", №4 (23)'09, Tb., 2009, 46 (In Georgian).

223 *Schliemann H.,* Tarifliches Günstigkeitsprinzip und Bindung der Rechtsprechung, `Neue Zeitschrift für Arbeitsrecht~ (NZA), Heft 3, 2003, 124.

224 *Todua M., Wilems H.,* The Law of Obligation, Tb., 2006, 105 (In Georgian).

The issue of freedom is reflected in the legal institution of the freedom of contract. Primary manifestation of the above mentioned is **private autonomy.** The parties have broad area of action to freely implement any action, not prohibited by the law.

The **right of equality under the** law shall be deemed as the primary constitutional basis of the freedom of contract. On the basis of this right the parties, on the basis of equal starting point, establish contractual relations and have identical opportunity to conclude or not to conclude a contract. There is an opinion in German legal literature, according to which the freedom of contract is the guarantee of constitutional freedom,[225] as the demonstration of the freedom of implementation of an action.[226]

As a summary, the **definition of the notion** of the freedom of contract may be provided: it represents one of the legal institutions of private- law relations, based on the equality of persons, which follows from the **constitutional norm, defines broad area of action and establishes general rule of conduct.**

[225] *Brinkmann* in *Prütting/Wegen/Weinrich*, BGB Kommentar, 1. Auflage, Verlag Luchterhand, Neuwied, 2006, vor §145ff, Rn. 13.

[226] Comp. *Hofmann* in *Hofmann/Schmidt-Bleitbreu/Hopfauf,* Kommentar zum Grundgesetz (GG), 11. Auflage, Verlag Carl Heymanns, Köln, München, 2008 Art. 2 Rn. 33.

Lana Tsanava*

Government Responsibility as a Mechanism of Balancing Power within the System of Separation of Power

1. Introduction

The Hebrew word denoting "life" is worn on necklaces and other jewellery and is regarded as an image invoking the meaning of God.[1] In the same way the responsibility of the government can be regarded as symbol of democratic governance, as its "face and image", as in the democratic order the one managing must be accountable to those who are managed.[2]

Responsibility is the key characteristic of democracy; without such responsibility the society moves from the democratic order to the non-democratic order. Traditional-liberal theory of democracy considers the *responsible government*, in other words the government, which is capable to make decisions and be accountable for the above decisions. The restriction of political governance is the main element of understanding of the representative democracy.[3]

Restriction of power is achieved via the application of government control and responsibility principles. Based on the above, control is the key concept of the constitutionalism. System of control and responsibility ensures the rationality of the government, makes it more prudent and consistent. The government is accountable to the parliament and through parliament to the society.[4]

The issue of control over the government and its balancing acquired more relevance in the modern constitutionalism. This is caused by the modern tendencies of constitutionalism. Initially the founders of system of separation of power were acknowledging the superiority of legislative body; today in contrary to the above approach the executive body gains increasing power. For the execution of assigned functions – with the purpose to meet population expectations and solution of problems – the executive -body widens its competence. Parliament practically becomes the body subordinated to the executive. Despite the above priority of the executive is not considered as non-complying with the tendencies of the modern democracy if in response to the increased authority of the government there are effective responsibility and control mechanisms.[5]

The issue of responsibility and control over the government is relevant in all countries with the democratic order. Any executive government is responsible.[6] However it must be noted that the

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1 *Dubnick M. J.*, Seeking Salvation for Accountability, 2002, 2, <http://mjdubnick.dubnick.net/papers/2002/salv2002.pdf>, [04.01.2014].

2 *Bradley A., Ewing K.,* Constitutional and Administrative Law, Oxford, 2007, 107.

3 *Burgenberger B.,* Theory of Democracy*,* 28 (In Georgian), <http://migri-law.ge/download/demokratiis%20teoria.pdf > [04.01.2014].

4 *Turpin C., Tomkins A.,* British Government and the Constitution, Oxford, 2007, 565.

5 *Lovo P.,* Contemporary great democracies*,* translated by *N. Tskitishvili and M. Balavadze,* edited by *V. Kes-helava,* Tb., 2002, 123 (In Georgian).

6 *Bradley A., Ewing K.,* Constitutional and Administrative Law, Harlow, 2007, 107.

parliamentary system is more distinguished with the diversity of forms of government responsibility and control. The undisputed criterion of the parliamentary system is existence of responsible government.[7] Therefore, it is considered that parliamentary system most of all reflects etymological meaning of the democracy – people's governance – as representatives of the people – parliament members – are authorised to observe the activities of the government and make relevant measures.[8]

-The main research topic of present article is to review mechanisms of check and balances in the various governance models under the context of separation of powers.

2. Separation of Power

The enlightenment thinkers made huge influence in the fight for the freedom. We shall specially mention doctrines of John Lock, Charles Louis Montesquieu and Jean-Jacques Rousseau, who have established the concept of separation of power. The doctrine on the separation of power is still regarded as the main mechanism for the control over the government. Idea of separation of power implies separation of the authority into three branches– legislative, executive and court – and assigning to each of them exclusive rights.[9] Legislative branch creates laws, executive branch – executes and the Court is dedicated to resolve the disputes. Deterring the drive towards the power is possible only if the person with such desire is not simultaneously the one controlling the means for the achievement of the desire.[10] Moreover, objective of separation of power is not distribution of work and specialisation of functions, but achievement of inter-control and balance between the branches. If one of the bodies has crossed the authority boundaries, the other two must have capability to restrain it.

From XVII century up to the beginning of XX century the idea of "supremacy" of legislative -body and its dominance over the executive government was widely spread.[11] One of the founders of separation of power theory John Lock was declaring that "in the constitutional state, which acts for the purpose to maintain the integrity, there can be only one supreme authority – legislative, and the other authorities must and do obey to it, as legislative body represents the body equipped with the trust."[12] However constitutionalism has developed in other direction. Executive gained more power. Starting from the mid period of XX century the executive achieved leading role in the triad of authority. Compared with other branches, the executive possesses more financial, material-technical, technological, organisational, human and other types of resources. Government controls full information in the areas of foreign and internal relationships. The government has significant authorities in the legislative processes, government's legislative initiatives even exceed the parliamentary initiatives and executive possesses

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7 *Lovo P.,* Contemporary Great Democracies, translated by *N. Tskitishvili and M. Balavadze,* edited by *V. Keshelava*, Tb., 2002, 128 (In Georgian).

8 *Melkadze O., Makharadze O.,* Organisation of Political Authorities in the Countries with Parliamentary System (in relation to the Georgian problems), Tb., 2001, 27 (In Georgian).

9 Manual for the Georgian Constitutional Law, General edition of *D. Gegenava,* Tb., 2013, 26 (In Georgian).

10 *Sajó A.,* Limiting Government: An Introduction to Constitutionalism, translated by *M. Maisuradze,* edited by *T. Ninidze,* Tb., 2003, 90 (In Georgian).

11 *Kverenchkhiladze G.,* Constitutional Status of Georgian Government (comments to the Article 78 of Constitution), modern constitutional law, volume I, Tb., 2012, 9 (In Georgian).

12 *Lock J.,* from the book , *Kverenchkhiladze G.,* Constitutional Status of Georgian Government (comments to the Article 78 of Constitution), Modern Constitutional Law, Vol. I, Tb., 2012, 10 (In Georgian).

many other tools, by which influences the activities of legislative body.[13] András Sajó describes the strength of modern executive body in the following way: "Executive power is kind of centaur: the lower part of its body is the bureaucracy, state administration, and the higher part of the body – politicians from the political parties, who thanks to electors, parliament and first of all the most influential members of their party express the state interests. The strong lower part of the body makes the executive body as the strongest branch, which has highest chances to achieve its objectives."[14]

3. System of Control over the Executive -Power in the Presidential Republic

3.1. Executive Power in the Presidential Republic

Establishment of presidential republic is related to the authors of Philadelphia constitution. The concepts of separation of power are reflected in this system in the best way. Presidential system delegates one function to each branch. Parliament is equipped with the legislative function, president – with executive authority, and the court with the justice function. President manages the executive power for the fixed term.[15] President is elected independently from the parliament, directly by the people or by the election panel; in other words president has independent source of legitimation and is not related to the will of the majority of the legislative body. In the presidential republic institute of president entails leadership of the state and leadership of the executive -power. For example, constitution of USA does not at all consider the notion of government, however there is a cabinet of president functioning by the president, the cabinet comprises of secretaries (same as Ministers). Cabinet is not an independent body, as it is in the presidential republic; this is the president's consultative body. The president implements executive authority alone and does not share with the ministers the right to make decisions. President has full freedom in making decision in the area of governance. This is well demonstrated in the speech of Lincoln made at the consultations with his secretaries on the abolishment of slavery: "seven against, one in favour: the decision is made".[16]

Cabinet is accountable to the president and not to the parliament. The right to dismiss the member of the cabinet is granted to the president.[17] The above means that the executive government in the presidential republic is monist, headed by one person, as for the parliamentary republic – it is managed by the collegial body. Supporters of presidentialism state that president elected by all people, can better embody the will of people than the legislative body. They state that president as the single acting person has more opportunities to act promptly and decisively.[18] However, famous scientist Hans Kelsen heavily

13 *Kverenchkhiladze G.,* Constitutional Status of Georgian Government (comments to the Article 78 of Constitution), modern constitutional Law, Vol. I, Tb., 2012, 10-11 (In Georgian).

14 *Sajó A.,* Limiting Government: An Introduction to Constitutionalism , translated by *M. Maisuradze,* edited by *T. Ninidze,* Tb., 2003 (In Georgian).

15 *Bradley A., Ewing K.,* Constitutional and Administrative Law, Harlow, 2007, 85.

16 *Lovo P.,* Contemporary Great Democracies, translated by *N. Tskitishvili* and *M. Balavadze,* edited by *V. Keshelava,* Tb., 2002, 198 (In Georgian).

17 *Kandelaki K., Losaberidze D., Rukhadze Z., Tabutsadze I., Khmaladze V., Jibgashvili Z.,* Constitutional Systems and Constitutional Process in Georgia (1995 -2009) prospects of its development, Tb., 2009, 18 (In Georgian).

18 *Fish S.,* Stronger Legislatures Stronger Democracies, Journal of Democracy, Vol. 17, No.1, 2006, 5-6, <http://www.europarl.europa.eu/pdf/oppd/Page_8/Stronger_legislature%20_Stronger_democracies.pdf>, [04/01/2014].

criticises USA system. He writes: "When only one individual is elected, who represents millions of individuals, the idea of people representation, of course, loses its last basis."[19] He was of the view that the above approach would open way for the Caesarism, Caesar type governance. And indeed, in the countries, which do not have high political culture and civil society, the presidential republic becomes the source of dictatorship.

3.2. Responsibility of President

President is elected for the fixed term, in case of USA for 4 years. Under ordinary circumstances, president cannot be dismissed during this term. He/she can be dismissed only in case criminal offence, violation of constitution or high treason. And if the president is incapable, incompetent or abuses the authority, then there is no mechanism for dismissing him. The president's impeachment cannot be implemented due to the conflict among the branches of power,[20] which forces the legislative body to tolerate the president during his term. We can say that "president and chambers are predestined for cohabitation for the duration of their mandates".[21] In the American system president is not the member of congress and is not accountable to the chambers. There is nothing in the American system, which fits direct responsibility regime, to which the prime minister collides in parliamentary system. Presidents are only open to the questions of media, and this happens only when the president agrees to answer the questions.[22] On the other hand, the president does not have right to dissolve the congress, as in the parliamentary republic. Moreover the president does not have right for the legislative initiatives, or for any "positive" prerogative for influencing the congress.[23]

3.3. System of Mutual Balance

Executive and legislative bodies function independently in the presidential republic and cannot have any influence over each other. Then what are the mechanisms for check and balances of legislative and executive powers? – USA constitution creates such system, where each branch, despite its independence, is forced to collaborate with the other one. The branches of government are separated and independent from each other, but they are not autonomous, as they can't act themselves, in an isolated manner.[24] Constitution determines "sharing of power " between legislative and executive powers, creating check and balances system. Via the "power sharing" president has right of veto on legislative acts, and the senate has right of veto on staffing decisions made by the president for executive government and court

[19] *Kelzen H.* in : *Lovo P.,* Contemporary Great Democracies, translated by *N. Tskitishvili* and *M. Balavadze,* edited by *V. Keshelava,* Tb., 2002, 84 (In Georgian).

[20] *Sargentich T.,* The Presidential and Parliamentary Models of National Government, AM. U.J. INT'L L. & POL'Y, Vol. 8:579, 580, <http://www.auilr.org/pdf/8/8-23-19.pdf>, [04.01.2014].

[21] *Pakte P., Mellen-Sukramanian P.,* Constitutional Law, translated by *G. Kalatozishvili,* edited by *A. Demetrashvili,* Tb., 2012, 351 (In Georgian).

[22] *Aucoin P., Jarvis M.,* Modernizing Government Accountability: A Framework for Reform, Canada, 2005, 23, <http://publications.gc.ca/collections/collection_2008/csps-efpc/SC103-15-2005E.pdf>, [04.01.2014].

[23] *Pakte P., Mellen-Sukramanian P.,* Constitutional Law, translated by *G. Kalatozishvili,* edited by *A. Demetrashvili,* Tb., 2012, 353 (In Georgian).

[24] *Sajó A.,* Limiting Government: An Introduction to Constitutionalism, translated by *M. Maisuradze,* edited by *T. Ninidze,* Tb., 2003, 94 (In Georgian).

branches.[25] Founders of American constitution established senate not only as the legislative body, but also granted it with significant prerogatives in relation to the executive government – senate relieves presidential functions. Senate has to approve with 2/3 of votes the agreements concluded by the president. Senate appoints the high rank federal officials. It provides consent for the appointment of members of cabinet. President, despite his large power, is forced to collaborate with the parliament for the simple reasons, for example when the parliament does not allocate relevant assignments; otherwise president will not be able to carry out his functions as without consensus of the parliament the president can't take even one cent from the budget. Moreover, without consent from the parliament the president can't create any service.[26] President's authority related to the -declaration of war is subject to the congress's control. Moreover, congress committees hold special authority and other representatives of executive brench , with the exception of the cabinet, are regularly questioned at the committees. Parliamentary commissions have special importance in the area of control over the executive. There are oversight commissions, as well as investigation commissions. Investigation commissions are more important in America compared with the other countries with parliamentary regimes.[27]

Separation of power often creates a dead end, when complex and important issues are discussed. President faces big challenges in the process of reaching agreements with the foreign nations due to the possible opposition from the congress.[28] Shlezinger, in contrary, provides example of Great Britain's parliamentary system, where prime minister appoints members of the executive without consent from the parliament, concludes agreements without parliament's ratification, -declares war without the permission provided by the parliament, hides information in the absence of his calling by the parliament, is protected from the parliamentary investigation and by heritage gets the power once possessed by the absolute monarch.[29]

Presidential system establishes accountability system for the government via setting restrictions for two separate branches. These two branches may have differing views; therefore for decision making it requires debates and negotiations. The above may facilitate making better decisions. The system of mutual check and balances together with other values widens the access to the power and political dialogue. However, the wider is the dialogue, the more complex is to make decision. Separation of power and mechanisms for the checking and balancing includes in itself the potential for disorder and lack of organisation. In this regard, the US Supreme Court in its decision on the case *Immigration and Naturalization Service v. Chadha,* stated that". "Convenience and efficiency are not the primary objectives-or the hallmarks-of democratic government".[30] Indeed, "Convention dated 1878 has

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25 *Aucoin P., Jarvis M.,* Modernizing Government Accountability: A Framework for Reform, Canada, 2005, 23, <http://publications.gc.ca/collections/collection_2008/csps-efpc/SC103-15-2005E.pdf>, [04.01.2014].

26 *Izoria L.,* Presidential, Parliamentary or Semi-Presidential? Way to the Democratic Consolidation, Tb., 2010, 18 (In Georgian).

27 *Lovo P.,* Contemporary Great Democracies, translated by *N. Tskitishvili and M. Balavadze,* edited by *V. Keshelava,* Tb., 2002, 182-183 (In Georgian).

28 *Sargentich T.,* The Presidential and Parliamentary Models of National Government, AM. U.J. INT'L L. & POL'Y, Vol. 8:579, 585, <http://www.auilr.org/pdf/8/8-23-19.pdf>, [04.01.2014].

29 *Shlezinger A.,* Leave the Constitution Alone, Parliamentary Versus Presidential Government, edited by *Lijphard A.,* 90-94, cit.:, *Sargentich T.,* The Presidential and Parliamentary Models of National Government, AM. U.J. INT'L L. & POL'Y, Vol. 8:579, 581, <http://www.auilr.org/pdf/8/8-23-19.pdf>, [04.01.2014] .

30 *Sargentich T.,* The Presidential and Parliamentary Models of National Government, AM. U.J. INT'L L. & POL'Y, Vol. 8:579, 588-589, <http://www.auilr.org/pdf/8/8-23-19.pdf>, [04.01.2014].

acknowledged doctrine of separation-delegation of power not to stimulate the efficiency, but to exclude the chances for the arbitrary application of power. The objective was not to avoid conflict, but to protect people from autocracy via the unavoidable disagreement accompanying the separation of state power into three sections."[31]

Finally, we can state, that "this pair, which cannot be parted, is more interested than any other party, to achieve some harmony in the relationships."[32] These mutual inter-compromises, weaken the government tyranny and create system of mutual checks and balances.

4. Control over the Government in the Parliamentary System

4.1 Historical Overview

Responsiblity of Government before the parliament was established under the Great Britain's parliamentary regime. The historical fight for the responsibility of ministers was long and complex. The above is related to the fight against the absolute dynasty of Stuarts at the end of 17th century, when the parliament made ministers responsible for their misconducts, which was achieved through the approval of the ministers' authorities independently from the King.[33] Creation of doctrine on the responsibility of the minister was facilitated by the immunity of the King.[34] The personality of the king was regarded as sacred, the person "who is not capable of doing wrong". The minister or King's advisor and not the King himself could become responsible for the illegal actions implemented on behalf of the King.[35] Based on this rule, there was always minister responsible for all areas of King's activities.

Ministers were only the members of private, non-collective board and their responsibility had purely criminal nature. At some point of time the responsibility was demonstrated through the announcement of ministers' impeachment by the parliament. State servants were responsible to the parliament for committing the treason, grave crime or other law offences. In the 17th century the impeachment became political weapon possessed by the parliament against the non-popular decisions made by the King. Threat of impeachment was forcing the ministers to resign from their positions without starting the above procedure.[36]

During almost the whole 18th century, the cabinet represented the body, consisting of high officials and their inter- relationship was vague and unclear. Cabinet as an integral body was not accountable to the parliament.[37] In 1714 following the ascent of the German prince from the Hannover dynasty to the throne, who neglected English language and left without attention the issues of the kingdom, the cabinet

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31 *Sajó A.,* Limiting Government: An Introduction to Constitutionalism, translated by *M. Maisuradze,* edited by *T. Ninidze, Tb.,* 2003, 92-93 (In Georgian).

32 *Pakte P., Mellen-Sukramanian P.,* Constitutional Law, translated by *G. Kalatozishvili,* edited by *A. Demetrashvili,* Tb., 2012, 351 (In Georgian).

33 See: <http://ezproxy.iliauni.edu.ge:2055/EBchecked/topic/1928742/ministerial-responsibility>, [04.01.2014].

34 *Lovo P.,* Contemporary Great Democracies, translated by *N. Tskitishvili* and *M. Balavadze,* edited by *V. Keshelava,* Tb., 2002, 146 (In Georgian).

35 *Bradley A., Ewing K.,* Constitutional and Administrative Law, Harlow, 2007, 108.

36 *Pakte P., Mellen-Sukramanian P.,* Constitutional law, translated by *G. Kalatozishvili,* edited by *A. Demetrashvili,* Tb., 2012, 240 (In Georgian).

37 *Bradley A., Ewing K.,* Constitutional and Administrative Law, Harlow, 2007, 109.

led by the prime minister started its independent existence.[38] After 1717 the king was rarely attending cabinet meetings. The king could act only with the advice of the minister. The parliament could force the King to dismiss the minister, however could not dictate to the king on the appointment of the minister. At this point there was not a clear line between the activities of the cabinet and the ministers. By 1806 year the community chamber started discussions on the following issue: whether the ministers had to take general responsibility over the activities of the government or the ministers were responsible only for their own actions. [39]

At the beginning of the 19th century the scope of personal responsibility has reduced significantly and the signs of collective responsibility became visible. After 1832 year it became evident that the cabinet had to retain the support from the majority if it desired to prolong its authorities. Unlike the past periods, now the whole government should stand in front of the parliament in order to determine, whether the cabinet was implementing effective governance.[40] Doctrine on collective responsibility was established by lord Salisberg in 1878 in the following form: all members of cabinet are absolutely and inevitably responsible even if the cabinet does not support adopted decision. It does not have right to state that at one instance it was supporting decision and in the second instance – was not supporting it. These are the principles, which establish the absolute responsibility following the adoption of decision.[41] 1832 year was also important due to the fact that adoption of reform bill laid the foundation to the parliamentary monism. If previously the minister for functioning required trust from the King and Parliament and the discontent of one of them could become basis for his dismissal, after 1832 the King lost right to carry out personal policy. By virtue of law the cabinet did not any more require the trust from the King.[42] It became reality in 1841, when the prime minister, Sir Robert Pill created the government without assistance from the Queen Victoria.[43] In mid-19th century responsibility of ministers became the basis for the parliamentary governance of Great Britain.

4.1.2. 19th Century Europe

In the beginning of 19th century there was following problem faced by the whole Europe: how to control the King. The issue of King's responsibility could not be discussed neither in the context of personal nor in the context of the head of executive government. Therefore liberal opposition was obstinately requesting the parliament to establish responsible government. "If you want to have full trust between the nation and government, allow the Hungarians to establish constitutional or, in other words, responsible executive power "…[44] The above issue was in various ways reflected in the European constitutions. The responsible government system was established in this way in the Europe. However,

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38 *Pakte P., Mellen-Sukramanian P.,* Constitutional law, translaCed by *G. Kalatozishvili,* edited by *A. Demetrashvili,* Tb., 2012, 239 (In Georgian).

39 *Bradley A., Ewing K.,* Constitutional and Administrative Law, Harlow, 2007, 109.

40 Ibid.

41 Ibid, 110.

42 *Lovo P.,* Contemporary Great Democracies, Translated by *N. Tskitishvili and M. Balavadze, edited by V. Keshelava, Tb.,* 2002, 283-284 (In Georgian).

43 <http://ezproxy.iliauni.edu.ge: 2055/EBchecked/topic/1928742/ministerial-responsibility>, [04.01.2014].

44 *Sajó A.,* Limiting Government: An Introduction to Constitutionalism, Translated by *M. Maisuradze, edited by T. Ninidze,* Tb., 2003, 102-103 (In Georgian).

English revolutions and fight for the limitation of King's authority has become basis for the responsible government and the system created first prototype for the separation of power. The absolute power of the King was restricted by the two-chamber parliament, the King retained executive power (later the King was deprived of this power too), and the parliament – legislative power. According to András Sajó, in XVIII century issue of relationship between these branches was regarded not as the issue related to the government relationship distributed according to the functions, but as the mean for balancing social powers composing the country.[45]

4.2. General Characterisation of Parliamentary System

Formation of executive government via the parliamentary way and its accountability to the parliament represent the features determining the parliamentary democracy. The above meaning, that formation of government is not determined only by the elections, but is also the result of negotiations (political bargaining). Moreover, the above means that the government may finish its mandate before the expiration of parliament term, if the parliament desires so.[46] Parliamentary system is the anti-thesis of system, which is based on the separation of power. The liaison between the legislative and executive powers is considered so important, that one author referred to it as "belt", which ties everything together and processes system in this way.[47] The above connection between the parliament and executive government is realized via the -confidence relationship. The issue of - confidence- no confidence arises at almost all levels of government functioning, covering not only its "birth" (formation of the government) and "death" (dismissal of the government),[48] but also support to specific draft laws, government programs and etc.

4.3 Government Formation

First of all, the issue of the confidence to the government arises at the moment of its formation. Generally in the parliamentary system, in the process of government formation the head of the state makes the first step. However, the empiric involvement of the Head of Government in the government formation process is significantly different from the constitutional ruling. In the majority of parliamentary monarchies, the constitution grants the monarch with the authority to appoint and dismiss government members. However in practice, the democratic norms forced monarchs to transfer these authorities to other persons and first of all, to the leaders of governing political party.[49]

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45 *Sajó A.,* Limiting Government: An Introduction to Constitutionalism , *translated by M. Maisuradze, edited by T. Ninidze, Tb.,* 2003, 91 (In Georgian).

46 *Diermeier D., Eraslan H., Merlo A.,* A Structural Model of Government Formation, 2001, 27, <http://www.ssc.upenn.edu/~merloa/wpapers/strucgov_2001.pdf>, [30.05.2014].

47 *Lauson K.,* State order of Human Being's Society, the republic: Parliamentary or Presidential, edited by *O. Melkadze,* Tb., 1996, 151.

48 *Huber J. D.,* The Vote of Confidence in Parliamentary Democracies, The American Political Science Review Vol. 90, No. 2, 1996, 270, <http://www.jstor.org/stable/2082884> [11.09.2008].

49 *Winter L.D.,* The Role of Parliament in Government Formation and Resignation, Parliaments and Majority Rule in Western Europe, edited by *Doring H*., 123, <http://allman.rhon.itam.mx/~emagar/ep3/rules/doring.ed.parliamentsAndMajRule1995.pdf>, [30.05.2014].

In those parliamentary countries, which have two-party system, the head of the state names the winning party, and in case of multi-party system and with various possibilities to form coalition government, the influence of the head of the state increases, especially during the period of political crisis, when it is not possible to form the government. In case of revealing the winning party, the government is formed quickly and simply. If it is not possible to reveal one winning party, formation of government is more complex process full of many alternatives. In this case, process is determined not by the election results but by the institutional restrictions, objectives and resources of all persons participating in the process. After consultations with the leaders of political parties, in some countries, with the former prime minister (and vice prime minister), speakers of chambers, key social-economic groups in the country and even with the chairman of the constitutional court, the candidacy of the prime minister is named; the prime minister forms the government and for getting the investiture he/she meets with the parliament. In Norway, Denmark, Great Britain, Luxemburg and Netherlands formally there is no requirement of voting for the investiture. Although there is no requirement for voting on the investiture, but there is a norm in Luxemburg and Netherlands that the government must be supported and not tolerated by the majority. In Netherlands, confidenceis implied until the contrary is not approved via voting. Among the countries with formal requirement for vote, the relative majority is sufficient in Belgium, Italy, Ireland and Sweden. In Sweden before getting authority by the prime minister and the government, it must be proved that absolute majority is not against the prime minister. In practice, the above implies that abstinence is considered as implied consent and accordingly, prime minister can be elected by the minority too. Only in Spain (at the first voting) and in Germany (at the first voting) the government must be approved by the absolute majority, in other words in some countries it is possible to form the government only with the support of majority, in other countries – it is possible to have minority forming the government.[50]

4.4. Dismissal of the Government

The parliament forms the government; in addition to the above, future functioning of the government also depends on the parliament, as the parliament can dismiss the government as a result of motion of no confidence . Precondition for motion of no confidence might be the political disagreement unlike the presidential republic, where impeachment is only related to the criminal offence.[51] Maintaining permanent agreement between the majority and the government can be considered as the characteristic of the parliamentary regime. If there is not agreement between them, it causes withdrawal of one of the players. No-confidence voting is the way for the resolution of disagreement between the government and majority. Bailys discovered, that in the collegially managed political regime there is a low level of protest and demonstrations, there are less riots, armed clashes and even political murders, compared with the monocratically managed political regimes.[52]

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50 *Winter L.D.,* The Role of Parliament in Government Formation and Resignation, Parliaments and Majority Rule in Western Europe, edited by *Doring H*., 123, <http://allman.rhon.itam.mx/~emagar/ep3/rules/doring.ed.parliamentsAndMajRule1995.pdf>, [30.05.2014].

51 *Sargentich T.,* The Presidential and Parliamentary Models of National Government, AM. U.J. INT'L L. & POL'Y, Vol. 8:579, 580, <http://www.auilr.org/pdf/8/8-23-19.pdf>, [04.01.2014].

52 *Bagce H.,* The Role of Political Institutions in Tackling Political Fragmentation and Polarization: Presidentialism Versus Parliamentarism, 2002, 152, <http://eskidergi.cumhuriyet.edu.tr/makale/140.pdf>, [04.01.2014].

In practice, the authority of parliament to dismiss the government can be used in case of minority government or collapse of party solidarity. In other cases, the government is provided with the support of majority. However, collective responsibility does not lose its sense. Need for maintaining the confidence of the chamber itself sets restrictions for the government. It forces the government to explain, justify its position, make steps towards the agreement and make compromises.[53] Prime minister has to make even more compromises if the government is of coalition type.

4.5.Traditional and Rationalized Parliamentarism

The contemporary and traditional parliamentarisms are not similar in terms of bringing up the government's responsibility. In this regard we can distinguish traditional (classic) and rationalised parliamentarism.

4.5.1. Crisis of Traditional Parliamentarism

Classical type of constitution does not create obstacles for bringing up the government's responsibility. In some parliamentary regimes such responsibility can be brought up regarding any issue through any means: voting on no-confidence, voting on postponement, rejection of draft law, declining credits. Systematic bringing up the issue of responsibility causes instability of the government.[54]

Parliamentary instability was especially wide-spread in XIX century and first half of XX century. In this period the parliamentarism acquired the most negative meaning, even became the synonym of instability.[55] Crisis often caused paralysation of government or facilitated legal emergence of fascism.[56] In 1875-1914 period republic of France, during 39 years 48 governments were changed. In the fourth republic the situation aggravated even more and each government functioned only for about 6 months' period.[57] It was possible to save parliamentarism only via the reforms, with the main objective of the reform – to strengthen the government.

4.5.2. Rationalization of Parliamentarism

Major changes have been made to the constitutions of Western European states following the war, for the purpose of rationalization of Government and Parliament. The rationalized parliamentarism is the unity of constitutional mechanisms and procedures, which are aimed to strengthen the stability of cabinet so that to maintain the main features of parliamentary system, including legislative supervision over the Government's policy.[58]

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53 *Turpin C., Tomkins A.,* British Government and the Constitution, Cambridge, 2007, 567.

54 *Lovo P.,* Contemporary great democracies, translated by *N. Tskitishvili* and *M. Balavadze,* edited by *V. Keshelava,* Tb., 2005, 101 (In Georgian).

55 Ibid, 104.

56 *Tanchev E.,* Rationalised parliamentarism, the republic: Parliamentary or Presidential, edited by *O. Melkadze,* Tb., 1996, 38 (In Georgian).

57 *Sajó A.,* Limiting Government: An Introduction to Constitutionalism , translated by *M. Maisuradze,* edited by *T. Ninidze,* Tb., 2003, 224 (In Georgian).

58 *Tanchev E.,* Rationalized Parliamentarism, republic: Parliamentary or Presidential, edited by *O. Melkadze,*

Under the classical parliamentary system rejection of draft law, submitted by the cabinet, automatically puts the legality of further functioning of government under question. As a result of rationalization, voting of no confidence to the government became separate procedure, i.e. it is possible only deliberately. In addition, the procedure of motion of no confidence itself has been complicated. To raise the issue of voting of no-confidence the signatures of particular number of members are required. In addition, in order to reduce the frequent use of voting of no confidence, bringing up of above issue has been prohibited for certain period of time. The terms for voting of no-confidence have been determined. Absolute majority of votes is required for motion of vote of no confidence, when in accordance with the classical parliamentarism, even the simple majority is enough.[59]

The main tool for rationalized parliament is constructive vote of no-confidence.[60] The most important mechanism that has been elaborated for strengthening of government stability is definitely the innovation Basic Law of Federal Republic of Germany. In accordance with the article 67 of Basic Law of Germany, the Chancellor resigns from his office as a result of distrust only in case if the parliament has his/her substitute. In case of successful voting of no-confidence, there is requirement for the submission of the alternative government. Accordingly, the government may be dismissed only by the coalition which is ready to start work together. Therefore, the government may not be dismissed by the coalition, which, according to Strøm, "is no more than a disparate gang of disaffected legislators, the kind of "snipers" (franchi tiroti) that have sometimes brought down Italian government".[61]

In response to the interpellation the issue of confidence has emerged.[62] The government may at its discretion call for a vote of confidence. The vote of confidence may be transformed into the instrument for manipulation in hands of cabinet, when the government submits unpopular bill to the parliament or wills to avoid the issue of non-confidence.[63]

4.5.3 The Matter of Confidence as an Instrument of Government

The Prime Minister may bring up issue of confidence on any policy, when he desires so. In Italy the standing order gives the possibility to use vote of confidence not only for specific issues, but also for separate articles or amendments. In some countries generally specific type draft laws, such as budget, procurements (supply), are considered as raising the issue of confidence. The example of Great Britain indicates how the procedure of confidence, initiated by the government, works. In 1993, the House of Commons of Britain voted motion of no-confidence with regard to the joining the Maastricht Treaty. Two major opposition parties endorsed integration with agreement, however, supported the vote of no confidence, because ratification of social part of the agreements did not take place. The Prime Minister

Tb., 1996, 38-29 (In Georgian).

59 *Tanchev E.,* Rationalized Parliamentarism, republic: Parliamentary or Presidential, edited by *O. Melkadze,* Tb., 1996, 40 (In Georgian).

60 Ibid, 41 (In Georgian).

61 *Strøm K.,* Parliamentary Government and Legislative Organization, Parliaments and Majority Rule in Western Europe, edited by *Doring H*., 75, <http://allman.rhon.itam.mx/~emagar/ep3/rules/doring.ed.parliamentsAnd-MajRule1995.pdf>, [30.05.2014].

62 *Ph. Lovo,* Parliamentarism, translation made by *N. Tskitishvili and M. Balavadze,* edited by *V. Keshelava,* Tb., 2005, 100 (In Georgian).

63 *E. Tanchev,* Rationalized Parliamentarism, republic: parliamentary or presidential, edited by *O. Melkadze,* Tb., 1996, 41 (In Georgian).

needed solid support from the conservative party, among them the support of those twenty rebels, who opposed any integration with European institutions. They had decided to support the opposition.[64]

John Major brought up the vote of confidence against vote of no confidence; he declared that in case of failure, dissolution of Parliament would take place. Consequently, the rebels have supported the government. Great Britain has ratified the agreement supported by the Prime Minister. This is clear example of vote of confidence. Even in cases when the vote of confidence is not applied, the members of Parliament take into account that the Prime Minister may at any time bring up the issue of confidence. The vote of no confidence gives important possibility to Prime Minister to have an influence over the politicians, even when this procedure has not commenced yet.[65]

The procedure of confidence creates such system between the executive and legislative body, which contradicts the presidential republic. The legislative authority of United States creates final policy; the executive may only use the veto, but cannot change the policy itself. The executive authority creates final program in the Parliament, using the vote of confidence. If Parliament does not take into account the above matter, the Parliament turns out in the role of presidential republic executive authority, only with opportunity to put a veto.[66]

4.6 Mutual Check of Government and Parliament

The collective responsibility of government is balanced with the pre-term elections of legislative body by the executive authority. All post war parliamentary constitutions grant the right to the executive authority to discharge the legislative body, if the cabinet was voted on no-confidence but it did not resign. Similar action is not possible under the classical parliamentarism.[67]

The right of dissolution is named as "flexible" division of authorities, which is opposite to the "inflexible division" of authorities introduced by the USA Constitution. Copying the Unites States system, the constitution of Sweden of 1809 and constitution of Norway of 1814 prohibited dissolution of parliament. Norway still follows this system. Despite the bringing up of the issue of responsibility of Government, prohibition of dissolution right was never questioned under the Norway regime.[68] The same takes place in Switherland, where the Government is legally subordinated to the Parliament. However, -Switherland does not belong to parliamentary system.

In order to avoid abuse of dissolution right, sometimes the constitution restricts dissolution of parliament by reason of certain circumstances, indicating the time. Many of constitutions, for example, Basic Law of Germany maintain this mechanism only for urgent situations. This is conditioned by hopeless situation of Parliament and impossibility to form the -government. The same happens in Greece. This also takes place in Sweden, when it is not possible to appoint the Prime Minister.[69]

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64 *Huber J. D.,* The Vote of Confidence in Parliamentary Democracies, The American Political Science Review Vol. 90, No. 2, 1996, 269, <http://www.jstor.org/stable/2082884>, [11.09.2008].

65 *Huber J. D.,* The Vote of Confidence in Parliamentary Democracies, The American Political Science Review Vol. 90, No. 2, 1996, 269, <http://www.jstor.org/stable/2082884>, [11.09.2008].

66 Ibid (In Georgian).

67 *E. Tanchev,* Rationalized Parliamentarism, republic: parliamentary or presidential, edited by *O. Melkadze,* Tb., 1996, 41 (In Georgian).

68 *Ph. Lovo,* Parliamentarism, translation made by *N. Tskitishvili and M. Balavadze,* edited by *V. Keshelava,* Tb., 2005, 106 (In Georgian).

69 *StrømK., Swindle S.,* Strategic Parliamentary Dissolution, The American Political Science Review, Vol. 96, No. 3, 2002, 576, <http://web.pdx.edu/~mev/pdf/Strom_Swindle_ParlArtiicle.pdf>, [26/04/2014].

Dissolution authority is often considered as main feature of parliamentarism. Douglas Verney names it among 11 features of parliamentary democracy.[70] Juan Lints considers it as antidote of "temporary inflexibility", which pesters presidential democracies so much. However, Lovo considers that this does not represent main feature of parliamentarism and even is not its organic form; according to his view, this is firstly opportunistic and then of theoretical nature.[71] Because the parliamentary Government is considered as fused power system, where the legislative and executive branches are forced to submit consecutive and agreed policy, in theoretical terms it is considered that authority of head of government, to dissolve the parliament, is counterbalanced with right of parliamentary majority to dissolve the government. These two mechanisms of "doomsday devices", authorities of dismissal and dissolution, force the legislative and executive -bodies to be interdependent. However, the practice does not always show that realization of dissolution right is directed towards the government's stability; this, in some cases, is the instrument for manipulation with the government.[72]

4.7 Analysis of Parliamentary System

Unlike presidential system, the parliamentary system underlines more unity and interrelationship of legislative and executive authority and not their antagonistic attitudes. As independence of legislative and executive authority represents specific feature of presidential government, their unity and combination represents exact principle of cabinet government.[73] In Walter Bagehot's opinion, unity of legislative and executive authorities definitely represents hidden essence of Constitution of England and secret of its effectiveness. In his work "The English Constitution: The Cabinet" Bagehot writes:

"If the persons who have to do the work are not the same as those who have to make the laws, there will be a controversy between the two sets of persons.[…] The executive is crippled by not getting the laws it needs, and the legislature is spoiled by having to act without responsibility: the executive becomes unfit for its name since it cannot execute what it decides on; the legislature is demoralized by liberty, by taking decisions of which others (and not itself) will suffer the effects. [...] In England, on a vital occasion, the cabinet can compel legislation by: the threat of resignation, and the threat of dissolution; but neither of these can be used in a presidential state. There the legislature cannot be dissolved by the executive government; and it does not heed a resignation, for it has not to find the successor. Accordingly, when a difference of opinion arises, the legislature is forced to fight the executive, and the executive is forced to fight the legislative; and so very likely they contend to the conclusion of their respective terms. [...] You have got a Congress elected for one fixed period, going out perhaps by fixed instalments, which cannot be accelerated or retarded — you have a President chosen for a fixed period, and immovable during that period: all the arrangements are for stated times. There is no elastic element, every thing is rigid, specified, dated."[74]

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70 *Verney D.*, Parliamentary Government and Presidential Government, Parliamentary Versus Presidential Government, edited by *Lijphart A.*, Oxford, 1992, 36.

71 *Ph. Lovo,* Parliamentarism, translation made by *N. Tskitishvili and M. Balavadze,* edited by *V. Keshelava,* Tb., 2005, 107 (In Georgian).

72 *StrømK., Swindle S.,* Strategic Parliamentary Dissolution, The American Political Science Review, Vol. 96, No. 3, 2002, 576, <http://web.pdx.edu/~mev/pdf/Strom_Swindle_ParlArtiicle.pdf>, [26/04/2014].

73 *Bagehot W.*, The English Constitution: The Cabinet, Parliamentary Versus Presidential Government, edited by *Lijphart A.,* Oxford, 1992, 66.

74 Ibid, 67-71 (In Georgian).

4.8. Government Responsibility: Myth or Reality?

It is true that parliamentary democracy facilitates efficiency of authorities, cooperation, but the following question may arise: did the Parliament raise its hands against the responsibility by transferring the reins of governance to the government?[75] Political relationship between the government and the parliament in democratic state has been subject to frequent criticism, even since 19th century. This criticism originated from close cooperation between the parliamentary majority and the government in parliamentary system, which is incompatible with the idea of separation of powers.[76] We could conclude that one of the most important roles of parliament – control over the executive authority – is more protected in presidential republic, than in parliamentary system. However, in this regard, Möllers states in his book "Three Branches" that general idea – related to necessary contrast between parliament and government, as requirement of separation of powers – is wrong. Close cooperation existing in parliamentary system is necessary between the government and parliamentary majority, in order to facilitate the realization of democratic will.[77] Indeed, the balance between government power and parliament power is bent in favour of the government, but when one talks about the strong head of parliamentary government, the part of his power is conditioned by compromise made with various fractions. Otherwise, if coalition collapses, the government has to resign. Finally, cooperation between the parliament and government does not represent the danger. The cooperation also is originated in presidential system. Therefore, this is not danger due to the fact that both in presidential and parliamentary system, more or less executive and legislative authorities – depend upon each other, actually in different ways, but interrelationship is in place in both cases.

5. Semi-Presidential (Mixed) Republic

5.1. General Description of Semi Presidential Republic

The semi-presidential system, which sometimes is referred to as "double" or "mixed" system, unites the elements of presidential and parliamentary systems. The semi-presidential republic is sometimes characterized as the parliamentary republic with double executive authority.[78] The first constitutional characterization of "semi-presidential" system belongs to Duverger. The French scientist Duverger acknowledges the form of government as semi-presidential, where the president: a) is elected by people, b) possesses significant competencies, c) coexists with the government, resigning of which is parliament's competence.[79] It describes this governance as the system, which alternates between the presidential and parliamentary systems. Duverger does not consider the fifth republic of France as

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75 *Strøm K.,* Parliamentary Government and Legislative Organization, Parliaments and Majority Rule in Western Europe, edited by *Doring H*., 58, <http://allman.rhon.itam.mx/~emagar/ep3/rules/doring.ed.parliamentsAndMajRule1995.pdf>, [30.05.2014].

76 *Möllers C.,* The Three Branches A Comparative Model of Separation of Powers, Oxford, 2013, 110.

77 Iibid, 113 (In Georgian).

78 Venice Commission (European Commission for Democracy Through Law), Final opinion (No. CDL-AD (2010) 028) on the draft Constitutional Law on Amendments and Changes to the Constitution of Georgia, <http://www.venice.coe.int/docs/2010/CDL-AD(2010)028-e.asp>, [04.01.2014].

79 *Izoria L.,* Presidential, parliamentary or sSemi Presidential? Path to Democratic Consolidation, Tb., 2010, 26 (In Georgian).

presidential, and not as parliamentary, but reviews it as the system, which alternates between these two systems. Despite this the term "semi-presidential" is often perceived as intermediate form of governance between presidential and parliamentary. The professors M. Shugart and J. Carey are of the view that this is neither intermediate type nor alteration between presidential and parliamentary systems. They called French system as Premier-presidential system.[80]

In semi-presidential system the president, as well as the government implement executive authority. Direct elections for the presidency give to population the right of decisive vote for election of chief executive; in the meantime, existence of government shall reduce the risks related to the arrogence of president. In addition, the president is free of responsibility and the government is accountable to the president, as well as the parliament.[81] This system implies agreed, often competing control over the prime minister and the government from the president and the legislative body.[82]

5.2. Formation of Government

In the mixed system the president has wide competencies including the formation of government. The president selects and appoints the prime minister. The prime minister, based on his viewpoint, selects the candidacies for ministers and submits to the president for approval. The parliament's investiture is neither necessary nor set by the law in France. The Constitution of France gives the right to the president to name the candidacy of prime minister without obtaining consent from the parliament; nomination of prime minister and government is based on the decision made by the president, depending whether they– president and prime minister - wish to express the respect towards the parliament institution.[83] However, the procedure of obtaining of confidence is introduced in practice, based on the will of the developer of the Constitution. But in 1988 – 1993-ies this procedure was avoided, because the government was formed from the minority of National Assembly and was submitting to the parliament only the key issues.[84]

There is perception that the President of France becomes to some extent similar to the President of presidential republic, who, at his discretion, selects the members of Government. However, The President of France, Mitterrand, has appointed Chirac - the leader of main opposition party - as Prime Minister. Why did Mitterrand do so, when he initiated formation of Government himself? Or if the question is put otherwise, why the President of the USA did not act similar to Mitterrand, when he appeared before the Senate, controlled by democrats? The answer of this question is as follows: Who enjoys the right to dismiss the Government?[85] In the Unites States the Senate participates in the appointment of members of Cabinet of president. However, the presidents of the USA manage to staff the Cabinet in line with their

[80] *Shugart M., Carey J.,* Presidents and Assemblies Constitutional Design and Electoral Dynamics, New York, 1992, 23.

[81] In Russian Federation the Government is constitutionally responsible to the Parliament, as well as the President, but in France, in accordance with the Constitution, is responsible only to the Parliament.

[82] *Fish S.,* Stronger Legislatures Stronger Democracies, Journal of Democracy, Vol. 17, No. 1, 2006, 6, <http://www.europarl.europa.eu/pdf/oppd/Page_8/Stronger_legislature%20_Stronger_democracies.pdf>, [04.01.2014].

[83] *Saprani U.,* Principles of management: Executive Authority, republic: Parliamentary or Presidential, edited by *O. Melkadze,* Tb., 1996, 184 (In Georgian).

[84] *Lovo Ph.,* Parliamentarism, translation made by *N. Tskitishvili and M. Balavadze,* edited by *V. Keshelava,* Tb., 2005, 89-90 (In Georgian).

[85] *Shugart M., Carey J.,* Presidents and Assemblies Constitutional Design and Electoral Dynamics, New York, 1992, 108-109.

sympathies, even when the Senate is oppositely disposed. But the president, and not senate, enjoys the right to dismiss the members of Cabinet in the USA. In France the President cannot dismiss the Cabinet, but the Assembly enjoys such right. Therefore, when the President of France meets opposition assembly, he is weaker in Government formation process compared with the president of the USA.[86] The president preserves the right to name the Government, but the Assembly has the initiative to dismiss it. Where only the President may dismiss the Government, the Cabinet is staffed in line with president's will, but where only the parliament is entitled to dismiss, the will of majority of parliament is dominant in the process of formation of the cabinet.[87]

5.3. Organization and Functioning of Executive Government

The executive government has two leaders in the mixed system: the president and the prime minister; in addition, there are not clearly separated competencies between them. As for the cooperation with executive authority in Constitutions of mixed republics, the ambiguity of Constitution represents the impediment for this system. Based on the example of Portugal and Weimar republics it can be said that major challenge between the state leader and leader of the executive authority is clear non-separation of competencies.[88]

In this system the president plays dominant role, if he is supported by the assembly. The president fulfils executive authority, but the government is accountable to the Parliament. The prime minister performs the role of link with the assembly, but in crisis situations – the role of protecting "shield", which protects the president from political blows. If the economic policy of executive authority fails, the president may sacrifice the prime minister to the parliament, clearly, if he is able to convince the parliament in guiltiness of the prime minister.[89]

The executive authority may be divided into opposing segments – the president on the one hand and the cabinet, supported by the assembly, on the other hand, which are elected independently by various voters. When the president and the government represent opposing powers, the cohabitation, so called coexistence, is originated. If, at that time, one of the parties or both parties neglect the rights of each other, cohabitation may originate the crisis. Therefore, the cohabitation is determined as "executive, divided against itself".[90] However, the president still retains the lever, he may, by any reason, dismiss the parliament; in France, one of prohibitions is prohibition of dismissal of parliament, during one year since its election. In other cases, he may easily use the dismissal right for the restoration of the majority, supporting him. If voters support the government party, than he has to adapt with the opposition government.

5.4. Evaluation of Model of Semi-Presidential Regime

The fifth republic of France established the semi-presidential system. Following negative experience, related to the making parliamentary decisions, gained in third and fifth republics, it was considered that the strong president and weak parliament – similar to the Constitution of Weimar republic

86 Ibid, 117 (In Georgian).
87 Ibid, 125 (In Georgian).
88 Ibid, 56 (In Georgian).
89 Ibid, 53 (In Georgian).
90 Ibid, 57 (In Georgian).

- would enhance decision making ability of political system. Actually, the parliamentary government and powerful president elected by people, existing in French system, have created many problems. Lack of political responsibility of the president is often the subject for criticism. The president does not undertake the responsibility for his policy to neither voters nor the parliament. The President of France is authorized to dismiss the parliament, but the President of USA does not have authority to act so. The president may use the right of dissolution of Parliament for destabilization of parliamentary policy. As a result, unlike the parliamentary system, there is less bilateral interrelationship of the parliament and government. Instead, the parliament depends on the president.[91] All above mentioned caused deformation of principle of separation of power .[92] New, "semi-presidential" system was spread in Eastern Europe. It is establishing as authoritarian presidential system in the landscape of unstable political parties. The president desires to prevent formation of majority in the parliament, because as the weaker is the parliament, the stronger becomes the president.[93] However, M. Shugart and J. Carey consider that this form of governance is allowed, as, here, asymmetry of government formation is compensated through asymmetry of dissolution of government by the parliament. They believe that undemocratic form is represented by mixed governance, where the president has an authority to appoint, as well as dismiss the government. They determine this form as the President-parliamentary system. Such system took place in Germany, so called Weimar Republic (1919 - 1933), which resulted in emergence of fascism; today it is given in Russian Federation and other states. The check and balance mechanisms are totally impaired in this system.

As the general feature for mixed governance model, it can be said that control of government is the weakest in this model. It is probably amazing that Vth Republic of France established such model, which less complies with concept of / separation of power and Government control, when most important contribution, made by France to the development of constitutionalism, is the control of government by people – ensuring specific realization of human rights and freedom declaration, adopted in 1789[94].

5. Conclusion

Each existing system entails some positive and some negative aspects. There is mutual inter-dependence of branches in presidential republic and parliamentary system, creating the system for power checking and balancing.. However, this is implemented through different ways in presidential and parliamentary models. In the presidential republic each branch can examine the other branches without creating danger for its existence; as for the parliamentary system – disagreement between the branches is the basis of withdrawal for one of them. The presidential system is characterised with the "inflexible" separation of power, as for the parliamentary system – such separation is "flexible". Parliamentary system is balanced through responsibility- dismissal mechanisms. However, one can notice, that this balance is more bent to the favour of the government. Therefore for the restoration of balance it is necessary to maximally restrict the possibility to dismiss the parliament.

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91 *Möllers C.,* The Three Branches A Comparative Model of Separation of Powers, Oxford, 2013, 113.

92 *Chernilowsky Z.,* Institute of President Followed in Historical Experience Footsteps, republic: Parliamentary or Presidential, edited by *O. Melkadze,* Tb., 1996, 110 (In Georgian).

93 *Möllers C.,* The Three Branches A Comparative Model of Separation of Powers, Oxford, 2013, 112.

94 *Howard A.,* Path to Constitutionalism, republic: Parliamentary or Presidential, edited by *O. Melkadze,* Tb., 1996, 45 (In Georgian).

As for the mixed governance, it is better to separately discuss premier-presidential and president-parliamentary models. In both cases there is a dependency of parliament on the president, weak control of the government and president without responsibility. Despite the above, in the model with Premier-presidential the issue of check andbalance is not so acute, as in the president-parliamentary model. We can state that this is a system, which is acceptable; however it is better to avoid it.[95] In the latter model, president appoints the government, dismisses it, dismisses the parliament, and leads the executive government. In this case the government as well as the parliament depend on the president. It is very doubtful to carry out control over the executive government in this system; this is illustrated by the practices of the countries where such form is established. As there is no control over the executive government, hence this is not a democratic form of governance.

As we can see, the tendency of contemporary constitutionalism is the strengthening of executive government and not legislative one. One the one hand, this is essential for the normal functioning of the government, but on the other hand, does not it indicate to the vanishing of idea of people's souverenity? According to the theory of people's souverenity the representative body, parliament expresses the voice of people, or according to Rousseau – the common will. However the people will does not look so strong in present politics.[96] It seems that the constitutionalist have to think hard about the elaboration of check and balance mechanisms. Otherwise, after years only the historians will remember that once upon a time there was a concept of government control and power restraining.

[95] *Elgie R., Moestrup S.,* Semi-Presidentialism in Central and Eastern Europe, Manchester, 2008, 1.

[96] *Strøm K.,* Parliamentary Government and Legislative Organisation, Parliaments and Majority Rule in Western Europe, edited by *Doring H.,* 54-57, <http://allman.rhon.itam.mx/~emagar/ep3/rules/doring.ed.parliamentsAndMajRule1995.pdf>, [30.05.2014].

Karlo Nikoleishvili*

Independence and Impartiality of Parole Board

1. Introduction

The aim of administering and enforcing a punishment is the restoration of justice, the re-socialization-rehabilitation of a criminal and prevention of new crimes.[1] The rebuilding into a convict the sense of responsibility towards the law and respectfulness of rules of co-existence[2] will guarantee the prevention of a new crime and ensure reestablishment of a convict into a society. State should assist convicts to make the transition from life in prison to a law-abiding life in the community through social programs and institutions.[3] Conditional release is one of the most effective and constructive means of preventing reoffending, providing the prisoner with planned and supervised reintegration into the community.[4] In 1847 French A. Bonneville de Marsangy coined the concept of conditional release that implied the release of a convict after certain period of imprisonment with a promise of satisfactory future behavior.[5]

The prison overcrowding and prison population growth represent a major challenge to prison administrations and the criminal justice system as a whole, both in terms of human rights and of the efficient management of penal institutions.[6] The abovementioned problem encourages a state to formulate efficient policy on release of convicts.

Considering all the aforementioned, the existence of conditional release is of vital importance for criminal justice system.Although inappropriate enforcement of the abovementioned right of convicts might lead to serious consequences. Thus, it is significant that the parole system is built on fair principles.

The recent amendments in the Georgian legislation raised many questions on adequate functioning of parole institutions, especially on decision making mechanisms. The question is whether the transfer of decision making competence on conditional release from the court to local councils infringes the constitutional and international principles of fair trial?

According to Article 84 Paragraph 5 of the Constitution of Georgia only a court may quash, change,

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1 Law of Georgia "Criminal Code of Georgia", 22/07/1999, №2287, Legislative Herald of Georgia №41(48), 13/08/1999, Article 39 (In Georgian).

2 Law of Georgia "Imprisonment Code", 09/03/2010, №2696, Legislative Herald of Georgia №12, 24/03.2010, Article 116, Paragraph 1 (In Georgian).

3 Council of Europe, Committee of Ministers, Recommendation Rec (2006) 2nd European Prison Rules, Rule №107.

4 Council of Europe, Committee of Ministers, Recommendation Rec (2003) 22 on Conditional Release (Parole), preamble.

5 *Pradel J.,*Comparative Criminal Law, translated by *E. Sumbatashvili*, ed. *T. Ninidze*, Tb., 1999, 467 (in Georgian).

6 Council of Europe, Committee of Ministers, Recommendation No R. (99) 22 Concerning Prison Overcrowding and Prison Population Inflation, preamble.

or suspend a court decision. However, the abovementioned statement does not automatically emphasize non-constitutionality of the Georgian parole system. The legislation of European countriesalso differs – in different states variously created and structured bodies make decision on conditional release. Not only the court but the prison administration, special tribunal, public prosecutor etc. can also be a competent body.[7] Consequently, the scope and judicial functions of an authority is important and not its name.

It is strongly recommended that the structure and scope of a parole board is in compliance with fair trial standard and independence and impartiality is ensured. The European Court of Human Rights (accordingly European Court or Court) discusses the above-mentioned issue in the context of the Article 5 Paragraph 4 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. However, for the explanation it uses fair trial standards envisaged by the Article 6.[8]

Considering all the above-mentioned the parole model regulated by the Georgian legislation raises great research interest. The fact that the issue is practically not researched reinforces the interest towards it.

The key research question of the article is – are the structure and scope of activity of the parole board in compliance with fair trail standards? What is the level of its independence and impartiality? Thus to give appropriate answer to this question, historical research, analysis, synthesis and interdisciplinary methods will be utilized. To answer the key research question it is important to examine constitutional and international principles of fair trial, to analyze national conditional release mechanism and afterwards establishing, comparing and synthesizing of the research results.

2. Parole in Georgia (Historical Analysis)

The parole system has undergone changes for four times during the last decade. Territorially competent court studied cases and made decision on the basis of the petition submitted by a director of penitentiary establishment until 2006.[9] The cases of bribe-taking and corruption among public servants were frequent that time. Directors were not exceptions as well. Consequently, the struggle against criminal in penitentiary system was much more complicated. Thus, in the framework of the launched reform changing of the parole system became inevitable.

Directors of penitentiary establishments have been deprived of the right of petition since 2006. The Standing Commission that acted as a mediator between courts and convicted was created at the Penitentiary Department. A convict had a right to approach the Commission for mediation based on the Article 68 of the Law of Georgia on "Imprisonment". The commission evaluated certain circumstances and made decisions on submitting parole request to the court.

In total 4294 convicts applied to the Standing Commission at the Penitentiary Department for the mediation from July 2006 till December 2008. 1377 applications out of 4294, constituting 32% of the total, were deemed satisfactory. The Standing Commission submitted 1048 applications to the

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7 *Panfield N.*, *van ZylSmit D., Dunkel F.,* Release from Prison, European Police and Practice, Willan Publishing, USA, 2010, 425. Sited: *Mikanadze G.,* Prisoners' Right for Conditional Release – European Experience and Georgian Reality, in book: Human Rights Protection: Achievements and Challenges, ed. *K. Korkelia*, Tb., 2012, 130 (In Georgian).

8 *Bokhashvili B.,* Case Law of the European Court of Human Rights, Tb., 2004, 222 (In Georgian).

9 *Mikanadze G.,* Prisoners' Right for Conditional Release – European Experience and Georgian Reality, in book: Human Rights Protection: Achievements and Challenges, ed. *K. Korkelia*, Tb., 2012, 130 (In Georgian).

courtbetween July 1, 2006 and October 1, 2008, out of which 924 were satisfied, 96% of the total.[10] The statistics shows that actual decision was made by Standing Commission and the court had an approval function only.

The abovementioned model of conditional release changedin 2009. The competence of studying applications moved from the Penitentiary Department to the Ministry of Corrections and Legal Assistance of Georgia. The Standing commission of the department was substituted by the Standing commission of the ministry itself. Moreover, the Commission itself studied applications and made decisions instead of the court.[11]

The Law of Georgia on "Imprisonment" was annulled on October 1, 2010 and a new "Imprisonment Code" went into force. The new law entirely transformed the parole system.The local councils (parole boards) to discuss issues related to conditional release were established. They were responsible to study cases and make decisions.[12] Thus, British model analogue was introduced into the country.[13] Practically, courts were no longer able to participate in the case discussion process. Courts only retained the function of appeal -a decision of the local council can be appealed at the court through the Administrative procedure.[14]

The aforementioned change does not abolish the Standing Commission. It continues its activity as a supervising body of the local council.[15] The Parole Boardis obliged to submit quarterly report to the Standing Commission. The Commission, on its initiative, may request any case reviewed by the Council, where a convict's request for parole was rejected. It may take its own decision on the case concerned. [16]

Finally it should be noted that nothing has changed factually notwithstanding the fact that the court no longer makes decision on conditional release. Statistical data made it obvious that even before the latest amendments the permanent commission was a *de facto* decision-making body and the court only had a function of approval.

3. Parole Board of Ministry of Corrections as a "Judicial" Body

The bodies having judicial authority and legal liability to conduct processes must be defined, before giving detailed analysis of the court's independence and impartiality. It may be presented as an institution that officially is not a court though exercises judicial power, - makes decisions on disputing issues and ensures their compliance with laws.[17]

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10 Report of the Public Defender of Georgia, The Situation of the Human Rights and Freedoms in Georgia, 2008, second half, 82.

11 *Mikanadze G.,* Prisoners' Right for Conditional Release – European Experience and Georgian Reality, in book: Human Rights Protection: Achievements and Challenges, ed. *K. Korkelia*, Tb., 2012, 130 (in Georgian).

12 Law of Georgia "Imprisonment Code", 09/03/2010, №2696, Legislative Herald of Georgia №12, 24/03.2010, Article 41, Paragraph 1 (In Georgian).

13 *Mikanadze G.,* Prisoners' Right for Conditional Release – European Experience and Georgian Reality, in book: Human Rights Protection: Achievements and Challenges, ed. *K. Korkelia*, Tb., 2012, 131 (in Georgian).

14 Law of Georgia "Imprisonment Code", 09/03/2010, №2696, Legislative Herald of Georgia №12, 24/03.2010, Article 42, Paragraph 6.

15 Ibid, Article 44, Paragraph 1.

16 Ibid, Article 44, Paragraph 7.

17 *Smith R. K. M.,* International Human Rights, Textbook, 2nd ed., translated by *M. Kobiashvili,* ed. *G. Jokhadze*, Tb., 2005, 356-357 (In Georgian).

The Case-law makes it obvious that the name (title) of an authority exercising judicial function is not of crucial importance for the European Court of Human Rights.[18] In the case *H v. Belgium* the court explained that a "tribunal" is characterized in the substantive sense of the term by its judicial function, that is to say determining matters within its competence on the basis of rules of law and after proceedings conducted in a prescribed manner.[19]

In the case *Didier v. France* the European Court maintained that the Financial Market board represents a "tribunal" for the purposes of the Article 6 paragraph 1 of the Convention. Irrespective of its classification in domestic law, it is competent to deal with all aspects of the case, so that in that respect it too is a judicial body that has full jurisdiction.[20]

At the same time it is not vital that a court as itis mentioned in the Article 5 Paragraph 4 of the European Convention to be a classic court type, integrated in the state's standard judicial system. It is important that an institution itself is authorized to make appropriate decisions, satisfies the standards of a fair trial and provides the same guarantees as a court.[21]

Moreover, different bodies have the authorization to make decisions on conditional releasein different European states and they are not always directly integrated in judicial system. For example in England, Wales[22] and Scotland[23] the decisions are rendered by parole boards. Convicted prisoners with a sentence of up to three years in Belgium are eligible for provisional release on the basis of an administrative decision under the responsibility of the Minister of Justice, while prisoners serving a sentence of more than three years are eligible for conditional release based on the decision of the Sentence Implementation Courts.[24] In Slovenia, decision is taken by a specially created commission consisting of 3 members: Supreme Court Judge, Supreme State Prosecutor and a civil servant from the Prison Administration Unitof the Ministry of Justice.[25]

The Constitutional Court of Georgia in one of its decisions underlined that the nature of legal category is defined not by its name but through its content, in this particular case a function imposed on an authority. A judge and a person exercising judicial power are functionally equal - both of them execute justice.[26]

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18 E.g, *Demicoli v. Malta*, [1991] ECHR, App. no 1305/87, 40.

19 *H v. Belgium*, [1987] ECHR, App. no 8950/80, 50.

20 *Didier v. France,* [2002] ECHR, App. no *58188/00,* 3. *McBride J.*, Human Rights and Criminal Procedure, The Case Law of the European Court of Human Rights, Council of Europe, translated in the frames of European Union and Council of Europe joint program „Elimination of Inhuman Treatment and Non-punishment", 2011, 152 (In Georgian).

21 *Trechsel S., (with the assistance of S.J. Summers*), Human Rights in Criminal Proceedings, translated by *V. Gogelia, E. Lomtatidze, E. Kartsivadze, T. Ivanishvili, M. Narindoshvili*, Georgian Constitutional Court, Tb., 2009, 532-533 (In Georgian).

22 *Padfield N.*, Recalling Conditionally Released Prisoners in England and Wales, European Journal of Probation (EJP), Vol. 4, No.1, 2012, 34-45.

23 *Weaver B.*, *Tata C.*, *Munro M.*, *Barry M.*, The Failure of Recall to Prison: Early Release, Front-Door and Back-Door Sentencing and the Revolving Prison Door in Scotland, European Journal of Probation (EJP), Vol. 4, No. 1, 2012, 85-98.

24 *Ridder S., Beyens K., Snacken S.,* Does Reintegration Need REHAB? Early Release Procedures Without a Legal Permit of Residence in Belgium, European Journal of Probation (EJP), Vol. 4, No. 3, 2012, 31.

25 *SugmanSubbs K.*, *Ambroz M.*, Recalling Conditionally Released Prisoners in Slovenia, European Journal of Probation (EJP), Vol. 4, No.1, 2012, 103.

26 Citizens of Georgia – Irakli Lekveishvili, Koba Gotsiridze, Koba Kobakhidze and the Public Defender of

The local council of the Ministry of Corrections of Georgia is authorized to change the court's decision regarding the term of imprisonment after studying in details the case. Thus, the provided explanation reads that the above-mentioned authority based on its scope of activities exercises a juridical power. Hence, judicial guarantees must be provided and the scope of activities of local councils should be in line with fair standards.

4. Independence and Impartiality

Independence and impartiality are based on the most significant principles of constitutionalism – separation of power among legislative, judicial and executive branches. The division of power serves as a precondition for a free development of a person and rule of law. The independence of the branches is vitally important in order to avoid domination of one branch over another.[27] Montesquieu used to write: It was always that way that a powerful person permanently had and currently has addiction to use its power in a negative way and such situation will continue until he encounters a barrier. To avoid the negative usage of power it is vital that the power is controlled by power itself.[28]

It is totally unacceptable legislative and executive branches to be controlled by one entity and nonetheless granting it the judicial power.[29] Independence and impartiality of justice system is of vital importance for the existence of rule of law state. Montesquieu's words prove this: There is no freedom if judicial power is not separated from legislative and executive power. If it is combined with legislative authority, the power over the citizens' lives and freedom will be unbalanced as the judge will appear to be legislator himself/herself. If it is combined with the executive authority, the judge gains a power of oppressor.[30]

The abovementioned principles are reflected both in the national legislation and international treaties. According to the Article 84, Paragraph 1 of the Constitutiona judge shall be independent in his/her activity and shall comply with the Constitution and law only. Any pressure upon a judge or any interference in his/her activity in order to influence his/her decision making shall be prohibited and punishable by law. Article 6, Paragraph 1 of the European Convention on Human Rights defines that everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Furthermore, the Article 3 Paragraph 10 of the Typical Provisionof the Local Council approved by the Minister of Corrections and Legal Assistance of Georgia with the order №151

Georgia v. Georgian Parliament and the President of Georgia, February 26, 2003, Georgian Constitutional Court, Paragraph 1 (In Georgian).

27 *Tsnobiladze P.*, Georgian Constitutional Law I, Tb., 2005, 226 (In Georgian).

28 Charles Secondat, Baron de Montesquieu, The Spirit of the Laws, trans. And ed. Anne M. Cohler, Basia Carolyn Miller, and Harold Samuel Stone (Cambridge: Cambridge University Press, 1992), XI, 4. Sited: *Sajo A.,* Limiting Government, An Introduction to Constitutionalism, translated by *M. Maisuradze*, ed. *T. Ninidze*, Tb., 2003, 89, note 4 (In Georgian).

29 *Tamanaha B. Z.*, On the Rule of Law History, Politics, Theory, New York, 2004, 53-54. Sited: *Gegenava D.,* Legal Nature of the Constitutional Court and Its Role in the Concept of the Division of Power, in book: Modern Constitutional Law I, ed. *G. Kverenchkhiladze* and *D. Gegenava*, Tb., 2012, 82 (In Georgian).

30 *Secondat Ch.,* Baron de Montesquieu, The Spirit of the Laws, trans. And ed. Anne M. Cohler, Basia Carolyn Miller, and Harold Samuel Stone (Cambridge: Cambridge University Press, 1992), XI, 6. Sited: *Sajo A.,* Limiting Government, An Introduction to Constitutionalism, translated by *M. Maisuradze*, ed. *T. Ninidze*, Tb., 2003, 268 (In Georgian).

issued on October 28, 2010, indicates that the Council member shall be independent in discharging his/her obligations and shall obey only Georgian legislation.

However, formal description of judge's independence and impartiality is not enough, even the communist constitutions considered this. The existence of actual guarantees for providing independence and impartiality is vital.[31] Thus to define the independence and impartiality of the Local Council at the Ministry of Correction as an authority exercising judicial power, it is important to carry out a consistent research. The local council should be an independent body that satisfies principle of fair trial and ensures impartiality on deciding important issues.

4.1. Independence

The rule of law and the justice itself would have been devoid without existence of an independent court.[32] The existence of an independent judicialsystem that settles disputes among parties serves the interests of justice itself. The division of power between executive and judicial branches is the cornerstone of a rule-of-law state.[33] Judicial branchshould not fall under influence of any state or non-state institutions.[34]

In the case *Malhaus v. the Czech Republic* the European Court of Human Rights has not considered the Land Office as an authority which satisfies the requirements of independence necessary for a tribunal within the meaning of Article 6 Paragraph 1 of the Convention. The court indicated that the Land Office is an autonomous department of the District Office which is charged with carrying out local state administration under the control of the Government.[35]

In the case *Kadubec v. Slovakia* the European Court of Human Rights determined that the Piešťany local office and the Trnava district office were charged with carrying out local State administration under the control of the government. The appointment of the heads of those bodies is controlled by the executive and their officers, whose employment contracts are governed by the provisions of the Labor Code, have the status of salaried employees. Therefore, the manner of appointment of the officers of the local and district offices together with the lack of any guarantees against outside pressures and any appearance of independence clearly show that those bodies cannot be considered to be "independent" of the executive within the meaning of Article 6 Paragraph 1 of the Convention.[36] In the case *Lauko v. Slovakia* the European Court of Human Rights gave similar evaluations to the activities of other district/regional services.[37]

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31 *Schwartz H.,* The Struggle for Constitutional Justice in Post-Communist Europe, translated by *K. Aleksidze,* edit. *K. Kublashvili,* Tb., 2003, 88 (In Georgian).

32 *Trechsel S. (with the assistance of S.J. Summers*), Human Rights in Criminal Proceedings, translated by *V. Gogelia, E. Lomtatidze, E. Kartsivadze, T. Ivanishvili, M. Narindoshvili*, Georgian Constitutional Court, Tb., 2009, 67 (In Georgian).

33 *Smith R. K. M.,* International Human Rights, Textbook, second edition, translated by *M. Kobiashvili,* ed. *G. Jokhadze*, Tb., 2005, 358 (in Georgian).

34 *Trechsel S., (with the assistance of S.J. Summers*), Human Rights in Criminal Proceedings, translated by *V. Gogelia, E. Lomtatidze, E. Kartsivadze, T. Ivanishvili, M. Narindoshvili*, Georgian Constitutional Court, Tb., 2009, 74 (in Georgian).

35 *Malhous v. The Czech Republic*, [2001] ECHR, App. no 33071/96, 57.

36 *Kadubec v. Slovakia*, [1998] ECHR, App. no 27061/95, 57.

37 *Lauko v. Slovakia*, [1998] ECHR, App. no 26138/95, 64.

The name (title) of the Local Council at the Ministry of Corrections itself implies that it is related to the executive branch. It exists as a structural unit under the ministry and its members are appointed by the minister and hierarchically are his/her subordinates. Parole board is an administrative body that makes decisions in the form of an individual administrative act. Thus, in this particular case an executive branch is eligible to fulfill judicial function, that itself violates the principle of the division of power and obligation that justice should be carried out by an independent authority.

It is also noteworthy to discuss other aspects of the independence regulated by the Georgian legislation and the European Court of Human Rights. In order to define the independence of a judicial body the European Court of Human Rights focuses on certain factors. [38] Namely, several requirements are set for national courts in order to be considered independent. Initially the above-mentioned criteria were established to define a court in the case *Le Compte, Van Leuven and de Meyere v. Belgium*.[39] Later they were converted into criteria defining independence.[40]

Incal v. Turkey is one of the many cases where the European Court of Human Rights reiterated that in order to establish whether a tribunal can be considered "independent" regard must be had, *inter alia*, to the manner of appointment of its members and their term of office, the existence of safeguards against outside pressures and the question whether it presents an appearance of independence.[41]

4.1.1. Appointment

The European Court of Human Rights defined that the judicial body should be independent - notably of the executive and of the parties to the case.[42] The separation of power principle should ensure that each branch is eligible to define its structure and exercises the right to appoint staff.[43] It is true that in frequent cases other state authorities (institutions) make decision on establishment of judicial bodies and appointment of judges, but they do not have right to control or interfere in further activities implemented by judicial bodies or judges.[44] The form of judges'appointment is vitally important for definition of independence.[45]

The members of the Parole Board are appointed by the Minister of Corrections on the base of the recommendations submitted by the Standing Commission of the ministry.[46] In 2011 report the Public

[38] *Bokhashvili B.,* Case Law of the European Court of Human Rights, Tb., 2004, 237.

[39] *Le Compte, Van Leuven and De Meyere v. Belgium*, [1982] ECHR, App. no 6878/75.

[40] *Trechsel S. (with the assistance of S.J. Summers*), Human Rights in Criminal Proceedings, translated by *V. Gogelia, E. Lomtatidze, E. Kartsivadze, T. Ivanishvili, M. Narindoshvili*, Georgian Constitutional Court, Tb., 2009, 75 (In Georgian).

[41] *Incal v. Turkey*, [1998] ECHR, App. no 22678/93, 65.

[42] *Campbell and Fell v. the United Kingdom*, [1984] ECHR, App. no 7819/77; 7878/77, 78. See: *Korkelia K., Kurdadze I.*, International Law of Human Rights with Emphasis on the European Convention on Human Rights, Tb., 2004, 163 (In Georgian).

[43] *Sajo A.,* Limiting Government, An Introduction to Constitutionalism, translated by *M. Maisuradze*, ed. *T. Ninidze*, Tb., 2003, 111 (In Georgian).

[44] Ibid, 119.

[45] *Salov v. Ukraine*, [2005] ECHR, App. no 65518/01, 80.

[46] Law of Georgia "Imprisonment Code", 09/03/2010, №2696, Legislative Herald of Georgia №12, 24/03.2010, Article 41, Paragraph 1. Article 3 Paragraph 3 of the Typical Provision of the Local Council approved by the Minister of Corrections and Legal Assistance of Georgia with the order №151 issued on October 28, 2010.

Defender indicated that the appointment procedure of Board members might make doubtful the independence and impartiality of members from executive authorities.[47]

It should be mentioned that various states have various rules and procedures on appointment of judges. Subsequently, it is not a surprise that the European Court of Human Rights avoids criticism regarding the issue.[48] The appointment of members of court by the executive authority does not infringe the European Convention. In order to establish the violation of the Article 6 of the convention it is essential that the whole judge appointment procedure and practice is considered illegal and leads to negative results.[49] For instance in the case *Lithgow v. The United Kingdom*, the fact that two members of the Arbitration Tribunal were appointed by the government was not deemed as the violation of the European Court of Human Rights.[50]

Thus the appointment of members of the Board by the Ministry of Corrections does not itself violate a standard of fair trial. Hence, as it was mentioned in previous paragraph, the fact that the council is a structural unit of the ministry is problematic itself.

4.1.2. Terms of Appointment

To create powerful, independent judicial system it is essential to establish a sustainable branch of state authority. The term of appointment and possibility of its limitation has an immense influence on the independence of a judge. The appointment of judges for short-term and renewed period is particularly intolerable.[51] If the legislation grants the government right to appoint judges for a short-term, but on a renewed basis, the independence and impartiality of judges raises doubts and questions. To retain position a judge will always try to make decisions in favor of government.[52]

Judges benefit from lifetime appointment in some European countries. However, the decisions of the European Court of Human Rights make it obvious that appointment of judges for 3-5 years term is acceptable for maintaining impartiality.[53] In the case *Ringeisen v. Austria* the court observed that the Regional Commission is a "tribunal" within the meaning of Article 6, paragraph 1 of the Convention as it is independent of the executive and also of the parties, its members are appointed for a term of five years and the proceedings before it afford the necessary guarantees.[54] In the case *Sutter v. Switzerland* the applicant claimed that the rule on appointment of judges breaches the principle of fair trial. According to the law, a judge was appointed for 3-year term by the federal council i.e. the government. However, the

47 Annual Report of the Public Defender of Georgia, The Situation of Human Rights and Freedoms in Georgia, 2011, 354 (In Georgian).

48 *Trechsel S., (with the assistance of S.J. Summers*), Human Rights in Criminal Proceedings, translated by *V. Gogelia, E. Lomtatidze, E. Kartsivadze, T. Ivanishvili, M. Narindoshvili*, Georgian Constitutional Court, Tb., 2009, 75 (In Georgian).

49 *Bokhashvili B.,* Case Law of the European Court of Human Rights, Tb., 2004, 238 (In Georgian).

50 *Lithgow v. The United Kingdom,* [1986] ECHR, App. no 9006/80, 202.

51 *Schwartz H.,* The Struggle for Constitutional Justice in Post-Communist Europe, translated by *K. Aleksidze,* ed. *K. Kublashvili,* Tb., 2003, 92 (In Georgian).

52 *Trechsel S. (with the assistance of S.J. Summers*), Human Rights in Criminal Proceedings, translated by *V. Gogelia, E. Lomtatidze, E. Kartsivadze, T. Ivanishvili, M. Narindoshvili*, Georgian Constitutional Court, Tb., 2009, 76 (In Georgian).

53 Ibid.

54 *Ringeisen v. Austria*, [1971] ECHR, №2614/65, 95.

European Court of Human Rights observed that in order to maintain independence it is not necessary to appoint judges lifetime or that his/her resignation is impossible. If a judge is appointed for a definite period it is vital that he/she to be independent while performing duties and to be free from pressure and influence as well.[55]

According to the Article 86 Paragraph 2 of the Constitution of Georgia judges shall be appointed for life unless they reach the age determined by law. Before the lifetime appointment of a judge, the appointment of a judge for a definite period but not more than three years may be envisaged by law. On February 26, 2003 the Constitutional Court of Georgia discussed the issue of constitutionality of Article 85[2] Paragraph 1 of the Organic Law of Georgia on "Common Courts". The above-mentioned norm authorized the President of Georgia to appoint a person that was eligible to carry out judicial activities for 18-month period of time.[56] The court maintained that an appointment of a judge for a limited period of time has a negative influence on his/her independence. Appointment of a judge for life or long time is a serious guarantee to avoid inference in his/her activities. Giving promise to the judge that he/she would be free and independent in his/her decisions would have positive impact on his/her activates.[57] Thus the Constitutional Court satisfied the appeal.

According to the Article 3 Paragraph 11 of the Typical Provision of the Local Council of the Ministry of Corrections, the council member shall be appointed for 1-year term. Repeated Appointment of the member shall be allowed. It is obvious that appointment of a member for a short term cannot guarantee independence and impartiality.

4.1.3. Remuneration (Salary)

Financial and administrative independence is essential for the existence of a fair trial. In case of economic dependence executive and legislative branches will attempt to influence court by limiting or reducing its funding.[58] Widely spread viewpoint on existence of "bribed" judges in the East damages and deteriorates the public respect towards rule of law and the judicial authority itself.[59]

To ensure independence of a judge he/she must receive high remuneration. While preparing the report for Council of Europe membership it was made clear that bribe-taking among judges in Georgia was a well-established practice. This did not come as a surprise as their salary – USD 20 per month average, was not enough to satisfy even basic needs. The President of Georgia Eduard Shevardnadze confessed that only 2 of 3 judges were uncorrupted in Georgia.[60]

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55 *Sutter v. Switzerland,* [1979] ECHR, №8209/78, 2. *McBride J.*, Human Rights and Criminal Procedure, The Case Law of the European Court of Human Rights, Council of Europe, translated in the frames of European Union and Council of Europe joint program „Elimination of Inhuman Treatment and Non-punishment", 2011, 154 (In Georgian).

56 Citizens of Georgia – Irakli Lekveishvili, Koba Gotsiridze, Koba Kobakhidze and the Public Defender of Georgia v. Georgian Parliament and the President of Georgia, February 26, 2003, Georgian Constitutional Court (In Georgian).

57 Ibid, Paragraph IV.

58 *Schwartz H.,* The Struggle for Constitutional Justice in Post-Communist Europe, translated by *K. Aleksidze,* ed. *K. Kublashvili,* Tb., 2003, 93 (In Georgian).

59 Ibid, 88.

60 Council of Europe, Parliamentary Assembly, Report on Compliance of Georgian Regulations on Law and Order with the European Standards (1997) 1, Paragraph 115. Sited: *Trechsel S. (with the assistance of S.J.*

Adequate remuneration and social guarantees is a precondition to avoid corruption in the judicial system.[61] The state is responsible to create adequate and eligible working and living conditions for judges' to ensure their independence.[62]

Members of Parole Board carry out their activities without receiving any remuneration.[63] Practically making decisions on such important issues is their supplementary (secondary) job and they do not receive monetary encouragement for this. Thus, on one hand it weakens the Board members' independence and strengthens their addiction towards their main job, and on the other hand it promotes corruption.

4.1.4. Immunity

Judge's immunity acts as an important guaranty for the independence of judicial system. It ensures the avoidance of blackmail or influence from Ministry of Internal Affairs, Prosecutor's Office or other executive authorities. According to the Article 87 Paragraph 1 of the Constitution of Georgia no one has the right to arrest, detain, or bring criminal proceedings against a judge, search his/her apartment, car, workplace, or conduct a personal search without the consent of the Chairperson of the Supreme Court of Georgia.

Members of Parole Board do not benefit from immunity. Like any other person criminal responsibility can be imposed on her/him without enjoying any protection privileges from executive, legislative or judicial authorities. The above-mentioned circumstances raise questions and doubts regarding the Board's independence.

4.2. Impartiality

The term – impartiality is a state of mind, when during the discussion of a problem balance is maintained between the parties.[64] In the frames of UN Human Rights Committee stated - judges must not harbor preconceptions about the matter put before them, and that they must not act in ways that promote the interests of one of the parties.[65] Furthermore, in the case *Piersack v. Belgium* European Court of Human Rights observed that impartiality normally denotes absence of prejudice or bias.[66] Thus there

Summers), Human Rights in Criminal Proceedings, translated by *V. Gogelia, E. Lomtatidze, E. Kartsivadze, T. Ivanishvili, M. Narindoshvili*, Georgian Constitutional Court, Tb., 2009, 76-77 (In Georgian).

61 *Korkelia K., Mchedlidze N., Nalbandov A.,* Compatibility of Georgian Legislation with the Standards of the European Convention on Human Rights and Its Protocols, Tb., 2005, 118 (In Georgian).

62 Organic Law of Georgia on "Common Courts", 04/12/2009, №2257; Legislative Herald of Georgia №41, 08/12/2009, Article 68, Paragraph 2.

63 Order No114 of Minister of Corrections and Legal Assistance on "the Remuneration of Employees of the Ministry of Corrections and Legal Assistance" issued on December 31, 2013 does not include information regarding council members' salary.

64 *Trechsel S., (with the assistance of S.J. Summers*), Human Rights in Criminal Proceedings, translated by *V. Gogelia, E. Lomtatidze, E. Kartsivadze, T. Ivanishvili, M. Narindoshvili*, Georgian Constitutional Court, Tb., 2009, 83 (In Georgian).

65 Arvo O. Karttunen vs Finland, October 21, 1992, 7. Paragraph 2. See: *Hanski R., Scheinin M.*, Leading Cases of the Human Rights Committee, Institute for Human Rights, Abo Akademi University, Turku/Abo, translated by *A. Gegechkori*, 2006, 199 (In Georgian).

66 *Piersack v. Belgium,* [1982] ECHR, App. no 8692/79, 30.

must be guarantees that will strengthen confidence of process participants towards the court and make them believe that the court will be impartial and unbiased and will make decision in the frames of the law.

The European Court of Human Rights uses both subjective and objective tests while assessing the degree of impartiality of a judicial body. Under the objective test, it must be determined whether, quite apart from the judge's personal conduct, there are ascertainable facts which may raise doubts as to his impartiality. This implies that in deciding whether in a given case there is a legitimate reason to fear that a particular judge lacks impartiality, the standpoint of the accused is important but not decisive. What is determinant is whether this fear can be held to be objectively justified.[67] A court should be performed as unbiased and impartial in the eyes of an ordinary citizen. As for the subjective test it is based on personal conviction of a particular judge. However, it is impossible to determine whether the requirements of the subjective test- the judge's state of mind to be unbiased - are met. Every person tends towards subjectivity and cannot be fully unbiased. Frequently in human being's mind hidden instincts are automatically developed. A judge, who is aware of his /her own prejudice, is able of self-criticism and self-control may be more neutral compared to one who does not know about his/her tendencies at all.[68]

To assess the impartiality of Parole Board it is important to address the following issues: conflict of interests, recusal and preliminary participation in case discussion.

4.2.1. Conflict of Interests

The decision, free from judge's political, financial or personal interests must be provided by specific regulations. The guarantees provided by the law should serve to avoid conflict between a judge's personal interests and the interest to make unbiased decision on the case.[69]

The European Court of Human Rights discussed numerous cases on conflict of interests. In the case *Belilos v. Switzerland* applicant claimed that Police Board that fined him was a body under subordination of the police authority. The decision was made solely by the police officer who could have been, but was not impartial. The circumstance that the abovementioned body was meant to be a municipal authority underlines its nature. Considering the fact that he was appointed on the post for 4-year term, the police board judge definitely was independent. At the same time he was a member of the police board, senior civil servant, who is liable to return to other departmental duties. The ordinary citizen will tend to see him as a member of the police force subordinate to his superiors and loyal to his colleagues. A situation of this kind may undermine the confidence which must be inspired by the courts in a democratic society.[70]

In the case *Ringeisen v. Austria* European Court of Human Rights stated that the Regional Commission is an independent body and its members are appointed for a term of five years and the proceed-

67 *Fey v. Austria,* [1993] ECHR, App. no 14396/88, 30.

68 *Trechsel S., (with the assistance of S.J. Summers*), Human Rights in Criminal Proceedings, translated by *V. Gogelia, E. Lomtatidze, E. Kartsivadze, T. Ivanishvili, M. Narindoshvili*, Georgian Constitutional Court, Tb., 2009, 84 (In Georgian).

69 *Schwartz H.,* The Struggle for Constitutional Justice in Post-Communist Europe, translatedby *K. Aleksidze,* ed. *K. Kublashvili,* Tb., 2003, 95 (In Georgian).

70 *Belilos v. Switzerland,* [1988] ECHR, App. no 10328/83, 63-67.

ings before it afford the necessary guarantees. Mixed membership of Regional Commission under the presidency of a judge comprised of civil servants and representatives of interested bodies. The Court does not consider the involvement of civil servants in the Commission as an infringement of Article 6, Paragraph 1 of the European Convention. Appointing a council member by the Upper Austrian Chamber of Agriculture (Landwirtschaftskammer) could not prove the doubts about bias.[71]

In the case *Sramek v. Austria* three civil servants from the Office of the Land Government were represented in judicial body– Regional Authority. On the base of *Ringeisen* judgment European Court reiterated that the presence of civil servantsin the authority exercising judicial function was compatible with the Convention. However, the present case is distinguishable from the Ringeisen case in that the Land Government, represented by the Transactions Officer, acquired the status of a party when they appealed to the Regional Authority against the first-instance decision in Mrs. Sramek's favor, and in that one of the three civil servants in question had the Transactions Officer as his hierarchical superior. That civil servant occupied a key position within the Authority. The European Court of Human Rights observed the violation of the Article 6 Paragraph 1 of the European Convention: Where a tribunal's members include a person who is in a subordinate position, in terms of his duties and the organization of his service, litigants may entertain a legitimate doubt about that person's independence.[72]

The decisions made by the European Court of Human Rights deserve criticism. Stefan Trechsel correctly indicates that independence is not provided by the executive authority, when public servants, who usually serve administrative body's interests, suddenly act as unbiased judges.[73] The division of power principle implies that the representative of one branch cannot be the part of another branch at the same time.[74]

The Article 86 Paragraph 3 of the Constitution of Georgia states that the position of a judge shall be incompatible with any other occupation and remunerative activity, except for pedagogical and scientific activities. A judge may not be a member of a political party or participate in a political activity. The Article 39 of Organic Law of Georgia on "Common Courts" reads the same.

The Article 3 of the Typical Provision of the Local Council of the Ministry of Corrections defines the rule of recruitment. The Local Council consists of five members: one representative from the Ministry of Corrections or Penitentiary Department Central Service, LEPL National Agency of Execution of Non-custodial Sentences and Probation, NGO, local self-governance body and High Council of Justice.It is obvious that the members have main job, which they represent in the council. In their main jobs they perform their functions and are appropriately paid as well, and Local Council membership is an additional unpaid liability for them. Thus on one hand fulfilling judicial functions and on other hand having a job linked to public service are incompatible.

By the order №191 issued by the Minister of Corrections and Legal Assistance of Georgia on July 31, 2010, Paragraph 9 of Article 3 of the provision - besides the self-governance representatives, the

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71 *Ringeisen v. Austria,* [1976] ECHR, App. no 2614/65, 95, 97.

72 *Sramek v. Austria,* [1984] ECHR, App. no 8790/79, 41-42.

73 *Trechsel S. (with the assistance of S.J. Summers*), Human Rights in Criminal Proceedings, translated by *V. Gogelia, E. Lomtatidze, E. Kartsivadze, T. Ivanishvili, M. Narindoshvili*, Georgian Constitutional Court, Tb., 2009, 81 (In Georgian).

74 *Sajo A.,* Limiting Government, An Introduction to Constitutionalism, translated by *M. Maisuradze*, ed. *T. Ninidze*, Tb., 2003, 110 (In Georgian).

council members do not have right to be political party members or interfere in political activities, was removed. Final edition of the provision makes it possible the council member to have political affiliation as well or to be involved in politics. Thus, the abovementioned contradicts to the Constitution of Georgia – the Article 86 Paragraph 3.

4.2.2. Recusal

It is vital the court to be totally neutral. Impartiality of a judicial authority might become questionable due to having close relationship with one of the parties or having a different stance.

The case *Holms v. Sweden* unveils the fact that the applicant was blamed to have close connection with Nazi circles. He appealed the decision in the court that consisted of 5 active members of the Social-Democratic Party. According to the European Court of Human Rights there was an objective doubt that the judicial body was biased, as for many years one of the jurors used to be direct or indirect owner of the Social-Democratic Party and another one used to be the party's ideological adviser.[75]

In the case *Pullar v. The United Kingdom* the applicant offered a corrupt deal to one of the engineers, to be more precise - in return of the bribe to protect his/her interests. A criminal case was instigated where the engineer was summoned as the main witness. One member ofthe jury, Mr. Forsyth, was employed by the firm in which the prosecution witness, Mr. McLaren, was a partner. The European Court did not reckon this to be a violation of the Article 6 Paragraph 1 of the European Convention, because abovementioned juror was only one of fifteen members, thus impartiality was guaranteed.[76] The European Court decision deserves criticism because the judicial body to be reckoned as impartial - there should not be any doubt towards its members.

The case *Wettstein v. Switzerland* was about the court trial taking place in one of the cantons. Like other cantons the administrative court consisted of the judges working full or part-time. Thus they could have been acting lawyers as well. On February 15, 1995 the applicant was presented in front of the canton's administrative court, where Mr. R represented a judge. In parallel with this in the case against the applicant that was taking place at federal court the same Mr. R was presenting a municipality. Thus in parallel regimes, Mr. R had two functions: on one hand he was a judge (in the case of the suitor taking place at canton's administrative court) and on the other hand - a representative of the party that appealed against the abovementioned applicant at the federal court. The European Court of Human Rights deemed that there was an objective doubt the court being biased.[77]

To provide impartiality it is significant the national legislation to settle so called judge's recusal. Part 8 of Georgian Criminal Procedure Code, Part 4 of Georgian Civil Procedure Code, Part 3 of Georgian Administrative Procedure Code[78] and Article 25 of Georgian Law on "Constitutional Jurisdiction" consider the bases for judge recusal, which is relevant to the European Court of Human Rights standards.[79]

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75 *Holm v. Sweden,* [1993] ECHR, App. no 14191/88, 31-33.

76 *PullarvThe United Kingdom,* [1996] ECHR, App. no 22399/93, 37, 40, 41.

77 *Wettstein v. Switzerland,* [2000] ECHR, App. no 33958/96, 45-49.

78 It is noteworthy that Administration Procedure Code does not include judge recusal regulations and on the base of Article 1 Paragraph 2 Georgian Civil Procedure Code isapplied.

79 *Korkelia K., Mchedlidze N., Nalbandov A.,* Compatibility of Georgian Legislation with the Standards of the European Convention on Human Rights and Its Protocols, Tb., 2005, 158 (in Georgian).

Article 15 of the Typical Provision of the Parole Board regulates member recusal during the oral hearing: there should not be ties of relationship or impediment between on one hand convicted, his lawyer, victim and on other hand the council member that will give base to doubt regarding the verdict's objectivity. The fact that the order issued by Minister of Corrections and Legal Assistance of Georgia does not consider the council member recusal possibility on the session without oral hearing is a violation. In reality it is possible the ties of relationship or other impediments to determine the council member's partiality during discussions without oral hearing. Thus this is a gap that needs to be addressed.

4.2.3. Preliminary Participation in Case Discussion

The judge's participation in the early stage of the judicial proceeding may become a reason for raising doubts on impartiality. It is vital a judge not to have prejudice regarding the discussion issue.

In the case *Hauschildt v. Denmark* the European Court of Human Rights discussed the issue of judge's impartiality who was taking part both in pretrial and constitutive discussions. According to the Danish legislation the judge was eligible to observe the investigation process. When taking a decision on detention on remand and other pre-trial decisions of this kind the judge summarily assesses the available data in order to ascertain whether prima facie the police have grounds for their suspicion; when giving judgment at the conclusion of the trial he must assess whether the evidence that has been produced and debated in court suffices for finding the accused guilty. The judge stated that there is a "particularly confirmed suspicion" that the accused has committed the crime(s) with which he is charged. This wording has been officially explained as meaning that the judge has to be convinced that there is "a very high degree of clarity" as to the question of guilt. Thus the difference between the issue the judge has to settle when applying this section and the issue he will have to settle when giving judgment at the trial becomes tenuous. The European Court thus concluded that there has been a violation of Article 6 paragraph 1 of the Convention.[80]

Parole issuesin Georgia are discussed by three Boards: East Georgia Parole Board, WestGeorgia Parole Board and Juvenile Parole Board.[81] The composition of Boards does not change for a definite period of time. In frequent cases the issue for releasing a convict is repeatedly discussed by the same Board. For instance, on February 28, 2013 by decision №01/13-001, without oral hearing Juvenile Parole Board denied convict's request about conditional release. The motivation part made it obvious that the council took into account the assessing criteria and considered dangerous activities, victim personality and age.[82] While on May 31, 2013 Juvenile Parole Board paid attention to the crime characteristics and heaviness, as well as on group crime and by decision №01/13-043 refused to release conditionally the same convict.[83] In both cases practically the Board made decision solely on the basis of the crime characteristics without assessing other important criteria and without oral hearing of the issue. It is possible an objective observer acquires doubt that during recurrent discussion of the parole case, the Parole

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80 *Hauschildt v. Denmark,* [1989] ECHR, App. no 10486/83, 43, 50-52.

81 Order No151 of Minister of Corrections and Legal Assistance of Georgia on "Approval of the Number, Territorial Jurisdiction and Typical Provision of the Local Councils of the Ministry of Corrections and Legal Assistance of Georgia" issued on October 28, 2010, Article 1.

82 Decision №01/13-001 made without oral hearing, February 28, 2013, Juvenile Parole Board.

83 Decision №01/13-043 made without oral hearing, May 31, 2013, Juvenile Parole Board.

Board was led by confidence established during previous discussions. Second decision did not unveil any additional assessments; the Board even did not call for an oral hearing.

5. Conclusion

On the basis of the latest amendments introduced in the National Legislation the court is deprived of the right to make decision on parole and the right is granted to specially created Board. However, historic analysis made it obvious that, a court in Georgia had just approval function and practically did not participate in decision-making.

Transfer of decision-making function on parole issues from court to Parole Board does not itself infringe neither National nor International standards. It is vital the decision-making body satisfies the principle of fair trial.

The assessments and conclusions developed in the research made it clear that parole Board is not an independent body as it is a part of an executive branch. The Board's independence is ensured neither by Board member appointment rule and term, nor by their salary as well as lack of immunity. The Board members' impartiality is under doubt as well: discussing parole issue is a supplementary (secondary) job for them; there is no possibility for recusal without an oral hearing.

Thus, it is necessary to introduce amendments in the legislation in order to provided independence and impartiality of Parole Board.

Lasha Panchulidze*

Issue of Separation of Administrative and Criminal Responsibility for the Offences Against Customs

1. Introduction

In the modern era, with the technological development, customs control at the state borders does not represent only the mean for ensuring economic incomes and stability; it also plays important role in the protection of public security. It is important to review the above issue as it gradually becomes relevant to control the facts of bringing into the state the weapons and materials, chemical and radioactive substances. Import of the above items to the country avoiding the customs control may not cause large damage to the country's economy; however it may create threat for the public security. Moreover, we need to clarify what do the chemical and radiation substances imply, which of them may be related to the threat and which category of substances and materials shall be considered as qualifying conditions for the article 214 of Criminal Law Code of Georgia (hereinafter referred to as CCG). For the above purpose it is necessary to review them; the general description will enable us to group them – the level of threat for the public generated by each of them. We need to clarify, which interests are protected under the article 214 of CCG and based on the above, we will able to discuss illegal bringing in/ taking out of which categories of substances shall be determined as actions punished under the criminal or administrative rules.

In addition to the above mentioned, the problem may be created by the bringing into and taking out of the state precious items avoiding customs control. Despite the fact that the above does not create threat to the public security, the normative vagueness generates some problems in this area too. We are dealing with the issue, whether the minimal value of precious items must be determined for the assigning of criminal responsibility. Administrative or criminal type punishment for mentioned actions requires separate discussion, as in practice, the above creates serious problems and law enforcement officers have to develop practice themselves for the eradication of such vagueness.

Moreover, taking the goods across the border with the violation of customs rules generally creates threat for the economic stability of the country; it is necessary to determine which type of actions can be included in the above mentioned crime. Accordingly, existence of simple term of "Bringing into/ taking out" in the article definition is not sufficient as bringing into and taking out of the country may imply various activities, such as import, re-export, transit, temporary bringing in and etc. Implementation of some of these activities avoiding customs control causes material damage to the state, implementation of other activities – do not have such effect. Therefore, issue on administrative or criminal punishment for the above actions requires the further analysis.

It is also possible to illegally bring into or take out items of cultural value avoiding the customs control. Despite the fact that such activities do not create threat for public safety and economic stability,

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the problem still remains, as legally the items of cultural value are clearly defined under the law article. In this case, problems are not generated by the criminal law, which has blanket effect; the problems are generated by the special normative act – where the above mentioned issue is not eradicated.

It is important to separate administrative and criminal responsibilities for the items brought into and taken out of the Georgian customs border, as one cannot punish person with the punishment from different areas for the same illegal act. More so, when the criminal law is at the last place among the other areas of law as the most repressive law field.

Administrative law considers responsibility for the moving of goods over the economic border of Georgia under the tax code, which defines the responsibility for the crossing of economic border by the cargo. The significant part of the article defines responsibility for the offences, which are considered under the Criminal Code of Georgia, namely article 214; therefore the separation of them requires further analysis. Present article discusses the issues of collision of various law fields and ways for overcoming such problems.

In practice there are many cases, when there are the criminal signs in the actions of the person, however the person is punished under the administrative rules. The present article will analyse such cases and the ways for problem solution will be presented.

Methods of analysis and synthesis, induction and deduction, description, comparison, systemic, dogmatic-legal methods are used for the study of issues under research.

2. Separation of Administrative and Criminal Responsibility for Bringing into or Taking out the items Included in Free Civil Turnover with the Violation of Rules

It has to be mentioned that tax code covers number of regimes for the commodity transactions. In particular, these regimes are: import, export, transit, warehouse, re-export, internal processing, external processing, temporary bringing into the country, free zone and free warehouse.[1]

The attention shall be drawn to which of them create threat for the economic interests of the country. Creation of threats for the economic interests mainly imply that the taxes from the commodities brought across the economic border of Georgia via the violation of customs rules are not paid to the budget.[2] From the transaction of import, export, transit, warehouse, re-export, internal processing, external processing, temporary bringing into the country, free zone and free warehouse, in case of bringing across the economic border of Georgia the one bringing the commodities shall only pay VAT (value added tax) tax for import, re-export and temporary bringing into the country. In case of import the person must pay import tax in addition to the VAT. Accordingly, the economic interests of Georgia are damaged only in case of import, re-export and temporary bringing into the country via the economic border of Georgia violating the customs rules.[3]

Only the commodity transactions of import, re-export and temporary bringing into the country create threat for the economic interests of Georgia. In all other cases, the items, such as gold, brought into the country are taken to other countries. Accordingly we must not punish similarly the person, who

1 Tax Code of Georgia, Article 227 (In Georgian).

2 *Draganova V. G., Rassalova M. M.,* Customs Law, Law and Right, MSK., 2011, 124 (In Russian).

3 Tax Code of Georgia, Article 162 (In Georgian).

brings across the economic border of Georgia gold with the violation of customs rules and implements import of goods and the person entering the country for transit and is going with the goods to Armenia, as the goods are not subject to VAT and import tax payment.

Moreover, we should consider that according to the article 7, section 2 of Civil Code of Georgia, offence is the action, which may formally include the signs of actions considered under the CCG but due to the marginal significance has not caused the damage which would create the need for the criminal responsibility of the person. As only the commodity transactions of import, re-export and temporary bringing into the country implemented via the violation of customs rules create threat for the economic interests of Georgia. In case of commodity transactions of export, transit, warehouse, internal processing, external processing, free zone and free warehouse there is no threat to the economic interest of Georgia; therefore person managing the goods under these commodity transactions shall not be punished under the criminal law rules.

Article 214 of CCG determines criminal responsibility for any commodity transaction implemented in the process of bringing across the economic border of Georgia goods with the violation of customs rules not considering the fact that the economic interests of Georgia are damaged only in case of import, re-export and temporary bringing into the country. Therefore, the formulation of article 214 of CCG shall be changed and it must specifically indicate the commodity transactions for which the person is assigned the criminal responsibility. As a result of such change the person implementing import, re-export and bringing into the country transactions on the economic border of Georgia with the violation of customs rules will be punished under the criminal law rules, as for the other commodity transactions – based on the tax code.

2.1. Separation of Administrative and Criminal Responsibility for the Bringing into or Taking out the Cultural Heritage with the Violation of Rules

In order to clarify what is the monument of cultural heritage, it is necessary to determine what the cultural heritage is. Cultural heritage can be tangible or intangible.

Tangible cultural heritage is any type of artistic, aesthetic, historical, bearing memorial value architectural, art, city planning, rural, archaeological, ethnographical, monumental, related to the development of technology immovable or movable object created by the human being or created via the impact of the human being over the nature.

The cultural heritage also covers documental materials, gardens, parks, landscape architectural objects, historical places, historically established environment related to the history, development of the country, its folklore, belief and traditions, related to the civilisations existing in the past or present civilisation.[4]

Intangible cultural heritage covers traditions of folklore and expression forms, including the language as the carrier of material cultural heritage, performance arts, traditions, habits, knowledge and skills related to the traditional arts, as well as instruments, items, artefacts and cultural areas related to the traditional arts, which are acknowledged as the part of cultural heritage by the society, groups and, in some cases, certain persons.

[4] Law of Georgia on " Basis for Issue of Licenses and Permits", Article 3 (In Georgian).

The monument of cultural heritage is: immovable or movable object of cultural heritage, which is assigned the status of monument in accordance with the law on Cultural Heritage. However, we are only interested in the movable objects of cultural heritage, for example: the movable monuments of cultural heritage are: paintings of Niko Pirosmanashvili "Kakhuri Gvino (Kakhetian Wine)", "Giraffe"; as for the immovable monuments of cultural heritage – Svetitskhiveli, Jvari monastery and etc.

The status of cultural heritage is assigned to the object, which has historical or cultural value related to its oldness, unique nature and authenticity. The legislation assigns the status of complex monument of the cultural heritage based on the relevant grounding. The status of complex monument of the cultural heritage is assigned to the set of cultural objects which are connected physically, functionally, historically or territorially and is the topographically identifiable unit.

The issue on the assigning the status of cultural heritage monument is reviewed by the Consultative body – Council for the Protection of Cultural Heritage under the Ministry of Culture and Monument Protection of Georgia.[5]

The status of cultural heritage monument is assigned to the object based on the conclusion of the Council via the individual administrative-legal act issued by the Minister.

The individual administrative-legal act issued by the Minister on the inclusion of object into the list of objects of cultural heritage is effective upon its promulgation; the above is registered in the state registry of monuments and internet page of the Ministry.[6]

The permission to take the cultural valuables from Georgia is issued by the Ministry of Culture and Monument Protection of Georgia.[7] Only holding such permission it is allowed to take cultural valuables for the business purposes from Georgia via the customs border. The uniform permit form is determined for taking the cultural valuables from Georgia; the form is approved by the Ministry of Culture and Monument Protection of Georgia.

The permission is required for taking the cultural heritage object across the customs border of Georgia; such permission is granted by the Ministry of Culture and Monument Protection of Georgia.[8]

Permission seeker applies with the written statement to the body issuing such permission. The statement shall include the following: for the physical person – date and place of birth, work address, residential address; for the individual entrepreneur – data of registration in the entrepreneurial registry; for the legal entity - data of registration in the entrepreneurial registry; indication on the type of permission required for the permission seeker.[9]

The rules for granting permissions on taking out of cultural valuables from Georgia and taking out of objects on a temporary basis, termination of permission, renewal, abolishment, rejection of permission and changes to the permission were defined under the law of Georgia on the basis for the issue of license and permission for entrepreneurial activities. The above mentioned law is abolished.[10]

We must consider the fact that movable object may be included in the list of intangible cultural heritage items if it is not possible to comprehensively determine the essence of the intangible cultural

5 Law of Georgia on "Cultural Heritage", Article 15 (In Georgian).

6 Ibid, Article 15.

7 Law of Georgia on "Basis for Issue of Licenses and Permits", article 19 (In Georgian).

8 Law of Georgia on "Basis for Issue of Licenses and Permits for Entrepreneurial Activities", Article 19 (In Georgian).

9 Law of Georgia on "Basis for Issue of Licenses and Permits", Article 19 (In Georgian).

10 Ibid, article 43.

heritage object, also when the data related to its historical or cultural value require verification or additional study. From the moment of inclusion of the item in the list of intangible cultural heritage objects the legal regime considered under the law of Georgia on "Cultural Heritage" is applied to the item. The item can be included in the list of intangible cultural heritage objects only for six months' period; the term can be prolonged only once for maximum 6 months. Accordingly the above process may continue for up to 12 months' period.

The Ministry presents the object included in the list of intangible cultural heritage objects to the Council of Protection of Cultural heritage with the purpose to make decision on assigning the status of cultural heritage monument, determination of its type, significance, condition, historical and cultural value and category.

If based on the relevant study it is determined that there is no basis for assigning the status of monument to the object included in the list of intangible cultural heritage objects, and based on the conclusion of the Council, the Minister is authorised to remove the object from the list of cultural heritage objects.

In the event of taking out of the country the cultural heritage object there is sufficient justification for application of imprisonment as the prevention measure.[11] The term of imprisonment - 9 months.[12] There is a possibility that person attempts to take the items temporarily included in the list of cultural heritage objects across the border of Georgia violating the relevant rules. In such case the person shall be punished according to the criminal law rules, as the legal regime determined for the monument applies for the items temporarily included in the list of cultural objects.[13] Therefore, person might be arrested and sentences to imprisonment. And then take him/her to the court in 6 months' time. It may occur later that based on the conclusion of the Council the mentioned item does not represent the cultural valuable. Even if the person is convicted on the last day of imprisonment, that period might not be sufficient as the 6 month period for the inclusion of the item into the list of cultural heritage objects may be extended by another 6 months, in total 12 months. After the Minister, based on the conclusion of the Council removes the temporarily included movable item from the single list, the composition of crime is not in place, however, the person is already sentenced.

In order to avoid the judging of the innocent person, it is required to provide definition in the article 214 that the present article does not apply to the cultural heritage monuments included temporarily in the list of cultural heritage objects. Instead of criminal responsibility, the above mentioned action must be punished under the administrative rules, namely relevant changes must be made to the article 289 of the tax code. As a result, if the object temporarily included in the list of cultural heritage objects is deleted from the list, the paid fine will be returned to the person.

In practice there are cases, when there is a doubt that the specific item represents the cultural heritage; for the above reason the Revenue Service of Georgia suspends taking of the item from Georgia and awaits for the relevant document. Following the receipt of such document the Revenue Service makes decision to allow the item out of Georgia or to transfer materials to the investigation service. For example: On 01 June 2013 the truck loaded with the wine was moving to the direction of Belarus, via the Poti port. In the process of customs examination, 20 books printed in 19th century were discovered in the

[11] Criminal Processual Code of Georgia, Article 198 (In Georgian).
[12] Criminal Processual Code of Georgia, Article 205 (In Georgian).
[13] Law of Georgia on "Cultural Heritage", Article 15 (In Georgian).

truck. The customs employees explained to the driver of the truck that the books, due to their antiquity could belong to the cultural heritage and the driver did not have relevant permission. The items were stopped until the presentation of the relevant document.[14] The issue of the above mentioned books has not been clarified yet. If the books do not belong to the cultural heritage then the Revenue Service will continue the procedure of taking the books out of Georgia. If the books represent the cultural heritage, we'll have the signs of crime considered under the article 214, section 3 of the CCG. It has to be noted that the article 214 of CCG covers intended crime; therefore the Revenue Service will transfer materials to the Investigation department, Investigation service of the Ministry of Finance in order to find out whether the person was aware that he was transporting the items of cultural heritage. Following the clarification of the above issue it will be possible to punish the person under the section 3, article 214 of CCG.

2.2. Separation of Administrative and Criminal Responsibility for Bringing into or Taking out Jewellery Items Made of Precious Metals or Jewellery Scrap with the Violation of Rules

Precious metal is any type of gold, silver, platinum and palladium in such forms as raw material, alloy, semi-fabricate, laboratory vessels and tools, chemical compounds, scrap and waste.[15]

Secondary metal raw material is considered as precious metal scrap if it is meant for industrial processing and produced in the process of metal production or mechanical processing; also the metal items which are not usable for the purpose they were produced due to the break, depreciation, mechanical, chemical damage or other reasons.[16]

Precious metals were registered according the law of Georgia on the State control, analysis and marking of precious metals and precious stones; in line with the law the registration of precious stones was implemented by the Department of Supervision of Precious Metals and Precious Stones under the Ministry of Finance of Georgia. Up to 01 January 2005 trading with precious metals and precious stones required the license; therefore persons involved in such activities were liable to account for volume and weight of precious metals, precious stones and products, as well as scrap and waste.

The state, namely the Ministry of Finance used the seal for marking of the precious metal items, samples. The seal was required for the gold items of over 375 probe, silver items of over 830 probe, platinum items of over 950 probe and palladium items of over 500 probe. The items covered or painted with non-precious metals, inert materials did not require marking. The seal describes the quality of the precious metals' alloys used for the production of the items, expressed as the weight units of the precious metal content in 1000 weight units of the alloy. Items produced on the territory of Georgia for the purpose of selling or made on order is subject to mandatory testing. Moreover, foreign products imported to Georgia and items produced before 1950, if such items were subject of trading or selling-purchase are subject to testing too.[17]

[14] See <http://rs.ge/Default.aspx?sec_id=4845&lang=1&newsid=2507>, [28.04.2014].

[15] Law of Georgia on "State Control, Analysis and Marking of Precious Metals and Precious Stones", article 2 (In Georgian).

[16] Resolution of the Government on the Definition of Service Charges and Payment Rules for the Export of Scrap of Ferrous and Non-Ferrous Metals and Wastes of Ferrous and Non-ferrous Metal, Article 1(In Georgian).

[17] Law of Georgia on "State Control, Analysis and Marking of Precious Metals and Precious Stones", article 7 (In Georgian).

However, since 01 January 2005 the above mentioned law has been abolished and at present license is not required for selling the precious metals.

The mentioned definition of precious metal cannot be applied for the qualification of crime considered under the section 3, article 214 of CCG, as the law providing the definition is declared as void since 01 January 2005.[18]

In accordance with the section 3, article 214 of CCG it is prohibited to import the precious metals, which are registered in line with the Georgian legislation. However, since 01 January 2005 the registration of precious metals has not been conducted.

During the moving across the customs border of Georgia person shall indicate in the customs declaration of the physical person about the valuables including the precious metals, precious stones and items, antique items and icons, paintings, sculptures and etc. considered as works of art.[19] Entering the incorrect information into the customs declaration or providing incorrect information to the responsible officer of the customs generates responsibility in line with the Georgian legislation.[20] Accordingly, there is one legal act, which mentions precious items, namely order of the Minister of Finance on "Customs declaration of physical person". The above order considers precious metals, precious stones and items as jewellery. Accordingly, the person importing the jewellery items made of even 0.1 gram gold or silver or precious metal of GEL 1 value must be punished with particular severity; namely, he/she must be punished under the section 3, article 214 of CCG as the section 3, article 214 of CCG indicates the bringing into and taking out of the country precious metals with the violation of rules; as for the rule on the precious metals, it is defined only under the above mentioned order issued by the minister of the Finance.

The practice found other way for development. In cases, which take place at the customs border of Georgia, for example, in the event of bringing into and taking out of the country golden and silver items the customs value of the mentioned items is determined. If the customs value exceeds the limit defined under the section 3, article 214 of CCG then the action is qualified under the section one, article 214 of CCG, and in the event of especially high customs value – under the section 2, article 214 of CCG.

For example: On 14 March 2014 at the customs checkpoint "Kazbegi" the customs officers examined the luggage of citizen of Armenia G.S.; they discovered 71.8 grams of golden items in the luggage. The value of the goods equalled to GEL 3576.40.

On the same day, 2014 at the customs checkpoint "Kazbegi" the customs officers examined the luggage of citizen of Azerbaijan A.S.; they discovered 94.15 grams of golden items in the luggage. The value of the goods equalled to GEL 3667.90.

In the above provided two examples the golden items were taken out of the country covertly; however the customs value did not exceed GEL 5000; therefore, in line with the notes to the article 214 of CCG we did not have crime composition in place. Citizen of Armenia G.S. was fined with GEL 3576.40 and citizen of Azerbaijan A.S. was fined with GEL 3667.9 in line with the section 10, article 289 of the tax code of Georgia.

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18 Law of Georgia on the Abolishment of Law "State Control, Analysis and Marking of Precious Metals and Precious Stones", Article 1 (In Georgian).

19 Order of the minister of Finance of Georgia № 1036 on the changes and amendments to the order of the minister of Finance №221, dated 05 April 2005 on "Customs Declaration of Physical Person", Annex 2 (In Georgian).

20 Tax Code of Georgia, Article 289 (In Georgian).

However, when the customs value of the golden items exceeds GEL 5000, we are dealing with the criminal composition; for example: on 08 February 2014 at the customs checkpoint "Kazbegi" the customs officers examined the luggage of citizen of Russia, G.E. entering from the Russian territory. Customs officers discovered 427.46 grams of golden items in the luggage. The value of the goods equalled to GEL 26,551.02. The goods were brought covertly. As a result, he was accused based on the section 2, article 214 of CCG.[21] In all three examples provided above the criminal law responsibility should be raised; as mentioned above the rules for bringing into the country the precious metals are defined only by the order of the minister of Finance of Georgia "on the customs declaration of physical person", and section 3, article 214 of the CCG does not indicate on the especially high volume of the items. According to the section 3, article 214 the person importing the jewellery items made of even 0.1 grams of gold or silver or precious metal of GEL 1 value must be punished under the section 3, article 214 of CCG.

The mentioned practice contravenes the definition of article 214 of CCG, as the limit provided in the notes to article 214 concerns customs value of movable item for sections 1 and 2, as only these sections discuss the movable items of especially high value.

It turns out that bringing into and taking out of the country of jewellery items made of precious metal or item scrap with the violation of rules defined under the section 3, article 214 of CCG is not actually applied in practice. The reason for the above is the fact that since 01 January 2005 the registration of precious metals has not been carried out, as the law of Georgia "on the State control, analysis and marking of precious metals and precious stones" was declared void; hence it is required to make changes to the section 3, article 214 of CCG and remove the above definition.

Accordingly, when the value of the precious metals brought into and taken out of the country does not exceed the limit defined under the article 214 of CCG, the person will not assigned criminal law responsibility. He will be assigned administrative responsibility.[22]

3. Separation of Administrative and Criminal Responsibility for Bringing into or Taking out Items Removed from the Civil turnover with the Violation of Rules

3.1. Separation of Administrative and Criminal Responsibility for Bringing into or Taking out Nuclear and Radioactive Substances with the Violation of Rules

Section 4, article 214 of CCG criminalises bringing into the country the weapons, materials or equipment, which can be used for the production of mass destruction weapons. The above considers weapons, which can liquidate and cause the significant injuries to the large group of people; and to other forms of life, or significantly damage the structures created by the human beings - for example: buildings, natural structures. The following items belong to the above mentioned group of weapons: nuclear, biological and radioactive weapons. The notion of mass destruction weapons is not established in the Georgian as well as international legislations;[23] therefore, legislator had to abstain from the application

[21] See <http://rs.ge/Default.aspx?sec_id=4845&lang=1&newsid=2909>, [27.04.2014].

[22] Tax Code of Georgia, Article 289 (In Georgian).

[23] For the definition of mass destruction weapons, see: *Carus W. S.*, Defining Weapons of Mass Destruction, National Defense University, 2012, <http://www.ndu.edu/press/lib/pdf/CSWMD-OccasionalPapers/CSWMD_OccationalPaper-8.pdf>, [28.04.2014].

of the term in the CCG. As a result, in the event of bringing into Georgia such substances the expertise is carried out; the expertise detects whether the specific substance represents mass destruction weapon or it is for the production of mass destruction weapons. The expert responsible to make decision does not have opportunity to guide his actions by any normative acts effective in Georgia, providing the notion of mass destruction weapon and the list of substances belonging to the ones used for the production of mass destruction weapons. Accordingly, the expert has to use the manual printed by some specific scientist and based on the manual write the expertise report; the above is causing uncertainty, as there are different views in the science on the basic issues, such as whether to consider the chemical weapon as the mass destruction weapon. According to some scientists only the nuclear and radioactive substances must be considered as mass destruction weapon.[24] There is a need for normative act, which defines – what is to be considered as the mass destruction weapon. As of today, there is not such normative act; hence the term "massive destruction" shall be removed.

Nuclear weapon is a device which generates atomic energy via explosion, as a result of atom fission or synthesis reaction.[25]

The need for the punishment of the facts of bringing into and taking out of the country of nuclear and radioactive substances with the violation of customs rules is determined by the fact that mentioned substances create the threat for public security; due to the above the special rules are established on their turnover.[26] The purpose of the above rules is to eradicate illegal turnover of nuclear and radioactive substances, legal regulation of transportation of goods subject to the radioactive control and ensuring the radiation safety of Georgia.

Radioactive substances are divided into four groups. The basis for such division is the safety of substances. The radioactive substances from the first group are not related to the hazard, and the radioactive substances from the group four are the most hazardous.[27]

The radioactive substances existing naturally in the environment belong to the first group of radioactive substances. Naturally existing radioactive substances have the dose of radiation, level of radioactive activity, caused by the natural or other radioactive sources in the environment. The radioactive substances existing in the nature are not subject to control.

All minerals and rocks contain small quantity of radioactive isotopes of uranium, thorium and potassium.[28] If the radioactive substances are concentrated in some object, the radiation level may reach the limit, which can be detected using the radiation monitor. Often the isotopes – radium, thorium and potassium – are discovered using the manual detectors. The ceramic tiles, gravel and potassium fertilisers also contain natural radioactive substances.[29]

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24 *Carter A.B.*, How to Counter WMD, Foreign Affairs, 2004, 73, See also: *Harigel G. G.*, Chemical and Biological Weapons: Use in Warfare, Impact on Society and Environment, Nuclear Age Peace Foundation, 2001, <http://www.wagingpeace.org/chemical-and-biological-weapons-use-in-warfare-impact-on-society-and-environment>, [25.04.2014].

25 Resolution of the Government of Georgia No 397, dated 24 December, 2010 on the approval of common practice for the joint actions in the event of alarms on the detection of nuclear and radioactive substances at the border checkpoints located in the airports, ports and sea area, Article 1 (In Georgian).

26 Ibid, Article 2 (In Georgian).

27 Order of the Minister of Labour, Health and Social Affairs of Georgia No 132/n, dated 26 March 2001 on the approval of radiation safety norms on the territory of Georgia, Article 1 (In Georgian).

28 See <http://www.world-nuclear.org/info/Safety-and-Security/Radiation-and-Health/Naturally-Occurring-Radioactive-Materials-NORM/>, [20.04.2014].

29 Order of the Minister of Labour, Health and Social Affairs of Georgia No 132/n, dated 26 March 2001 on the approval of radiation safety norms on the territory of Georgia, Article 1 (In Georgian).

The isotopes mainly used in the medicine belong to the second group of radioactive substances and there is less possibility to use them for terrorist purposes; the isotopes - CS-137, AM-241, CO-60 and etc – belong to this group.[30]

The radioactive substances used for industrial production and research belong to the group 3 of radioactive substances. These substances are mainly encountered in the industrial materials. Sometimes they are used for the creation of mechanisms for the radioactive radiation. The form, in which the substance is discovered, is essential; the above gives us an idea on the purpose of its use. In the event of transportation of these substances the special packaging and special transportation conditions are required. The following substances belong to this group of radioactive substances: cesium-137, cobalt-60.[31]

Materials belonging to the IV group of radioactive substances are used in the nuclear mechanisms.[32]

The radioactive substances belonging to the group 4 mainly consist of plutonium, with the exception of plutonium, which consists of more than 80% of plutonium -238 and uranium-233, enriched with uranium-23 or uranium-233; The uranium with the form different from the rock, containing isotopes with natural concentration; any material containing mixture of mentioned isotopes.[33]

The criminal law responsibility for bringing into or taking out of the customs border of Georgia is established due to the fact that the mentioned substances generate threat for the public security and economic interests of the state.[34] For example: on 25 January 2006 the employees of the Ministry of Internal Affairs arrested one citizen of Russia and three citizens of Georgia for the delivery of 100 gram, 90% enriched uranium; they were arrested in accordance with the section 5, article 214 of CCG and later were sentenced to the imprisonment for the period of 8.5 years.[35]

Section 4, article 214 of CCG indicates in general terms to the bringing into and taking out of radioactive substance across the customs border of Georgia. Accordingly the person is punished for bringing into and taking out of the country any type of radioactive substances based on the mentioned article.

Radioactive substances are divided into 4 groups in terms of the hazard related to them:

The radioactive substances existing naturally in the environment belong to the first group of radioactive substances. It has to be mentioned that the items, such as ceramic tiles, gravel and potassium containing fertilisers are not so hazardous to assign the criminal law responsibility to the person bringing into and taking out of the country the above mentioned items.

In reality, bringing into and taking out of the country the first group radioactive substances with the violation of customs rules can't create threat for the public security. The above discussed action creates threat for the economic interests of the country, as customs taxes are not paid to the budget. The

30 *Smith K. P.*, An Overview of Naturally Occurring Radioactive Materials (NORM), Environmental Assessment and Information Sciences Division, Argonne National Laboratory, Argonne, 1992, 65.

31 Order of the Minister of Labour, Health and Social Affairs of Georgia No 132/n, dated 26 March 2001 on the approval of radiation safety norms on the territory of Georgia, Article 1 (In Georgian).

32 Resolution of the Government of Georgia No 397, dated 24 December, 2010 on the approval of common practice for the joint actions in the event of alarms on the detection of nuclear and radioactive substances at the border checkpoints located in the airports, ports and sea area, Article 2 (In Georgian).

33 Order of the Minister of Labour, Health and Social Affairs of Georgia No 132/n, dated 26 March 2001 on the approval of radiation safety norms on the territory of Georgia, Article 2 (In Georgian).

34 *Lekveishvili M., Todua N., Gvenetadze N., Mamulashvili G.,* Comments to the Private Section of Criminal Law Code of Georgia, volume 1, Tb., 2014, 546 (In Georgian).

35 See <http://www.civil.ge/geo/article.php?id=14673>, [27.04.2014] (In Georgian).

purpose of the first section, article 214 of CCG is to protect the economic interests of the country, which considers responsibility for bringing into and taking out of the customs borders large volume of movable items – the above is quite sufficient.

When the first group radioactive substances are brought across the customs border of Georgia with the violation of customs rules, the customs value of the items shall be defined, following the value assessment; in the event of excessing the volume restriction defined for the movable items in the notes to the article 214 of CCG, the person shall be punished in accordance with the section one, article 214 of CCG. In the event of identification of customs value under the limit the person must be punished in accordance with the tax code of Georgia with the administrative fine defined for the bringing into or taking out of the country the items with the violation of customs rules.[36]

3.2. Separation of Administrative and Criminal Responsibility for Bringing into or Taking out Poisonous and Toxic Substances with the Violation of Rules

Section 4, article 214 of CCG provides the list of items, bringing of which across the customs border of Georgia is prohibited and bringing of such substances against the above rule results in the criminal law responsibility.

Definition of poisonous and toxic substances is not provided in any legislative act. At least one normative act, which will define the essence of poisonous or toxic substance, is required. Person must have possibility to legally bring into the country poisonous or toxic substances.

It is incorrect to establish direct criminal law responsibility for bringing such substances across customs border with the violation of rules.

Georgian legislation is familiar with the hazardous chemical substances, which can be considered as poisonous and toxic substances.[37]

Hazardous chemical substances and drugs have negative effect on the health of the human being and environment. It is prohibited to bring across the customs border of Georgia the following substances:[38]

a) Explosive substances and drugs in solid, liquid, paste or soft forms, which cause exothermal reaction without the atmospheric oxygen and quickly emit gases, detonate, are easily inflammable or explosive under the partially closed conditions via heating;

b) Oxidizing substances and drugs, which cause strong exothermal reaction in case of contact with other inflammable substances;

c) Extremely inflammable substances and drugs, which have low inflammation and boiling points. Inflame at the contact with air at room temperature and normal atmospheric pressure;

d) Substances and drugs which damage the live tissues when contacting them;

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36 Tax Code of Georgia, Article 289 (In Georgian).

37 *Giuashvili N., Dolidze A., Zeikidze L., Legashvili I., Rukhaia K., Karchava J., Gvinefadze M., Chankseliani A., Tsomaia I.,* Chemical profile of Georgia, Tb., 2009, 11 (In Georgian).

38 Convention on the Procedure on the Preliminarily Justified Consent about the International Trade with Certain Hazardous Chemical Substances and Pesticides, 10 September 1998, Rotterdam Convention, Article 1 (In Georgian).

e) Toxic substances and drugs, which cause death, acute or chronic poisoning in case of their entry into the body;

f) Irritating substances and drugs, which cause physical irritation and inflammatory processes in case of their entry into the body;

g) Allergic substances and drugs, which cause hypersensitivity (allergic reaction) in case of their entry into the body;

h) Carcinogenic substances and drugs which cause or contribute to the development of cancer diseases in case of their entry into the body;

i) Mutagenic substances and drugs, which cause or contribute to the destroy of genetic system in case of their entry into the body;

j) Teratogen substances and drugs, which cause or contribute to the damage of process of embryo development and defects in case of their entry into the body;;

k) Gonadotropic substances and drugs, which cause or contribute to the destroy of function of genital glands in case of their entry into the body;

l) Embryo-tropic substances and drugs, which cause development disorders in the embryo in case of their entry into the body;

Easily inflammable substances and drugs also belong to the poisonous and chemical substances[39], namely:

a) Substances and drugs, which are heated and inflamed at the contact with air at the room temperature in the absence of other sources of energy;

b) Solid substances and drugs, which inflame at the contact with thermal source for short period and continue burning after removing the source;

c) Liquid substances and drugs, which have low inflammation point;

d) Substances and drugs, which emit easily inflammable gases in the hazardous volumes at the contact with water or humid air;

Physical or legal persons involved in the import or export of hazardous chemical substances for the receipt of preliminarily justified consent shall apply to the Ministry of Labour, Health and Social Affairs of Georgia.[40]

Preliminarily justified consent is a principle, according to which it is not allowed in international trade to bring into the country prohibited or strictly restricted pesticides without the relevant agreement or avoiding the decision of the registration body, with the violation of convention (hereinafter referred to as convention) on the procedure for the preliminarily justified consent about the international trade with certain hazardous chemical substances and pesticides.[41] The essence of the preliminarily justified consent procedure is preliminarily clarifying the import regime of import of the substances to the country of freight destination by the exporters of especially hazardous chemical substances. Convention considers regular provision of information to the convention member countries on the import regime for the substances regulated by the convention; such information is provided by the convention

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39 *Giuashvili N., Dolidze A., Zeikidze L., Legashvili I., Rukhaia K., Karchava J., Gvinefadze M., Chankseliani A., Tsomaia I.,* Chemical Profile of Georgia, Tb., 2009, 11 (In Georgian).

40 Convention on the Procedure on the Preliminarily Justified Consent about the International Trade with Certain Hazardous Chemical Substances and Pesticides, 10 September 1998, Rotterdam Convention, Article 1 (In Georgian).

41 Ibid, Article 1.

secretariat. Convention member countries are liable not to allow the export of substances regulated by the convention to the countries, who were informed on the prohibition of the import of the substances by the secretariat. Moreover, in the event of export of the substances, which are not indicated in the annex of the convention, but utilisation or import of which to the specific country is prohibited or restricted, the country is liable to itself clarify the import regime in the recipient country and in case of prohibition of the import by the recipient country must not allow export of the substances from its territory.[42]

When the imported hazardous chemical substance is not included in the single state registry, the producer of the substance shall apply to the Ministry of Labour, Health and Social Affairs of Georgia to receive the report from the State expertise and register hazardous chemical substance.[43]

Registration of hazardous chemical substance considers inclusion of the substance into the single state registry of hazardous chemical substances. The Ministry of Labour, Health and Social Affairs of Georgia is responsible to register hazardous chemical substance.[44]

The state expertise of hazardous chemical substance determines the following: nature and level of impact of the hazardous chemical substance on the health of human being and environment; sufficiency and validity of recommended safety measures in the process of substance utilisation. In case of irrelevance of documents submitted for the state expertise and registration by the substance creator the Ministry of Labour, Health and Social Affairs of Georgia has right request the substance creator to carry out additional research, provide additional data and documents about the substance.[45]

Positive report issued by the State expertise on the hazardous substance is the basis for substance registration and following the above procedure the substance is covered under the import or export regime.[46]

In case of negative report issued by the State expertise, the Ministry of Labour, Health and Social Affairs of Georgia makes decision on the state testing of the substance. The state testing is carried out within one month period after the decision making.

Scientific or other organisation of the relevant profile carries out state testing of the hazardous chemical substance, based on the agreement at the cost of the state or substance creator.

The relevant report and conclusion is prepared based on the results of the state testing.

The rules and procedures for the implementation of state expertise and state testing of the hazardous chemical substance is defined under the statutes,[47] which is developed and approved by the Ministry of Labour, Health and Social Affairs of Georgia in agreement with the competent state bodies.

Hence, the Georgian legislation is familiar with only the notion of chemical substances and determines their features and categories via the special registry. However, there is no separate list for poisonous and toxic substances. The Georgian legislation does not define these two notions and they are applied only in the article 214 of CCG. The article 214 of CCG is blanket; however there is no special norm for these two notions, which could be used for its definition. Therefore, it is necessary to consider

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42 Law of Georgia on "Basis for Issue of Licenses and Permits for Entrepreneurial Activities", Article 4 (In Georgian).

43 See: Order of the Minister of Labour, Health and Social Affairs of Georgia No 82/n on the rules and procedures for the state expertise and state testing of hazardous chemical substances, Article 6 (In Georgian).

44 Ibid, Article 5.

45 Ibid, Article 4.

46 Law of Georgia on "Basis for Issue of Licenses and Permits for Entrepreneurial Activities", Article 5.

47 Ibid, Article 9.

the substances of these two categories and their sorting under the special norms, or their removal from the composition of CCG article.

On 16 December 2006 G.K. and J.A. went to Sarpi checkpoint; they were planning to transport 10 kilograms and 400 grams of poisonous substance – metal mercury to the republic of Turkey by the "Opel Vectra" made car. However, they were arrested by the employees of military police. On 04 July 2007 the accused persons were judged in accordance with the section 4, article 214, 19.[48]

On 09 July 2009 the persons crossed the Georgia-Azerbaijan economic border at the Lagodekhi checkpoint by the "Golf" made car and transported poisonous and toxic two-valency mercury. The employees of the Border police, Ministry of Internal Affairs arrested them. They were tried in accordance with the sub-paragraph "d", section 5, article 214 of CCG.[49]

3.3. Separation of Administrative and Criminal Responsibility for Bringing into or Taking out Mass Destruction Weapon Materials or Raw Materials with the Violation of Rules

The nuclear materials, radioactive materials, radioactive wastes and minerals, fossils using of which it is practically possible to produce nuclear materials, as well as any item, which are produced from nuclear materials or contain nuclear materials, as composing part, and nuclear technologies and know-how are considered as the materials of mass destruction weapons.[50]

The emergency situation is announced at the border checkpoints, airports, ports and sea area of Georgia in case of detection of radioactive substances; the competent bodies provide reaction to the above.

Border checkpoint is the section of the highway or the road, part of the railway station, port, airport, airdrome territory, allowed for the international traffic, where the border control related to the crossing of the border is carried out.[51]

Discovery of nuclear and radioactive substances is related to the risk; this procedure may cause the threat for the persons close to the territory; for the above reason the area – temporary station – is specially allocated on the border checkpoint, in the zone of customs control, at the airports and ports, where it is possible to safely place the goods, luggage or vehicles transporting or containing goods subject to radioactive control until the further isolation of goods and vehicles or carrying out otherrelevant measures envisaged by the legislation. The location of temporary station is determined by the authorised body of the Ministry of Internal Affairs of Georgia; the above issue must be agreed with the Ministry of Energy and Natural Resources of Georgia, namely with the department of Nuclear

48 See <http://www.supremecourt.ge/files/upload-file/pdf/sisxli-2008-3-uni.pdf>, [01.05.2014].

49 See <http://www.heretifm.com/?2/3576/&fl=Y2FsZW5kYXIuMjAxMy4wNi4z> , [28.04.2014].

50 Resolution of the Parliament of Georgia on the transit and import of wastes on the territory of Georgia, Article 2; In addition Resolution of the Government of Georgia No 397, dated 24 December, 2010 on the approval of common practice for the joint actions in the event of alarms on the detection of nuclear and radioactive substances at the border checkpoints located in the airports, ports and sea area, Article 2 (In Georgian).

51 Law of Georgia on the "State Border of Georgia", Article 2. In addition Resolution of the Government of Georgia No 397, dated 24 December, 2010 on the approval of common practice for the joint actions in the event of alarms on the detection of nuclear and radioactive substances at the border checkpoints located in the airports, ports and sea area, Article 2 (In Georgian).

and Radioactive Security and legal entity under the public law, Revenue service under the Ministry of Finance of Georgia.[52]

In order to eradicate the illegal transportation of mass destruction weapon materials to and out of Georgia the groups on duty are standing at the border checkpoints of the country; these are representatives of authorised body of the Ministry of Internal Affairs on duty, and there are representatives of tax body, legal entity under the public law, Revenue Service, the Ministry of Finance of Georgia standing at the customs checkpoints; they are trained and equipped with the individual radiation pagers and manual radiation detectors, as well as with the detector of radioactive isotopes, which is portable device. The above device is used for the search and identification of radionuclide, identification of gamma and neutron radiation and conducting the radiation expertise.[53] They are also equipped with x-ray, which emits short electric-magnetic waves, which makes it possible to x-ray the opaque items. Roentgen is the measurement unit used for the measurement of the dose of ionising radiation having no electric charge.

The tax body is authorised to check vehicle, physical person, his/her luggage, hand-luggage, goods and accompanying documentation, such as customs declaration, transportation bill, invoice, permission certificate at the customs control zone considered under the tax code of Georgia. Representatives of tax authority are also authorised to open the vehicle and check the goods loaded using the relevant devices; implement customs control measures considered under the tax code of Georgia; If needed invite relevant specialists for checking of physical person, his/her luggage, hand-luggage, vehicles or goods; call the examination group or/and support personnel. With the purpose to determine the specific activity value of the declared goods subject to the radioactive control the tax body is authorised during the examination to request involvement of examination group. In case of goods' transportation, the examination procedure may be finished only after confirming that the radiation level identified during the examination does not exceed the norms defined under the Georgian legislation.

The relevant sub-division of Information –analytical department, Ministry of Internal Affairs shall provide the data on the discovery and arrest of the nuclear and radioactive substances to the USA Department of Energy during 48 hours after receipts of such information.[54]

If the level of activity of nuclear and radioactive substance exceeds the determined threshold,[55] then the operator of central alarm station calls the examination group, which conducts second examination of radioactive material, in order to ensure the in-depth checking, definition of classification of the discovered material and its localisation. During the second examination, the suspicious source is scanned. In the event of summoning, the examination group shall ensure the relevant response, including stopping the vehicle, goods or persons, which caused the activation of alarm system, with the help of relevant bodies.[56]

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52 Law of Georgia on the "State Border of Georgia", Article 2 (In Georgian).

53 Order of the Minister of Labour, Health and Social Affairs of Georgia No 82/n on the rules and procedures for the state expertise and state testing of hazardous chemical substances, Article 4 (In Georgian).

54 Resolution of the Government of Georgia No 397, dated 24 December, 2010 on the approval of common practice for the joint actions in the event of alarms on the detection of nuclear and radioactive substances at the border checkpoints located in the airports, ports and sea area, Article 4 (In Georgian).

55 RUN-200, Order of the Minister of Labour, Health and Social Affairs of Georgia No 132/n, dated 26 March 2001 on the approval of radiation safety norms on the territory of Georgia (In Georgian).

56 Resolution of the Government of Georgia No. 397, dated 24 December, 2010 on the approval of common practice for the joint actions in the event of alarms on the detection of nuclear and radioactive substances at the border checkpoints located in the airports, ports and sea area, Article 8 (In Georgian).

If in the case of identification of group 1 radioactive substances the activity of radionuclide exceeds the limits determined under the radiation safety norms, the goods' transporter shall provide the examination group, authorised representatives of the tax body with the document confirming the legality of transportation of the substance or the goods containing such substance. In the event of presenting such documents the examination group cancels the alarm and informs the operator of the central alarm station about the fact.

There are double standards established for those leaving the territory of Georgia and those entering Georgia.

In the event of identification of group II radioactive substances in the process of examination of the physical person, when the luggage, hand-luggage, goods or the vehicles of the physical person do not contain such substance and the radiation background is caused by the medical treatment of the person, the person is liable to provide the examination group with the document issued by the medical institution, confirming that the person has undergone the medical treatment using the radioactive substances. Presenting the medical document is mandatory for the citizens of Georgia in case of leaving Georgia, and for the citizens of foreign country in the event of entering Georgia. If the person does not hold above mentioned medical document, then the identification data of the person, travel route and final destination must be registered in the relevant data base.[57]

Above discussed provision is obviously discriminative, as the citizen of Georgia in the event of leaving Georgia has to present medical document, and does not have to present such document in the event of entering Georgia. As for the foreigner, he/she does not have to present such document in the event of leaving Georgia and has to present the document in case of entering the country.

There is one precedent of bringing across the Georgian borders the materials necessary for the mass destruction weapons, avoiding customs. Namely in January, 2006 O. Kh. was arrested on the fact of bringing into the country 100 grams of 90% enriched uranium.[58] As for the bringing across the Georgian borders the mass destruction weapons, avoiding customs there are no such facts reported in the Georgian practice.

3.4. Separation of Administrative and Criminal Responsibility for Bringing into or Taking out Explosive Substances with the Violation of Rules

The explosive substance is "such compound, which is characterised with the quickly spreading chemical transformation under the certain impact, when the large kinetic energy, gas and temperature is emitted, using of which is possible for the implementation of mechanical motor works or for destroying of various items".[59]

The explosive substances are substances and drugs in solid, liquid, paste or soft condition, which cause exothermal reaction without the atmospheric oxygen and are quickly emitting gases, are detonating, are easily inflammable or exploded under the partially closed conditions via their heating.[60]

The explosive substances represent the explosive products, which are widely known as "plastic

[57] RUN-200, Order of the Minister of Labour, Health and Social Affairs of Georgia No 132/n, dated 26 March 2001 on the approval of radiation safety norms on the territory of Georgia (In Georgian).

[58] See, example related to the mentioned above. Page 281

[59] *Lekveishvili M., Todua N., Gvenetadze N., Mamulashvili G.,* Comments to the Private Section of Criminal Law Code of Georgia, Vol. 1, Tb., 2014, 654 (In Georgian).

[60] Law of Georgia on "Weapons", Article 2 (In Georgian).

explosive substances",[61] including the explosive substances in the form of springy or elastic sheets.[62]

The explosive substances are chemical compounds or mixtures, which under the external impact, including mechanical effect – blow, pricking; thermal effect – spark, flame, heating, discharge, undergo detonation with the generation of gases of high temperature and pressure.[63]

The explosive substances are divided into three groups: initiating, brisant and rocket.

The initiating explosive substances are characterised with high sensitivity on external impact. Above mentioned substances are mainly used in detonators as their explosion causes detonation of brisant substances which are in contact with initiating substances.

Brisant explosive substances are characterised with the breaking of the items, such as metal, concrete, which are in contact with the brisant substances. They are less sensitive to the external impact compared with the initiating substances.

In terms of strength the brisant substances are divided into three groups: high, medium and law strength explosive substances.

Rocket explosive substances are the chemical compounds or mixtures, the main form of transformation of which is burning. Gunpowder belongs to the above mentioned substances.

It is necessary to mark explosive substances in the State.[64]

For ensuring safe treatment of hazardous chemical substances and retaining their useful features, creator or producer of the substance is liable to determine the form of packaging, marking and labelling (technical means) for the substance and make relevant signage on the substance.[65]

Requirements for the mark and label contents are determined by the Ministry of Health Care of Georgia in line with the accepted international standards.[66]

The state takes measures for prohibition and avoiding the production of unmarked explosive substances on the territory of the country. The whole stock of explosive substances, which is not in the possession of authorised bodies implementing military or police functions must be destroyed or marked.[67]

Article 214 of CCG indicates on bringing into and taking out of the country explosive substances with the violation of rules. In accordance with the rules established by the Ministry of Health care, it is required to mark and label explosive substances.[68] Labelling considers putting the special sign, for example: there is no sign in written or image form on the truck, transporting hazardous goods, indicating that there are hazardous goods in the truck. The person may have all documents in order in the process of entering the customs checkpoint; however, the goods are not labelled. Section 4, article 214 of CCG does not indicate the crime techniques, which are listed in the first section of the article. Hence the action will be considered as violation of customs rules and person will be assigned criminal law responsibility.

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61 Convention on Marking of Plastic Explosive Substances with the Purpose of their Revealing, Article 1 (In Georgian).

62 *Khutsishvili G.,* Military Engineering, Tb., 2004, 121 (In Georgian).

63 Ibid, 123.

64 Convention on Marking of Plastic Explosive Substances with the Purpose of their Revealing, Article 3 (In Georgian).

65 Law of Georgia on "Hazardous Chemical Substances", Article 24 (In Georgian).

66 Ibid, Article 25.

67 Convention on marking of plastic explosive substances with the purpose of their revealing, Article 4 (In Georgian).

68 *Giuashvili N., Dolidze A., Zeikidze L., Legashvili I., Rukhaia K., Karchava J., Gvinefadze M., Chankseliani A., Tsomaia I.,* Chemical Profile of Georgia, Tb., 2009, 13 (In Georgian).

The above shall not be considered as reasonable measure. It is necessary to add to the notes to article 214 of CCG that if the person presents all required documentation at the customs and the goods are not brought into or taken out of the country avoiding the customs control or secretly, the person shall be released from the responsibility. As a result the person will be punished only in line with the administrative rules.[69]

In the period between 2007 and 2014 years, there are no reported court cases on the import of explosive substances to Georgia avoiding the customs control.

3.5. Separation of Administrative and Criminal Responsibility for Bringing into or Taking out Firearms with the Violation of Rules

It is forbidden to bring across (bring into or take out of) the customs border of Georgia firearms and ammunition without relevant permission.

Weapon is a device or item, which based on its construction, is designed for causing damage or liquidating the live objects, or for signalling purposes.[70]

The firearm is a weapon, where the shell or shot shell start directive movement via the energy emitted as a result of burning of the gunpowder or other types of charge and which are aimed at mechanical damaging or liquidating of objects from the distance.[71]

The main elements of firearm are: barrel, drum, lock, frame and barrel box.[72]

Section 4, article 214 of CCG indicates in a general manner about the firearms. There are several types of firearms distinguished: civil, regular service and military fire arms.[73]

The list of officials with the right to carry regular service firearms is approved by the Government of Georgia based on the joint recommendations provided by the Ministry of Defence of Georgia and Ministry of Internal Affairs of Georgia.

Export, import, re-export and transit of weapons, weapon materials, military machinery, technical documentation as well as works and services related to the production of weapons is implemented based on the permission issued by the Ministry of Justice of Georgia.[74]

In order to receive the permission the following documents shall be submitted to the Ministry of Justice: a) export or import agreement; b) certificate of origin of goods; c) copy of signed contract (agreement) or formally drafted minutes describing the intentions; d) permission on export, import, re-export and transit of weapons,[75] issued by the authorised state body of the country in which the party to the contract (agreement) or formally drafted minutes on intentions is registered; e) certificate on final utilisation, if the permission seeker is not the consumer.

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69 Tax Code of Georgia, article 289 (In Georgian).

70 *Dzabunidze G.,* On Weapons, Tb., 2004, 34 (In Georgian).

71 Law of Georgia On Weapons, Article 2 (In Georgian).

72 *Dzabunidze G.,* On Weapons, Tb., 2004, 38 (In Georgian).

73 *Murakhovski V.I., Fedossev S.I.,* Infantry Weapons, MSK., 1992, 34 (In Russian).

74 Resolution of the President of Georgia No 408, dated 22 September 2002 on "Some measures for the solution of issues related to the export, import, re-export and transit of double purpose products subject to the export control", article 1; In addition, the resolution of the Government of Georgia No 451, dated 01 December 2011 on Approval of permit for and rules for permit issue for the export, import, re-export and transit of double purpose products, Article 2 (In Georgian).

75 Law of Georgia on "Licence and Permit Fees", Article 5 (In Georgian).

The Ministry of Justice of Georgia issues such permission based on the recommendation of inter-disciplinary permanent commission on the military-technical issues, under the National Security Council of Georgia; the Ministry submits to the commission the copies of above listed documents. Permission on export, import, re-export and transit of hunting smoothbore, sport, received as a prise, gas, shot gun, collection weapons and materials required for them does not require recommendation from the inter-disciplinary permanent commission on the military-technical issues, under the National Security Council of Georgia. The permission holder presents the permission and originals of agreement to the customs bodies of Georgia.[76]

Bringing into and taking out of Georgia (except for export-import, transit and re-export) of single samples of weapons by the physical persons is carried out in line with the rules envisaged under the Georgian legislation, based on the permission issued by the Ministry of Internal Affairs of Georgia.[77]

Bringing into and taking out of Georgia of weapons and weapon materials by the representatives of foreign states and international organisations, by the persons accompanying the high officials, important persons visiting Georgia provided in the registry drafted by the Special Service of State Security of Georgia, is implemented based on the permission issued by the Special Service of State Security of Georgia; the above information is provided to the Ministry of Foreign Affairs of Georgia, Ministry of Internal Affairs of Georgia and the State Department of State Border Defence.

Citizen of foreign country has right to purchase weapon in Georgia with the permission issued by the Ministry of Internal Affairs of Georgia based on the recommendation provided by the relevant country.[78]

Citizen of foreign country has right to bring into Georgia hunting and sport weapons, if relevant contract (agreement) on the hunting or invitation to the sport activity, and the permission issued by the Ministry of Internal Affairs is in place. For the exposition of such weapons the permission issued by the Ministry of Justice of Georgia is required. The weapon brought into Georgia shall be taken out of the country within the period considered in the relevant contract (agreement) or invitation. In case of violation of terms the weapons are confiscated temporarily until the solution of the issue.[79]

The persons holding the permit on carrying the firearm, have right to carry the arms across the border only with the permission issued by the state, where the firearm is being taken. As there are two checkpoints at the border, the firearms shall not be confiscated at the checkpoint from which the person leaves the country. Despite the above, in practice – when the person leaves the state border of Georgia, and he/she does not hold permission from the relevant state, the firearm is confiscated at the border checkpoint of Georgia. The above practice is not proper, if the person has permit for carrying the firearms in the state, as taking out the firearms via the border checkpoint of the state is not violation of customs rules of the State. However, this is violation of legislation of the country, where the firearm is taken without permission.[80] Accordingly, confiscation of firearm at the border checkpoint is illegal. In

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76 Law of Georgia on "Basis for Issue of Licenses and Permits for Entrepreneurial Activities", Article 6 (In Georgian).

77 Ibid, Article 19.

78 Law of Georgia on Weapons, Article 26 (In Georgian).

79 *Dzabunidze G.,* On Weapons, Tb., 2004, 17 (In Georgian).

80 *Juk A. B.,* Rifles and Automatic Guns, MSK., 1088, 32 (In Georgian).

order to avoid the above it is necessary to adopt normative act, according to which the taking firearms to other country will be prohibited, when the person having right to carry firearm in Georgia, does not have permission to bring the firearm to another country, namely the country he is going to.

The cases of bringing across the Georgian border the firearms and mass destruction weapons with the violation of customs rules are provided together in the section 4, article 214 of CCG. It turns out that bringing into and taking out of country one pistol contains the same threat for the public security as the mass destruction weapons, for example: on 03 September 2013 on the territory of border checkpoint "Sarpi" during the customs examination of citizen of Turkey, Sh.P. the firearm *SARSILMAZ T1102-11R01398* was discovered with one magazine and 25 bullets. Due to the above fact Sh.P. was accused under the section 4, article 214 of CCG.[81]

It is desirable to make changes to the norm and remove the firearm from the article, as the norm covers items, which create extraordinary threat to the public security. Bringing into and taking out of Georgian border the firearms with the violation of customs rules shall be moved to the chapter – Crime against the public security and order. Article 262 of CCG separately defines the responsibility for illegal bringing into and taking out of Georgia narcotic means. For example: On 19 April 2014, during the examination of luggage held by the Russian citizen M.A. coming from Turkey, at the customs checkpoint "Vale" the following drugs containing narcotic and psychotropic substances were detected: CETACODEINE - 52 pills, PHENAZEPAM - 9 pills, LEXOTAN – 5 pills. On 18 April 2014, at the border checkpoint "Tsiteli Khidi" during the examination of citizen of Azerbaijan Sh. S. the drug containing narcotic substances was discovered: MABRON RETARD – 20 pills. The materials related to the revealed crimes were forwarded to the Samtkhe-Javakheti Main Regional Division, Ministry of Internal Affairs of Georgia.[82] The persons for the above facts will be sentenced in accordance with the article 262 of CCG.

The similar rules shall cover the cases related to the firearms. According to the present law, in case of bringing the firearm the person is sentenced in accordance with the section 4, article 214 of CCG, which covers the sanction between five to eight years of imprisonment. In case of bringing into the country the mass destruction weapons the person is again punished under the article considering the imprisonment for the period of 5 to 8 years, which is not reasonable. Bringing into the country the firearms cannot create the same threat to the public security as illegal bringing of the mass destruction weapons across the border of Georgia. Therefore definition of bringing the firearms shall be made in the chapter Crime against the public security and order, Article 262 of CCG; after moving this crime to the discussed chapter the sanctions for committing the crime shall be significantly reduced.

81 See <http://rs.ge/Default.aspx?sec_id=4845&lang=1&newsid=2678>, [27.04.2014].

82 See <http://rs.ge/Default.aspx?sec_id=4845&lang=1&newsid=2962>, [28.04.2014].

3.6. Separation of Administrative and Criminal Responsibility for Bringing into or Taking out Weapons and Strategically Important Raw Materials with the Violation of Rules

Bringing into and taking out the customs border the weapons is subject to state control. For the physical or legal entity to bring into and take out of the territory of Georgia the weapons, the license or special permission is required.

Permission is right to implement the action related to the object for the definite or indefinite term.[83] The person must have one type license – general license or special license for repairs on the specific type of weapons in order to bring into or take out of the customs border of Georgia the weapons,[84] license for manufacturing, production of military weapons,[85] general license for repairs to the military weapons, general license for trade with military weapons, license for trading with the specific type of weapons. The physical person must hold one of the following types of permissions: permission with the right on purchase, storing and carrying the self-defence short-barrel arm or sport-type short screw-barrel firearm, self-defence gas weapon, hunting firearm, sport-type long barrel firearm or sport-type short barrel firearm.[86] The person, who according to the legislation of Georgia, following the expiry of official authorities retains right to carry the firearm shall hold the permission to purchase civil arms; the citizen of foreign country must hold permission to take out of Georgia the civil firearm, gas air weapon, hunting or sport firearm purchased in Georgia;[87] The other types of permissions are: permission on export, import, re-export, transit, internal processing, external processing and bringing into or taking out of country on a temporary basis; permission on collecting and exposing the firearms and etc.

For the implementation of export and import control the Government of Georgia approves the list of strategic purpose military products and services subject to the export and import control based on the recommendation provided by the Permanent Commission on Technical Military Issues under the Ministry of Defence of Georgia.

Export, import, re-export, transit, internal processing, external processing and bringing into or taking out of the country on a temporary basis of the weapons shall be implemented on the basis of permission, issued by the Ministry of Defence of Georgia.[88] Permission for the weapons not considered for the military purposes, which can be, however, used for the production of nuclear, chemical and other mass destruction weapons or the means for their transportation is issued by the Ministry of Economy and Sustainable Development of Georgia or by the legal entity under the public law, Revenue service under the Ministry of Finance of Georgia. For this type of weapons the Government of Georgia approves the

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83 Law of Georgia on "Licence and Permits", Article 19 (In Georgian).

84 Resolution of the President of Georgia No 408, dated 22 September 2002 on "Some measures for the solution of issues related to the export, import, re-export and transit of double purpose products subject to the export control", Article 6 (In Georgian).

85 Resolution of the Government of Georgia No 451, dated 01 December 2011 on Approval of permit for and rules for permit issue for the export, import, re-export and transit of double purpose products, Article 2 (In Georgian).

86 Law of Georgia on Weapons, Article 19 (In Georgian).

87 Ibid, Article 19.

88 Law of Georgia on "Export and Import Control Over the Arms, Military Machinery and Double Purpose Products", Article 8 (In Georgian).

list based on the recommendation provided by the Ministry of Economy and Sustainable Development; the list is agreed with the Permanent Commission on Military Technical Issues under the Ministry of Defence of Georgia.[89]

It is important that the legislator separates the weapons and materials in the process of definition of the weapons.[90] It has to be mentioned that the statutes of the Ministry of Defence mentions separately the arms and materials,[91] meaning that bringing into and taking out of the customs border of Georgia the weapon materials does not generate the basis for the article 214 of CCG, as the weapon material is not indicated in the list of items provided by the above article.

There are cases in practice, when bringing across the border the weapon materials is punished under the section 4, article 214 of CCG. For example: on 06 February 2014, at the checkpoint Sarpi in the process of examination of the car owned by the citizen of Turkey S.I. 21 bullets were detected. For the above fact the person was tried in accordance with the section 4, article 214 of CCG.[92]

The disposition part of section 4, article 214 of CCG does not indicate to the punishment for the mentioned above weapon materials. As based on the present edition the person bringing across the border the weapon materials shall be punished in line with the section 2, article 236 of CCG – for carrying the weapon materials.

Article 236 of CCG considers punishment for purchase, storing, carrying, transportation, sending or selling of firearms and weapon materials. Carrying even one bullet generates the composition for the crime considered under the article 236. The above indicates to the will of the legislator - carrying the weapon materials and firearms create equal threat for the public security. Due to the above it becomes clear that there is requirement to mention the punishment for carrying the weapon materials in the disposition of the section 4, article 214 of CCG. As in line with the present edition, the person bringing across the border the weapon materials shall be punished in line with the section 2, article 236 of CCG – for carrying the weapon materials.

4. Conclusion

The ideas provided in the work can be presented in the form of following theses:

In terms of items included in the free civil turnover we have mentioned that the Tax Code covers several regimes of commodity transactions. In particular these regimes are: import, export, transit, warehouse, re-export, internal processing, bringing into the country on a temporary basis, free zone and free warehouse. Among the above transactions, the economic interests of Georgia are damaged only in case of import, re-export and temporary bringing into the country via the economic border of Georgia violating the customs rules. Therefore in the event of implementation of commodity transactions of export, transit, internal processing, external processing, free zone and free warehouse the person shall be punished under the administrative rules. This argument is reinforced with the fact that the section 2, article 7 of CCG does not consider as crime the action with the marginal significance of the caused

[89] Law of Georgia on "Export and Import Control Over the Arms, Military Machinery and Double Purpose Products", Article 6 (In Georgian).

[90] Law of Georgia on Weapons, Article 11 (In Georgian).

[91] Statutes of the Ministry of Defence, Georgia, Article 2 (In Georgian).

[92] See <http://rs.ge/Default.aspx?sec_id=4845&lang=1&newsid=2910>, [28.04.2014].

damage. Article 214 of CCG requires changes, in order to specify the commodity transactions for which the person is punished under the criminal law rules. As a result, in the event of import, re-export and bringing into the country on a temporary basis across the economic border of Georgia of the goods with the violation of customs rules the person will be punished under the criminal law rules; in the event of other commodity transactions - under the tax code of Georgia.

With regard to the items temporarily included in the single list of cultural heritage objects, we reviewed the case when the person may be tried and then it may turn out that there was no crime composition in place. The way for the problem solution was offered; in particular the relevant changes shall be made to the section 3, article 214 of CCG. As a result of such changes, the administrative responsibility will be assigned for the offences related to the items temporarily included in the list of cultural heritage objects.

In terms of precious metals we determined that the paragraph "Bringing into and taking out of jewellery items produced from the precious metals or precious metal scrap with the violation of rules" shall be removed from the section 3, article 214 of CCG as since 01 January 2005 the registration of above mentioned items and scrap has not been carried out.

Bringing into Georgia the items removed from the free civil turnover, such as poisonous, toxic, radioactive, explosive substances, weapons, explosive devices, firearms, material which can be used for the production of mass destruction weapons, strategically significant raw materials, with the violation of defined rules creates threat for the public security; therefore bringing into the country of the above mentioned items is subject to strict control. The rules for their bringing into and taking out of the border are defined by the normative acts; however, some of them, such as normative act "on the State control, analysis and marking of precious metals and precious stones" are known as void.[93] Moreover, the definition of poisonous and toxic substance is not provided in any normative act; as for the mass destruction weapons – there is no established position on their definition; such definition is not also provided in the international law, creating the risk for incorrect use of the term. The present article discusses in detail the meaning of substances removed from the free civil turnover, as provided in the article 214; which of them can create threat and which category substances and materials must be considered in the disposition of article 214 of CCG?

Moreover, in case of bringing into and taking out of Georgia the radiation substances of group 2, we have discussed the issues when the citizen of Georgia and citizen of foreign country are placed under unequal conditions.

We have determined that labelling of explosive substances is obligatory, therefore in line with the valid law, in the absence of labelling the person is punished under the criminal law rules, which shall not be considered as reasonable. If person presents all required documents to the customs and the goods are not transported avoiding the customs control or transported secretly the person shall be punished administratively.

The shortcoming of the legislation was stated – weapon material is not part of notion of the arms;[94] therefore, in case of bringing into Georgia the weapon materials the person is punished under the article 236 of CCG, which clearly contradicts the will of the legislator.

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93 Law of Georgia on the abolishment of law "State Control, Analysis and Marking of Precious Metals and Precious Stones", Article 1 (In Georgian).

94 Law of Georgia on "Export and import control over the arms, military machinery and double purpose products", Article 1 (In Georgian).

Moreover, for bringing into and taking out of the country the cultural heritage, we have determined that the person bringing into the country more than 100 years' old one coin is punished under the criminal law rules despite the value of the coin. However in the event of bringing into the country the movable items the threshold value is defined; in case of bringing across the border the minimal value is determined at GEL 5,000; hence in the event of bringing into and taking out of the country the cultural heritage objects it is required to have the similar threshold to the one established for sections 1 and 2, article 214 of CCG.

And finally, we have discussed the issue, when bringing into and taking out of the country of only one pistol or one bullet contains the same threat for the public security as mass destruction weapons according to the section 4, article 214 of CCG. The cases of bringing across the border of Georgia the firearms and mass destruction weapons are considered together; as for the bringing into the country the weapon materials, it is not considered under article 214 of CCG. For the solution of problem, it was suggested to make changes to the mentioned norm and remove "firearm"; include the facts of bringing the firearms and weapon materials in the separate chapter on the public security.

Temur Tskitishvili*

Protecting Legal Good as the basis for Legitimization of Penalizing of Wrongdoings Involving Threat

1. Introduction

In criminal law literature of Georgia, the concept of "an object of crime" is usually used instead of legal good; "object of crime" implies "social relations", which is divided into four types. The present paper provides justification as to why the concept of Legal goods should be given priority over the "object of crime".

In German Criminal Law sciences there are varying views about legal good. It is defined as "the situation that can be infringed upon and protected", "the good,which is worth protecting, at the very least", "the interests protected under the criminal law", "personified ideal value", "abstract value of social order protected by law",[1] "ideal social value"[2], etc. Despite the diversity of views aboutl egal good, there is almost unanimous view that the constitution ofan action should be defined according to legal good,[3] because the constitution of each action serves the purpose of protecting specific legal good. The Paper provides the review of the views of individual authors about legal good and the formulation of the concept of legal good, the classification of legal good, the issue of inter relationship between legal good and value.

In the given Paper, legal good is reviewed as the basis for legitimization of penalizing wrongdoings involving threat. It criticizes the view according to which the provisions that set forth the penalization of wrongdoings involving threat do not imply legal good, since such resolution of the matter challenges the justification for having a relevant provision.

2. The Doctrine of Legal Good

The issue of having legal good was first brought up in the 19th century. Prior to that period crime was considered as the infringement of right.[4] In his "Theory on the Violation of a Right" (Rechtsverletzungstheorie), *Feuerbach,* a well-known German scientist defines crime as the encroachment on freedom ensured by the state, safeguarded by criminal law, and as an action directed against the rights of others, punishable by the criminal law. The goal of the state is to protect individual rights and, respectively, the infringement of such rights is a reason for criminalization.[5] Wrongdoings directed against morals and morality do not imply the infringement of individual right and therefore, in *Feuerbach's* view, they cannot be assessed as crime. Such wrongdoings were to be punished as police contravention

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1 *Roxin C*., Strafrecht, AT, Band I, 4. Aufl., München, 2006, 14.

2 *Wessels/Beulke*, Strafrecht, AT, Die Straftat und ihre Aufbau, 40. Auflage, Heidelberg, 2010, 3, § 1, 8.

3 *Roxin C*., Strafrecht, AT, Band I, 4. Aufl., München, 2006,14.

4 *Haft F.,* Strafrecht, AT, 8. Aufl., München, 1998, 73.

5 *Swoboda S*., Die Lehre Rechtsgut und ihre Alternativen, ZStW 2010, 26.

(Polizeiübertretungen)[6]

The Criminal Code of Georgia envisages a crime such as "crime against public morality" (cruel treatment of an animal, provision of a space for prostitution, disrespect towards a deceasedperson). According to Feuerbach's definition of a crime the above-mentioned infringement cannot be regarded a crime since, as the title of an offence indicates, goods to be protected against infringement is public morals and this, naturally, is not individual goods. This is about society and not an individual, as of a member of the society. In addition to the "crime directed against public morals", the Criminal Code also envisages other types of crimes that are also not directed against individual legal goods. For example, crime against the state.

In 1830's Birnbaum developed the theoryof the protection of legal good, according to which crime infringes upon goods bestowed to humansby nature, public, and first and foremost, by positive legal provisions.[7] He divided protected goods into two categories: "natural" and "social" good. Based on two-faced division of protected legal goods, Birnbaum would classify crime into "natural" and "social" crimes that are directed against public and individuals. He did not rule out the possibility of criminalization of amoral and anti-religious act.[8]

At the end of the 19th century and beginning of the 20th century Birnbaum's theory was further developed. List defined crime as the infringement of legally protected interests.[9] List's view was based on the theory of *Rudolf Von Ihering* according to which the goal is the "creator" of every law.[10]Any legal provision has to prove its advisability for the defined subjects, the carriers of subjective interests. Among the holders of these interests, legal good, Ihering implies not only individuals, but also collectively, public, as well as the state.State and individual do not confront each other and are not alienated, but there is also such a statement: "the state itself is the unity of individuals."[11]In this case, it implies that the state is the advocate of every citizen in a state legal society, rather than that of a specific segment of the society.

According to Hassemer, legal goods are those human interests that require protection under criminal law.[12] In his view, just socially justified, respectively, non-individual meaning of interests is insufficient for legitimizing criminal law.[13]According to the same viewpoint, protection of universal legal goods under the criminal law requires that penalization of an action be based on individual interests. The criminalization of harm to environment, endangering environmentis based not on the necessity to protect environment as a public good, but the idea that healthy environment, as "the ensemble of conditions for human life" („Ensemble der menschlichen Lebensbedingungen") serves the purpose of implementation of significant interests for individual life.[14]

Hassemerbrings individual interests to the fore, as compared to public or state interests. The cornerstone of his theory is that legal goods is the very human being, human interests. In this regard

6 *Swoboda S*., Die Lehre Rechtsgut und ihre Alternativen, ZStW 2010, 26.
7 *Haft F.,* Strafrecht, AT, 8. Aufl., München, 1998, 73.
8 *Swoboda S*., Die Lehre Rechtsgut und ihre Alternativen, ZStW 2010, 27.
9 *Haft F.,* Strafrecht, AT, 8. Aufl., München, 1998, 73.
10 *Röhl K., Röhl H*., Allgemeine Rechtslehre, Ein Lehrbuch, 3. Aufl., Köln. München, 2008, 357.
11 *Swoboda S*., Die Lehre Rechtsgut und ihre Alternativen, ZStW 2010, 31.
12 *Hassemer, Neumann*., in: NK, Band 1, 2. Aufl., 2005, 107, §1. 144.
13 Ibid, 106, §1. 137.
14 Ibid, 106, §1. 135.

Georgia Criminal Code is interesting, private part of which, unlike Georgia Soviet Criminal Code of 1960, starts with the offences against human beings.With this, Georgia legislator brought human interests to the forefront. But, at the same time, it should be considered that state interests come to the fore front in some cases. This may not be apparent from private part of the Criminal Code of Georgia, but the following circumstances provide indicationof this: a person may not be required to make a heroic act and sacrifice oneself for another person, but he/she may be required to take up on threat due to profession or another factor.Whenfending off attack of an enemy at the battlefield and thereby protecting state interests, a military is not authorized to reject threat menacing the soldier personally. The same can be said about a police officer, when he/she protects order, hence, publicinterests. Police officers is not only authorized, but also required to safeguard order and engage with an offender, if necessary. Police officers and military perform imposed duties by jeopardizing their life, which, not unfrequently, ends with the loss of life. Therefore, sometimes it may even be difficult to give a decisive answer to the question as to which is higher priority: human (individual), public or state interests?

The view of *B. Zoidze* in relation to the mentioned issue is very interesting. He states that "law revolves around individual interests. This, naturally, is in my and your interests. As for our interest in general, this is also a means for demonstrating my interest. It exists independently, but exists not by itself, but for me."[15]

The term "object of crime" is still used to denote legal good in Georgia criminal law literature.[16]Different views are expressed as to what can be considered "the object of crime". Some scientists regard that it implies social relations that are affected as a result of the crime.[17]They divide "object of crime" in general, generic, variety and individual object.[18]

G. Tkesheliadzeregarded that not only social relations, but also the criminal law was part of "general object of crime".[19] In his view, material side of "the object of crime" is socialrelations, while the official one is the criminal law. When a perpetrator commits a crime,this not only harms social relations but also violates the authority and prestige of the provision.[20]

Criminal law provision is a means that can be used to protect legal good. However, it is highly debatable as to how much a criminal law provision can be declared as the good subject to protection. There is such inter relationship between the criminal law provision and legal good protected by this provision as is between the end and the means.

In *G. Nachkebia's* view, instead of the "object of crime" we should use the term "object of protection under criminal Law".[21] In his view, crime infringes upon social relations are protected by criminal

[15] *Zoidze B.,* Attempt to Understand Practical Essence of Law, Tb., 2013, 116 (In Georgian).

[16] *Tsereteli T., Tkesheliadze G.,* Theory on Crime, Tb., 1969, 138; *Surguladze L.,* Criminal Law, Crime, Tb., 1996, 81; *Khuroshvili G.,* in the book: General Part of Criminal Law, Manual, Tb., 2007, 110 (editor of the manual); *Lekveishvili M., Mamulashvili G.,* in the book: Private Part of the Criminal Law, Book 1, 5th edition, Tb., 2014, 9 (editor) (In Georgian).

[17] *Tsereteli T., Tkesheliadze G.,* Theory on Crime, Tb., 1969, 138; *Surguladze, L.,* Criminal Law, Crime, Tb., 1996, 81 (In Georgian).

[18] *Tsereteli T., Tkesheliadze G.,* Theory on Crime, Tb., 1969, 138; *Surguladze L.,* Criminal Law, Crime, Tb., 1996, 138-157; *Lekveishvili M., Mamulashvili G.,* Private Part of the Criminal Law, Book 1, Tb., 2011, 9 (In Georgian) .

[19] Ibid, 142-143.

[20] Ibid, 144-145.

[21] *Nachkhebia G.,* The Concept of an Object Subject to Protection under Criminal Law, "Justice", 1999, N 6-7, 84 (In Georgian).

law, but the concepts of "object of crime" and "an object subject to criminal law protection" are mutually exclusive, since protection of certain legal good under criminal law and its infringement are mutually exclusive.[22] The mentioned provision is interesting. Crime is really rejection of what is protected by criminal law. If criminal law protects certain legal good, crime, on the contrary, causes the infringement upon such good. Therefore, which term is correct – "object of crime " or "an object subject to protection under criminal law" depends on the position we look at the legal good: after the commissioning of the crime, or prior to its commissioning. After the commissioning of the crime we can speak about "object of crime", while prior to the crime we can speak about "an object subject to protection under criminal law."[23] But, we can speak about "an object subject to protection under criminal law" even after the commitment of crime, although in such case we may imply not specifically a legal good, but in general, since following the commissioning of crime (in a completed form) there is no longer legal good to be protected in a specific form and it has already been encroached upon, i.e., there is nothing else remaining to be protected.

In addition to the above-mentioned, we have to say that the term "object of crime" and the "an object subject to protection under criminal law" does not comprise exact (specific) content. Following the commissioning of a crime specific legal good, as well as its holder may be encroached upon. For example, in case of murder, crime may be effected in a way as to result in the infringement of legal good only, which does not always envisage the encroachment upon the holder or such good. Specifically, in case of crime against property (damaging an item – CCG Article 187).

Criminal law protects specific good (life, health, property, etc.) as well as its carrier. The protection of legal goodserves the very purpose of protection of its carrier. However, we should not equalize legal good and its carrier (the object of an action).[24] When we use the term "object of crime" it is not clear as to specifically what is implied. The mentioned term does not enable us to differentiate legal good and an object of an action. Even the more, the scientists who regard social relations to be"an object of crime" also mention that it is a set of various constituents. "One constituent is the participants of relations, and another one – the activity of participants of such relations."[25] Determined rights and duties of participants of these relations are also considered as the constituent features of social relations.[26]

Current Criminal Code of Georgia, apparently, favors the term "legal good". This is indicated by the contents of Article 28, 20, 201 of the Code. According to Article 28 (1), necessary fending off implies injuring an offender in case of illegal encroachment in order to defend one's or another person's legal good.[27] While, according to Article 31(1), "a person who inflicts harm to legal good in the conditions of justified risk for the achievement of a goal of public benefit does not act illegally."

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22 *Nachkhebia G.,* The Concept of an Object subject to Protection under Criminal Law, "Justice", 1999, N 6-7, 84 (In Georgian).

23 *Nachkhebia G.,* Introduction to General Theory of Classifying an Action as a Crime, in the Context of the System of Concepts of Criminal Law, Tb., 2000, 111-112 (In Georgian).

24 *Turava M.,* Criminal Law, General Part, Theory of Crime, Tb., 2011, 22 (In Georgian).

25 *Tsereteli T., Tkesheliadze, G*., Theory about Crime, Tb., 1969, 138 (In Georgian).

26 *Lekveishvili M.,* Object Subject to Protection under Criminal Law and its Importance for Qualification of Crimes, Criminal Investigations, Tb., 1987, 95, Publishing House (In Georgian).

27 Predecessor Soviet Criminal Code, in relation to necessary fending off, would use the terms: "state interest", "public interest."

The protection of legal good is the basis for the criminalization of an action. In this case legal good isconsideredin material sense, legal good that exists prior to a legal provision and conditions the formation of such provision. In addition to understanding material perception of legal good, there is aformal understanding as well, according to which legal good is something that emanates from the content of the provision. There is no legal good in formal sense without a legal provision.[28] Legitimacy of criminalization of an action may be determined by legal good by material and not formal sense. If we rely on a formal sense of legal good, any provision should be considered legitimate and legitimacy of a provision may never be questioned.

The value of legal goodhas a bearing on the measure of punishment. Legislator determines the measure of punishment according to the type of good infringed upon. Even the more, the more important the good to be protected, the earlier is the stage of the instance of completion of crime. For example, the fact that not only an encroacher on life, health and state interests is punishable, but also wrongdoings that endanger such goods, is due to the very importance of the goods to be protected. L. Lekveishvili rightly indicates that the recognition of violation of a social norm as a crime is determined by the value of social relations. The higher the value of social relations, the greater the grounds for regarding the violation of these relations as a crime.[29]

3. Legal Goodas Actual Situation Protected by the Provision

Binding and Welzel viewed legal good as actual situation protected by the provision. In Binding's view, perpetrator does not violate criminal law. Criminal law is used to punish a perpetrator, but he/she violates the provision that is beyondthe criminal law.[30] In Binding's view, the purpose of the provisions beyond criminal law is to protect legal good from harm. The mentioned provisions are preventative. The goods protected by those norms that form the basis for the criminal laware actual objects, infringement, change of which by means of a crime is causally possible.[31]

As can be identified from the mentioned judgment, Binding rejects the protective function of criminal law[32], since, in his view, protection of legal good is not the function of criminal law, but of those laws that form the basis of the criminal law. Therefore, the function of the criminal law is to punish a perpetrator.

In the opinion of Binding, legal goodas actual condition protected by the norm is both corporeal and non-corporeal (e.g., freedom), which may actually be harmed or infringed. Therefore, infringement of legal goodis the result of encroachment reflected upon actual legal good, which is referred to as the wrong of the result.[33]

When we speak about legal good, as of actual situation protected by the provision, it should be defined as to what is implied under the concept of reality. The concept of reality implies the concept of actual essence, which is relatively limited as compared to the concept of essence. Actual essence is one

[28] *Mchedlishvili-Hedrich K.,* Criminal Law, General Part 1, Crime, Tb., 2014, 8 (In Georgian).

[29] *Lekveishvili M.,* Object Subject to Protection under Criminal Law and its Importance for Qualification of Crimes, criminal investigations, Tb., 1987, 95 (In Georgian).

[30] *Graul E.,* Abstrakte Gefährdungsdelikte und Präsumtionen im Strafrecht, Berlin, 1991, 41-42.

[31] Ibid, 42.

[32] On the mentioned issue, also see *Gamkrelidze O.,* Problems of Criminal Law, Vol. 1, Tb., 2011.

[33] *Graul E.,* Abstrakte Gefährdungsdelikte und Präsumtionen im Strafrecht, Berlin, 1991, 43.

of the fields of essence, but "it is more concrete and comprises only something that exists in time, moves, changes. While the concept of essence is both broader and abstract, as compared to it."[34] Such definition of actual essence enables us to differentiate ideal from real. There are two main fields of essence. These are – real and ideal essence.[35]

Sh. Nutsubidze differentiates essence and thus being. Although, in his view, there is no essence without thus being.[36] In his view, one of the sides of the essence will become real in thus being. Something comprised by essence manifests itself in thus being. Essence – is the assessment of thus being.[37] Therefore, essence is "more than essence". Each existing comprises "more than essence."[38] Thus being exceeds essence in concreteness.

N. Hartman regards being in time as a criterion of actual essence. In his view, something that exists in the section of certain time, changes, moves and is ephemeral. Real comprises everything that demonstrates individuality and key aspects of being intime. Everything real is comprised in time.[39]As for ideal, it does not exist in time. It is of universal and mandatory nature.[40] Ideal, similar to actual, is the type of objective reality. But real is the object of sensual perception, while ideal is the object of mind.[41]

If we consider that the essence of ideal changes as well, we may regard that it exists in time. But, the variation of the ideal essence does not mean that it exists in time. If realmovement and variation in time ends, ideal movement and variation in time does not end, i.e., it is exactly on time.[42]

In Hartman's view since ideal moves only within the scope of the concept, an illusion is formed that the concept itself is an object. While the concept is not identical to an object even when it exactly depicts it.[43]

In ideal Hartman assumes the fields of value. As for the relation of value to reality, reality may correspond or not correspond to it. Reality can be valuable, or, conversely contrary to the value. („Wertwidrig")[44]Although, it should be mentioned that value may not always be attributed to ideal and assigned the function of a measure (determining "valuable"). The assessment of actual reality may be performed via such value as morality, allowed by the normative nature of morality. However, life is not such value.

For example, life, health are among the goods protected by criminal law and manifesting actual condition and belonging to actual essence. When we speak about life and health, as manifestation actual essence, we mean life of a specific person, whose existence is limited by certain time and which may undergo certain effect, which is manifested as change in external world.

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34 *Avaliani S.,* Scientific Ontology and Phylosophical Theology, Tb., 2012, 42 (In Georgian).

35 *Avaliani S.,* Scientific Ontology, Tb., 1994, 41 (In Georgian).

36 *Nutsubidze Sh.,* Truth and the Structure of Cognition, Works, 2, Tb., 1979, 91 (In Georgian).

37 Ibid, 92.

38 Ibid, 96.

39 *Hartmann N.,* Der Aufbau der realen Welt, Grundrisseinerallgemeinenkategorologie, II Auflage, Meisenheim am Glan, 1949, 64. Referenced: *Tevzadze G.,* Nikolai Hartman's Ontology Critique, Tb., 1967, 90; *Hartman N.,* New Ways of Ontology *G. Tevzadze's* translation, Tb., 1997, 34 (In Georgian); *Avaliani S.,* Scientific Ontology, Tb., 1994, 41.

40 *Hartmann N.,* Zur Grundlegung der Ontologie, I Auflage, Berlin und Leipzig, 1935, 244, 268, (Quot.: *Tevzadze G.,* Critique of Nicolai Hartmann's Ontology, Tb., 1967, 98.

41 *Erkomaishvili V.,* Philosophy, Tb., 1998, 75-77 (In Georgian).

42 *Avaliani S.,* Scientific Ontology, Tb., 1994, 42 (In Georgian).

43 *Tevzadze G.,* Critique of Nicolai Hartmann's Ontology, Tb., 1967, 101 (In Georgian).

44 Ibid, 106-108.

Actually existing events are events that belong to the field of objective reality, and necessarily obey the laws of causal field.[45] When it is about the encroachment of such legal good as life, it is impossible to determine causal relation between encroachment and an action causing encroaching, since killing is a change in external world. And change in the external world obeys cause and effect pattern.

Welzel, too, concluded that legal goodis an objective situation that is independent from a criminal act, protected by norm, i.e., is the object subject to protection, against which a culpable action is directed. He shifted focus to an action and distinguished thewrongful nature of an action and result, the violation of a provision and legal good.[46] In his view, wrongful nature of the result lies in the encroachment of legal good or endangering it, while the wrongful nature of an action lies in an illegal, socially unethical action.The wrongful nature of an action is comprised by an illegal action, or that (objectively) violating foresight, directed towards encroachment of or endangering legal goods.Wrongful nature of an action does not depend on whether or not the result will occur, by means of the infringement of or endangeringlegal good.

In Welzel's view, the encroachment on or endangering legal good is not a precondition for the wrongfulness of an action and encroachment or endangering legal goods is not necessary for an action to be wrongful, since, in his view, there are wrongdoings without legal good as well (rechtsgutslose Delikte). Welzel brings crime envisaged under Paragraph 173 of the German Criminal Code as an example of such wrongdoing. The mentioned paragraph penalizes sexual intercourse between relatives.[47]

Differing views have also been stated on the mentioned issue in German law literature. German scientist Rudolf is of the idea that the sacredness of relations between specific familiesis the legal good in case of sexual intercourse between relatives.[48] One may not disagree to Rudolf's view on the grounds that, truly, there may not exist crime that poses at least abstract threat to legal good. Wrongdoing may not exist without legal good.

In Welzel's view, primary objective of criminal law is not to protect legal good, respectively, neither the protection of individuals[49]. If we share his view, then we will come to the conclusion that the norm that prohibits an abstract threat wrongdoing may not be serving the goal of safeguarding legal good. Prohibition without the purpose to protect legal good is inconceivable. The prohibition of a specific criminal action should serve the very protection of determined legal good.

Welzel regards it advisable to separate the condition protected under criminal law sanction and the object protected by the provision. He regards the very latter as legal good.[50] It should be mentioned that if Binding rejects protective function of criminal law, Welzeldoes not exclude it. InWelzel's view, criminal law protects not specific legal good, but principal values. In his opinion, criminal law has the doubled, overstagedprotection function. The provisions beyond the criminal law protect specific legal

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45 *Surguladze Ir.,* Government and Law, *O. Gamkrelidze's* translation, Tb., 2002, 71(In Georgian).

46 *Welzel H*., Studien zum System des Strafrechts, ZStW1939,491.

47 Current Criminal Code of Georgia does not envisage such constitution. Back at the time of passing the 1960 Criminal Code the following issue was brought up: wheter or not to include in the criminal code the mentioned constitution, but then they declined to penalize sexual relations between close relatives. The justification was that the moral code of conduct is better regulating the mentioned issue, than positive law.

48 *Rudolphi H. J*., Inhalt und Funktion des Handlungsunwertes im Rahmen der personalen Unrechtslehre, Maurach-FS, Karlsruhe, 1972, 56, Quot..:*Graul E.,*Abstrakte Gefährdungsdelikte und Präsumtionen im Strafrecht, Berlin, 1991, 47.

49 *Welzel H*., Das Deutsche Strafrecht, 11. Aufl., Berlin, 1969, 3.

50 Ibid, 491.

good, while the threat of a punishment and punishment have a deeper goal (rather than protection of individual legal goods): They serve ensuring social-ethical values. The following conclusion can be drawn from this: the provisions beyond the criminal law directly protect a specific legal good, while by safeguarding social-ethical values with criminal law sanctions, these goods are protected using a intervening way. *Welzel's* view is directed against the views of those authors, who define legal good as a reality, but as an abstraction, ideal value.

If we share *Welzel's* view, according to which there are wrongdoings without legal good, then we have to reject the statement according to which all crimes result in a victim and there is no crime without a victim[51]. Where there is no legal good, naturally, there is no one who carries it.

There is always a holder of legal goods behind legal goods. This may be an individual, society or state. This is the basis for dividing legal goods into individual and non-individual legal good. But, how much can be equalizevictim and the carrier of legal good? Do these two concept always coincide?

In the opinion of some of the scientists, a carrier of legal goodanda victim do not have the same meaning. Although there is no crime without legal good, it may exist without a victim.[52] In this case, this implies such crimes that are not directed against an individual. For example, forging documents[53]/ According to the provided provision, there is a victim when individual legal good is encroached upon.

Victim should mean more an individual, a specific addressee, who has been affected or compromised as a result of the crime. Although, we can use the concept of victim in two – wide and narrow meaning. In narrow sense, victim should imply just an individual, while victim in broad sensemay also imply society and stat.

Can the crime envisaged under Article 254 of the Criminal Code of Georgia that is manifested by the transfer of space or residence for prostitution be referred to as a crime when an action is directed against a specific legal good, but when there is no victim in a narrow sense of this word? If all crimes imply a victim, a question arises, who can be the victim of the mentioned crime? A person who pays money in exchange for the transfer of space (tenant), the person who is involved in prostitution voluntarily and receives money for sexual service, or a client who pays certain amount for sex service? An opponent may give such answer as well: society is the victim of the crime in this case. However, if we shared this view, a victim would be defined in an overly broad sense. It should be mentioned also that there exists moral and lawful goods,[54] like moral and lawful value.[55] Social morals can be considered as moral good, and respectively, any action directed against such goods does not violate the right (rather, the duty) and does not give rise to a victim, which emanates from purely imperative nature of morality, while the law is of "imperative-attributive" nature (Petrazhitski)[56].Therefore, there may be an obligation

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51 *Shalikashvili M.,*Victimology – Science about Victim of Crime, Tb., 2011, 15 (In Georgian).

52 *Kiefl/Lamnek*, Soziologie des Opfers, München, 1986, 32; *Röhl K., Röhl H.,* Allgemeine Rechtslehre, Ein Lehrbuch, 3. Auflage, Köln. München, 2008, 269.

53 Ibid.

54 *Tsereteli T.,* Using the Category of Actual Capacity for Building the Concept of Attempted Crime, Tbilisi State University Works, 24, Tb., 1942, 23, Publication (In Georgian).

55 *Naneishvili G.,* A priori – emotional basis of Psychological Theory of Law, in his book: Issues of Phylosopy of Law, Tb., 1992, 210 (In Georgian).

56 *Radbruch G*., Rechtsphilosophie, 2. Aufl., Heidelberg, 2003, 43; (*Naneishvili G.,* A priori – emotional basis of Psychological Theory of Law, in his book: Issues of Phylosopy of Law, Tb., 1992, 208 (In Georgian); *Vacheishvili Al.,* General Theory of Law, Tb., 2010, 98 (In Georgian).

without right.[57] An action may not result in victim (in a narrow sense) just because of the violation of a duty without the infringement of a right. There is a victim when a right has been violated.

In H. Sneider's view, victim should not be understood in a personificated way and we should not imply just an individual, a person in the concept of a victim. He states that there may also be collective, abstract victim. For example, social groups, society and its order, state, justice[58]. We do not deem the mentioned view valid. Victim is always concrete and we cannotunderstand the victim in an abstract sense. Like crime is not committed in general and crime is always committed in a specific situation, specific circumstance, similarly, there may not be "abstract victims." Crime may have not one or two, but many victims, even a certain group may be a victim of a crime, but this does not mean that there may be "abstract victim". Having "abstract victim" conflicts with the nature of and understanding of a victim. Moreover, we cannot regard justice and public order as victim. By means of such understanding of a victim we would intermingle legal good and its carrier. A victim may be not legal good, but its carrier. And justice and public order is always legal good.

In H. Jescheck's view, in such wrongdoings directed against public morals as cruel treatment of an animal, disrespect towards a deceased person, legal good is the value attitude engrained in the society. Jescheckmentions that, although the latter is regarded to be legal good, the basis for penalizing is not the harm caused by an action, but protection of established attitude towards social morality that should be ensured by criminal law sanction.[59]

4. Legal Good as anIdeal Value

The view according to which legal good is not real good, that can be assessed positively, but rather, is an ideal value, has found wide distribution. H. Jescheck regarded legal good to be an ideal, abstract value, and the society is interested in protecting it, and which carrier may be an individual or the unity of persons.[60]According to his theory, legal good is not identical to the result envisaged by the constitution of the action. Wrongful nature of the result implies encroachment upon actual object of an action or endangering it.[61]Jescheck discriminates between legal good and an object of an action. If legal good is an ideal value, object of an action belongs to the field of actual essence.

Plato's theory on ideals formed the basis for Jescheck's view on legal good[62]. According to the mentioned theory, legal goodis eternal, hence, unchangeable idea. Idea cannot be felt; a person may not see it[63]. In Plato's view, if perceptible objects are changeable, ideas, being imperceptible, are unchanging.[64]

Like Jescheck, other authors regard legal good to be an ideal value; they state that legal good is an ideal object, which cannot be encroached or revalued via specific criminal actions. It is just neglecting

57 *Pkhaladze B.,* Subject of Law and Rights Status of Citizens, "Soviet Law", 1966, N 6, 16 (In Georgian).

58 *Schneider H.J*., Viktimologie, Wissenschaft vom Verbrechensopfer, Tübingen, 1975, 10-11.

59 *Jescheck H.H., Weigend T.,* Lehrbuch des Strafrechts, AT, 5. Aufl., Berlin, 1996, 258-259.

60 Ibid, 257.

61 Ibid, 257.

62 About Plato's ideas see *Bakradze K.*, *Tsereteli S., Gujabidze P.,Kiladze V.,Chelidze M.,Nemsadze M.,* History of Philosophy, Tb., 1962, 49-56 (In Georgian) .

63 *Tsereteli S.,* Essays in the History of Philosophy, Vol. 1, Ancient Philosophy, Tb., 1973, 315 (In Georgian).

64 Ibid, 318.

their importance, and therefore, endangering those is that is possible.[65] The presented view may not be considered valid. When it is about the possibility of not encroachment, but endangering of legal good, naturally, a question arises: how possible is it to endanger legal good which encroachment is impossible? Endangering implies the creation of possibility of encroachment and if a good may not be encroached upon, we can deduce that even endangering it will be impossible. For it is something that may be encroached upon that may be endangered.

In opposition of Jescheck'sview, an idea was expressed that the goal of criminal law is not to protect concepts. The law is promulgated for safeguarding reality, not a concept.[66] In the mentioned view, if we define legal good as an ideal, non-realvalue, then it does not require criminal law protection, for its causal encroachment, as of an eternal and permanent, is impossible.[67] Causal encroachment is possible in case of something that is real. For example, if we consider legal good – life – as an ideal value, it will be impossible to encroach upon it or endanger it. Causal encroachment or endangering a concept is impossible. It is impossible for life, as a concept, to die or health, as a concept to be harmed. Everything that exists non-materially or ideally, does not have physical state, belongs to the field of ideal. While causality does not belong to metaphysical-ideal world.[68] Causality reflects the process in the real life. "life has ideal origins and is tightly related to ideal essence, but it still is a biological phenomenon and belongs to the sphere of reality."[69]

Although life, as a legal good protected by the Criminal Law, exists in personalized form and depicts actual condition, but not all goods protected by criminal law are such. Criminal law protects such goods also that are ideal values; the CC of Georgia has the chapter – Crime Against Health of Population and Public Morality. This chapter envisages punishment for such actions as: giving space for prostitution, disrespect to animals. The mentioned actions are directed against public morality. While public morality is the legal good which does not exist in a materialized form.

Alternative to "ideal" is not "material" but rather - "real." According to the view in the science circles, reality comprises not only of bodily articles, but of spiritual phenomena as well. These phenomena are not the products of ideal thinking that may not be subject to causal impact. These phenomena are the articles that can be encroached upon.[70]

Kant perceived idealism and ideal in terms of subjective idealism, just with the view of assuming the presence of what are our opinions and ideas. He juxtaposes objective and real to subjective and ideal, as emanating from the nature of our cognition.[71] Therefore, ideal, according to *Kant,* is not objective, but rather, subjective.

When speaking about legal good, as of an ideal value, we have to consider the following. Ideal and actual both belong to the field of the essence, but if they exist in real time, move and change, ideal, on the conversely, is unchangeable. Hence, when we speak about an offence directed against ideal value, it may not imply an action that gives rise to changes in real world. For example, if murder results in

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65 *Sax W*., „Tatbestand" und Rechtsgustverletzung, JZ 1976, 432.

66 *Kargl W.,* Friedenssicherung durch Strafrecht, Teleologische Strafrechtfertigung am Beispiel der Tötungsdelikte, Archiv für Rechts- und Sozialphilosophi, 1996, 492. Place of publishing, publishing house.

67 *Hefendel R*., Kollektive Rechtsgüter im Strafrecht, Köln, Berlin, Bonn, München, 2002, 29.

68 *Graul E.,* Abstrakte Gefährdungsdelikte und Präsumtionen im Strafrecht, Berlin, 1991, 56-57. Publishing house.

69 *Avaliani S.,* Scientific Ontology, Tb., 1994, 71 (In Georgian).

70 *Hefendel R*., Kollektive Rechtsgüter im Strafrecht, Köln, Berlin, Bonn, München, 2002, 28.

71 *Tevzadze G.,* ImmanilKannt, Tb., 1974, 227-228 (In Georgian).

change in external world by killing, it is impossible to drive change by giving space for prostitution or by a similar other action. When an action is performed against public morality, this does not change public morality, it remains unaltered.

Often attitude towards various issues change. Something that was considered immoral before and would be basis for condemning a person, now it may not be reprehensible, but "the ideal essence of a value should be differentiated from its historical perception. Something that was historically considered a valuemay not necessarily be a value. This change does not have an effect on a value."[72]

K. Roxin is of the opinion that, in order to infringe upon or endanger legal good, it is not necessary for it to be a bodily subtract, but it may be such reality that may be harmed. In his view, honor and dignity is immaterial, although social reality and it may be infringed upon effectively by abuse and libel.[73] *Roxin's* view is valid in relation to that it is absolutely possible to speak about the infringement of honor and dignity, but in this case "infringement does not imply the meaning as it has in case of the wrongdoings with result – murder, harming health. In the wrongdoings with result "encroachment" implies causing change in external world. For example, in case of murder encroachment upon life.The term encroachment is used in two senses (material and formal). In material sense the encroachment upon legal good gives rise to change in outer world and it may occur only in the wrongdoings with result, i.e., material wrongdoings. While, "encroachment" of legal goodin formal sense, may occur in the wrongdoings without results, the so-called "formal delicts" as well.

5. Classification of Legal Good

5.1. Individual Legal Good

Legal good is broken down into individual and supraindividual or universal goods. Life, health, personal freedom of humans, honor, property belong to individual legal goods. They are called individual goods because a specific person, an individual may be carrying it. Individual legal goodis also broken down into two groups.The first one comprises such goods that are embodied and are related to body. For example, life, health. At the same time, there is another group of legal good, which are integral to bodily condition and are abstract. Such as honor, dignity, freedom of will. The determination of their encroachment is not performed with the data of natural sciences. While the encroachment on life, health and similar individual good may be determined with the data of natural sciences.[74]

Individual legal goods are divided according to their material description into concrete-individual and abstract-individual legal goods. Concrete-individual is materialized (life, health), while abstract-concrete is non-materialized good (honor, dignity).[75]

Such individual good as life, the inviolability of body, material assets, may be perceived by an organ of perception. Such good, even when it is generally formulated (such as "life", freedom", and not "A"-s life or freedom) indicates to specific legal position, interest, which cannot be seen. Its encroachment can be verified empirically: a person is dead, unable to move and go to where one wants, etc.[76]

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72 *Tevzadze G.,* Critique of Nicolai Hartmann's Ontology, Tb., 1967, 110 (In Georgian).

73 *Roxin C*., Strafrecht, AT, Band I, 4. Aufl., München, 2006, 34, §2, 66.

74 *Martin J.*, Strafbarkeit grenzüberschreitender Umweltbeeinträchtigungen, Freiburg, 1989, 30.

75 Ibid, 30.

76 *Hassemer W*., Theorie und Soziologie des Verbrechens, Athenäum Verlag, Frankfurt/M, 973, 232.

5.2. Supra Individual legal good

From individual legal good they differentiate supra individual or universal legal good, which does not belong to an individual, a specific person, but rather, to the entire society, state. Such goods are: health of population, state order and security, justice.

Supra-individual good is characterized by the invermidiate link with specific person's goods. Universal legal good is necessary for normal functioning of the society and therefore they serve individuals as well[77], as the members of the society. Although, they are not referred to as individual good, since a specific person may not be carrier of those.

Universal legal goodis otherwise known as abstract-supra individual good, since it does not exist either in an embodied form or can belong to individuals. It has doubly the abstract nature.[78] In addition to abstract-supra individual legal good, they distinguish concrete-supraind ividual legal goodas well.

I. Martin mentions that environmental goods belong to the category of universal legal good: water, air, soil, plants and animals, but such universal legal good differ from other types of (e.g., state order, public order, justice) universal good by being embodied (verkörpert) and because they exist in physical, material form. I. Martin compares environmental good to such individual good as life and health. In his view, environmental legal good (Umweltrechtsgüter), given its specificity, can be referred to as concrete-supra individual legal good[79]. Hence, in Martin's view, supra individual legal good, in turn, is divided into two groups: abstract and concrete supra individual goods. Although, such division may still be conditional since supra individual legal good does not belong to a concrete individual; and this seriously challenges the concreteness of such good. Besides, goods is not an animal and plant; rather, goods is healthy environment. Animal, bird or plant are the components of this environment, as of supra individual goods protected by law. Criminal law protects an animal, wild birds, or plant to the extent to which they are necessary for having healthy environment. Healthy environment is a necessary condition for healthy living of people. One of the chapters of the Criminal Code has the title Crime against Environment (and not against animals, birds and plants) due to this very reason.

6. Protecting SupraI ndividual Legal Good and Hazardous Wrongdoings

Protection of individual legal good implies the protection of functions of specific state or civil institutions, respectively, of specific functions. Universal legal goodis otherwise known as collective legal good.

Unlike individual legal good, it is impossible to determine the damage of universal legal goodsince a specific person is not the carrier of it and it does not exist in an embodied form. Following the implementation of an action directed against supra individual legal good it is impossible to say as to how much and how legal good has been affected. It is practically impossible to harm such legal goods.[80]

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77 *Martin J.*, Strafbarkeit grenzüberschreitender Umweltbeeinträchtigungen, Freiburg, 1989, 31, Publishing House.

78 Ibid, 31.

79 Ibid, 33.

80 *Anastasopoulou I.,* Deliktstypen zum Schutz kollektiver Rechtsgüter, München, 2005, 59.

Supra individual legal good may not be defined by a provision as an object of an action that may undergo change in the sense of natural sciences. They may not be perceived as substantive data.[81]

When speaking about a specific threat, it implies an embodied object (for example, a human being) who appeared in the zone of impact of the source of threat. A wrongdoing giving rise to a specific threat is characterized by having effective threat to an object of an action. However, such object of an action does not exist in case of supraindividuallegal good. Therefore, it is impossible to determine when the creation of specific threat for supra individual legal good has started. Respectively, for protecting supra indivdual legal good the provision that envisages the criminalization of a wrongdoing giving rise to a specific threat is inadequate.[82]

In the chapter on the crimes against state we see wrongdoings which, on the one hand, are aimed at protecting supra individual legal good, while, on the other, require the presence of threat to protected good (constitution envisaged under Article 309(2) of the CCG, on posing threat to peaceful coexistence of Georgia). A question arises; can these wrongdoings be equalized with the hazardous wrongdoings? Bertz categorizes the mentioned wrongdoings under wrongdoings involving specific threat.[83]Although, it may debatable as to how much Bertz's view may be worthy of support, since specific threat exists when an object of action has entered the sphere of impact of threat, but such thing is impossible in relation to supra individual legal good, because of the absence of a relevant object.

Kindhoizer also indicates that it is impossible to create specific threat to peace of acountry and public safetyin the sense as is implied in the creation of specific threat. Therefore, posing threat to a country peace and public safetyis creating abstract threat[84], irrespective of how the legislator describes the constitution of an action.

It cannot be deduced from the above-developed reasoning that the wrongdoing involving abstract threat is directed just against supra individual legal good. It can also be directed against individual legal goods. As an example of this we can bring wrongdoings envisaged under Article 128 (desert in distress) and 129 (failure to provide assistance) of the CCG. However, we have to also remember that in case of deserting in distress and failure to assist victim is facing specific peril, despite the fact that the mentioned wrongdoings are wrongdoings involving abstract threat.

7. Separating Legal Good and Object of an Action in Wrongdoings Involving Threat

According to the view in science field, a strict line should be drawn between an object of an action and legal good. An object of an action is an object that is subjected to the constitution of an action, while legal good is something that is protected by law[85]. For example, when a building, human being, some article is an object of an action life, property is legal good.[86]

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81 *Anastasopoulou I.,* Deliktstypen zum Schutz kollektiver Rechtsgüter, München, 2005, 57.

82 *Otto H*., Konzeption und Grundsätze des Wirtschaftsstrafrechts (einschließlich Verbraucherschutz), ZStW 1984, 362-363.

83 *Berz U.,* Formelle Tatbestandsverwirklichung und materialer Rechtsgueterschutz, Muenchen, 1986, 84, Publishing House.

84 *Kindhäuser U.,* Gefährdung als Straftat, Rechtstheoretische Untersuchungen zur Dogmatik der abstrakten und konkreten Gefährdungsdelikte, Frankfurt/M, 1989, 214.

85 *Radtke H.,* Die Dogmatik der Brandstiftungsdelikte, Zugleich ein Beitrag zur Lehre von den gemeingefährlichen Delikten, Berlin, 1998, 68.

86 *Haft F.,*Strafrecht, AT, 8. Aufl., München, 1998, 75.

According to Kindhoizer legal good is such features of persons, articles, institutions that facilitate the development of each in a just, social democratic society. Legal good is a feature, state positively assessed by law, for example, alive and healthy existence of a person, operating capacity of an administration.[87]

Two functions may be especially distinguished from many functions of separating an object of action and legal good: classification of wrongdoings and the definition of constitution of a given action in private part of criminal law. The definition of wrongdoings involving abstract threat and their separation from infringement and wrongdoings involving specific threatis based on legal good and not on an object of an action. While the separation of infringement and wrongdoings involving specific threat are related to an object of an action. For example, arson is punishable under Paragraph 306 (1) (1) of the CC of Germany, as of a wrongdoing involving abstract threat. The mentioned wrongdoing is implemented when an outcome envisaged by the constitution of an action occurs, specifically, when an object of action is encroached upon – when an apartment in a multi-apartment building is set on fire.In the mentioned case, the outcome of just encroachment and creating specific threat is not dependent on legal good. Therefore, wrongdoings involving abstract threat relative to an object of action may be wrongdoings with outcome. Although there are such wrongdoings involving abstract threat that are not related to any outcome (leave in distress, failure to provide assistance), but there are also such wrongdoings involving abstract threat that imply driving a certain outcome. Specifically, arson, according to German CC is punishable as a wrongdoing involving abstract threat, but setting fire to a building where many persons live itself envisages encroachment upon someone else's property, which is already an outcome. It should be mentioned also that in case of arson it has to be determined whether fire resulted from an action of a specific person, which is the process of determining causes, although in this case we need to determine causation between a specific action and causing fire, versus between a specific action and an abstract threat. Setting on fire a building where thousands of persons liveis already a sufficient condition for committing wrongdoing involving abstract threat. I.e., this is about determining the causes of fire and not about determining whether abstract threat was created by the act of arson.

An idea has been voiced in legal literature that legal good and object of an action sometimes overlap, while in other cases, conversely, they differ and this difference is prominent in wrongdoings involving abstract threat.[88] Although, this idea may be considered highly debatable. For instance, when a building is exploded and because of the location and function of the building abstract threat of encroachment of life and health of other persons is formed. In the given situation object of an action (building) and protected legal good (life and health of other persons) do not overlap.[89]

K. Roxin mentions that interrelation between object of an action and legal good may be different. In this respect, he assumes three options: first, when object of an action and legal good overlap. Fraud is listed as its example. In his view, in case of fraud object of action and legal good overlap both officially and essentially. Another option, when an object of an action and legal good overlapby content, but not formally. For example, in case of murder (Article 108 of the CC). The object of an action is "a human being"; while legal goodis "life". Third option according to him is such case when object of an action and legal good can be separated distinctly from each other. For example, in case of theft an object is "another person's movable article", while property is protected legal good.[90]

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87 *Kindhäuser U.,* Strafrecht, AT, 5. Aufl., Baden-Baden, 2011, 36, § 2, 6-7.

88 *Turava M.,* Criminal Law, General Part, Theory on Crime, Tb., 2011, 23 (In Georgian).

89 *Graul E.,* Abstrakte Gefährdungsdelikte und Präsumtionen im Strafrecht, Berlin, 1991, 108.Publishing House

90 *Roxin C*., Strafrecht, AT, Band I, 4. Aufl., München, 2006, 33, § 2, 65.

8. Inter Relation Between Legal Goodand Value

It is rightly mentioned in German legal literature that value is an end.[91] Value is the highest goal, is an ideal,[92] which is subjected to teleological pattern.[93] Value is something that should be as an ideal that deserves to be real.[94] Therefore, that which must be is the form of value, presence of an ideal.[95] Although value is a goal, it may appear as means in relation to other values.[96] Values make the order of values, where one value is "high", and another is "low".[97]

Value is the goal of a norm of law. If the purpose of a legal provision is to protectlife, health, environment, value coincides with those (life, health, environment).[98] Criminal law provision sets forth the rule of conduct, which is aimed at achieving a relevant goal. Therefore, criminal law provision implies judging by a value.[99]

The goal of a legal provision is value, as well as protecting legal good, but there is certain difference between legal goodand value. In the use of words there is no clear distinction between legal goodand value, and at the level ofconcepts, they are often used interchangeably.Iflegal goodis concrete, value is more abstract.[100] The idea of a value is absolutely deprived of specificity.[101] Although, in philosophical literature there is also a different opening about goods.

In Hegel's Philosophy of Mindgoodis characterized as "abstractly general".[102] Hegel mentions that "definition of good is itself indefinite".[103] But, if we use the Hegel'sunderstanding of goods todefinelegal good, life of a specific person, as legal good should be considered "abstractly general", but this will not be correct, when it is about not about an idea of life in general, but life of a specific person. In philosophy God is also good. Moreover, goodmay be an action in philosophical sense and therefore we may speak about "doing good things", but it is questionable how much an action can be "legal good."

Value is not confined in time and space,[104] which is not the case with legal good. The goal of the law provision (Article 108, CC), for example, is to protect life and therefore it is good. However, when we speak about value, which is also the goal of the law provision, it implies the idea of life, which is abstract. Under life, as in legal goodwe imply life of specific human beings that can be encroached wrongfully.

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91 *Röhl K., Röhl H*., Allgemeine Rechtslehre, Ein Lehrbuch, 3. Aufl., Köln. München, 2008, 272.

92 *Shushanashvili G.,* Critique of Idealistic Understanding of Value, Tb., 1987, 50 (In Georgian).

93 *Shushanashvili G.,* Specifics of Moral Values, Tb., 1980, 9 (In Georgian).

94 *Nachkhebia G.,* Methodological Vocabulary of Criminal Law, Tb., 2006, 67 (In Georgian).

95 *JyoevO.I.,* Nature of Historical Necessity, Tb., 1967, 121, Publishing House.

96 *Shushanashvili G.,* Critique of Idealistic Understanding of Value, Tb., 1987, 43 (In Georgian).

97 *Khubua G.,* Theory of Law, Tb., 2004, 92*; Shushanashvili G.,* Critique of Idealistic Understanding of Value, Tb., 1987, 41 (In Georgian).

98 *Röhl K., Röhl H*., Allgemeine Rechtslehre, Ein Lehrbuch, 3. Aufl., Köln. München, 2008, 272.

99 *Tkesheliadze G.,* The Problem of Value and Law, "Soviet Law", 1981, N 2, 19 (In Georgian).

100 *Röhl K., Röhl H*., Allgemeine Rechtslehre, Ein Lehrbuch, 3. Aufl., Köln. München, 2008, 272.

101 *Avaliani S.,* Ontology and Axiology, in the collection: Research Papers in Philosophy, Collection 2, Tb., 1998, 21 (In Georgian).

102 *Hegel,* Philosophy of Mind, translation by *N. Natadze*, Tb., 1984, 296 (In Georgian).

103 Ibid, 294.

104 *Shushanashvili G*., Critique of Idealistic Understanding of Value, Tb., 1987, 49 (In Georgian).

Value, as an idea, is not visible. When we speak about value, it implies not an action that we see but the principle that is invisible to us.[105] Value is supra-psychical, therefore, is supra individual, super human. Value is not any object before us. Object is good,[106] i.e., valuable reality.[107] The concept of value comprises everything that does not exist but still is not nothing.[108]

Rickert differentiates between value and reality related to value which is referred to as good (Gut). For example, good is real, while value cannot be found in the realm of real objects. It operates from another side of the field of reality.[109] Value does not exist in reality, while good, as a valuable object, exists in reality.[110] In Rickert's view, value does not exist in reality; rather, it has an importance.[111]

9. Protecting Legal Goods as The Basis For Legitimization of Penalization of Wrongdoings Involving Threat

As has been mentioned above, *H. Welzel* expressed an opinion that there are wrongdoings that do not involve legal good (rechtsgutslose Delikte)[112] and respectively, according to this idea, the provision that prohibits a specific action cannot protect legal good. In the opinion of certain scientists, it is the very wrongdoings involving abstract threat that can be assigned to the circle of the wrongdoings penalization of which does not serve the protection oflegal good, since the mentioned wrongdoings do not involve encroachment upon legal good.[113]

According to the theory of *G. Jakobs* committing wrongis defined not as encroachment upon good, but as a violation of norm since it is an action involving non-sanctioned risk.[114]

The mentioned view was rightly criticized since the provision that does not serve the safeguarding of legal goodand envisages only punishment may not be considered legitimate which challenges the legitimacy of criminal law as well.

According to the view prevalent in German criminal law sciences criminal provisions serve the safeguarding of legal good.[115] The purpose of penalization is the prevention of general, which indicates to the objective of criminal law in relation to the protection oflegal good.[116]

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105 *Kant*, Founding Metaphysics of Morals, translation by *L. Ramishvili*, Tb., 2013, 97.

106 *G. Tevzadze* has translated "good" ("Gut") as "property", which is incorrect, *Tevzadze G.*, Epistemology of German Neo-Kantianism, Tb., 1963, 209, 220. German "Gut" had to be translated as "good".

107 *Tevzadze G*., Epistemology of German Neo-Kantianism, Tb., 1963, 220; *Burjaliani A.,* Philosophy of Law, Tb., 2012, 136 (In Georgian).

108 *Tevzadze G.,* Ibid, 217.

109 *Rickert H*., Der Gegenstand der Erkenntnis, Tübingen, 1915, (Quote: *Tevzadze G.,* Epistemology of German Neo-Kantianism, Tb., 1963, 209 (In Georgian)).

110 *Tevzadze G.,* Epistemology of German Neo-Kantianism, Tb., 1963, 242 (In Georgian).

111 *Tkesheliadze G*., The Issue of Value and Law, "Soviet Law", 1981, N 2, 17 (In Georgian).

112 *Welzel H*., Studien zum System des Strafrechts, ZStW 1939, 491.

113 *Frister H.,* Strafrecht, AT, 5. Aufl., München, 2011, 36, §3 25, Publishing House.

114 *Jakobs G*., Rücktritt als Tatänderung versus allgemeines Nachtatverhalten, ZStW 1992, 83.

115 *Kindhäuser U.,* Strafrecht, AT, 5. Aufl., Baden-Baden, 2011, S. 36, § 2 R. 6, Publishing house.

116 *Schünemann B.,* Aufgabe und Grenzen der Strafrechtswissenschaft im 21. Jahrhundert, Herzberg-FS, 2008, 41-42.

O. Gamkrelidze mentions that while the function of administrative law is to regulate socialrelations,[117] the function of criminal law is to protect these relations.[118] G. Tkesheliadze also indicates to the protective function of criminal law.[119]

B. Schünemannmentions that "the goal of criminal law is to protect legal goodand therefore, encroaching upon or endangering legal good is a first pillar of criminal wrong, as a first systemic step."[120]

Criminal law that is ideologically driven and violates such basic human rights as equality, freedom of opinion and religion, etc. may not be considered as the one protecting legal good.[121]

In *K. Roxin's* view, linking criminal law with the protection of legal good does not require that just encroachment upon legal good is punishable. Endangering legal good is also sufficient; this is considered as a precondition for penalization in the constitution of action in wrongdoings involving specific threat, while in wrongdoings involving abstract threat protected legal good is not listed in the constitution of an action, rather, it is just the motive for creating criminal law norm.[122] In the constitution of encroachment and wrongdoings involving specific threat we see the reference to legal good which is to be protected by a relevant provision. For example, Article 117 of the CC protects health and this is reflected in the title of the provision and in disposition as well. Title of Article 117 is "intentional severe injury of health". Article 127 of the CC envisages wrongdoing involving specific threatened the listed provision protects life which is seen from the title of this Article as well – placing in the condition dangerous to life." However, such indication is not in the constitution of wrongdoings involving abstract threat.Example of this is wrongdoing involving abstract threat envisaged under Article 133 of the CC – "illegal abortion", as well as wrongdoings involving abstract threat envisaged under Article 223, 224 and other Articles. Sometimes, as an exception, we see reference to legal good in the constitution of wrongdoings involving abstract threat, but this is not a general rule.For example, Article 128 envisages wrongdoing involving such abstract threat as "leave in distress", which disposition is formulated as follows: "desert a person without help who was in condition hazardous to life, and was unable to take measures to protect oneself, if a person who deserted a person in ordeal had the duty of care and was capable of assisting such person."While in case of encroachment and wrongdoings involving specific threat, not just sometimes, but in the majority of cases, there is an indication about the legal goods encroachment or endangering of which is wrongdoing; in wrongdoings involving encroachment outcome is an important element, which implies encroachment upon a specific legal good. Therefore, when formulating the constitution of encroachment/wrongdoing involving an outcome, legislator has to indicate legal good which encroachment is the wrong outcome. Although, legislator can formulate the constitution of an action without reference to such outcome, respectively, without reference to the encroachment upon legal good. However, in this case, come type ofoutcome is necessarily implied.

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117 *Gamkrelidze O.,* Problems of Criminal Law, Vol. 1, Tb., 2011, 124 (In Georgian).

118 Ibid, 117.

119 *Tkesheliadze G.* in the book: *Nachkhebia G.,Dvalidze I.(ed.),* General Part of Criminal Law, Manual, Tb., 2007, 77 (In Georgian).

120 *Schünemann B.,* Strafrechtswissenschaft in einem zusammenwachsenden Europa, in the collection: Criminal Law Sciences in the Process of Unified European Development, Tb., 2013, 438.

121 *Roxin C.*, Strafrecht, AT, Band I, 4. Aufl., München, 2006, 18, § 2, 13.

122 Ibid, 34, §2, 68.

Legislator refuses torefer to legal good when simple constitution of an action is formulated, where just wrongdoing is listed without describing. The constitution of murder would serve as an example (Article 108, CC). The constitution of murder does not include reference to life as the good protected under the constitution of the action.

B. Schünemannmentions that for ensuring protection of legal good it is necessary that criminal law provision be oriented to a person or persons who are able to take significant decision with regard to encroachment of legal good. While other persons should clearly be prohibited to help them.[123]

Following all the above-mentioned, it can be said that the requirement of the principle of legitimacy with regard to distinct formulation of law is closely related to criminal law function of safeguarding legal good. For the achievement of goal of protecting legal good, it is necessary that an addressee of a criminal law provision is able to understand respective requirement. Otherwise, effective realization of the purpose of criminal law provision would be impossible.

According to Article 1(3) of the Criminal Code of Georgia, the goal of the Criminal Code is to prevent wrongdoing and protect law and order. Prevention of wrongful encroachment is nothing else but the protection of legal good. It is by very prevention of wrongful encroachment that the protection of legal good is achieved.

If we deprive the criminal law of its important function in relation to the protection of legal goodand say that criminal law serves just the function of punishing an offender and not the protection of legal good, we will deprive it of the basis according to which, quite legitimately, criminal law is referred to as the human rights charter.

Wrongdoings involving abstract threatare not only directed towards protecting legal good but they even serve the enhancement of protection oflegal good.[124] Material basis for bringing protection of legal good under criminal law to the forefront by means of wrongdoings involving abstract threat is to deprive an offender of possibility to be in charge of potential of threat.[125] Wrongdoings involving abstract threat have the capacity to create specific hazard, potential and by penalizing the mentioned action legislator deprives an offender of the very possibility to rule over the potential of causing specific threat. Legislator uses the criminalization of wrongdoings involving abstract threatwhen the potential for creating certain threat and different development of events is so high that given their interaction, it is difficult to foresee those in specific cases. As an example of this, German scientists bring the case of setting home on fire and the case of drunk driving, since in these situations it is impossible to foresee the result of an action. In such case legislator offers protection of legal good bringing in ruling over the case; and this is sufficient basis for legitimization of penalizing the mentioned actions.[126]

When an offender himself/herself has problem with ruling over a dangerous action and the possibility that a third party may abuse such action increases, penalization of an action is legitimate. The fact that a third party has the possibility to abuse the created situation indicates to the risk of increased threat of an action.[127]

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123 *Schünemann B.,*Aufgabe und Grenzen der Strafrechtswissenschaft im 21, Jahrhundert, Herzberg-FS, 2008,42.

124 *Anastasopoulou I.,* Deliktstypen zum Schutz kollektiver Rechtsgüter, München, 2005, 64.

125 Ibid.

126 Ibid, 64; *Wohlers W*., Deliktstypen des Präventionsstrafrechts-zur Dogmatik „moderner Gefährdungsdelikte“, Berlin, 2000, 315.

127 See *Anastasopoulou I.,* Deliktstypen zum Schutz kollektiver Rechtsgüter, München, 2005, 65.

When determining a number of compositions, due to practical objectives, legislator refuses to determine the encroachment or creation of threat, since it often related to difficulty. The mentioned refers to sexual wrongdoings are directed against inviolable sexual development of a minor, such as, for example, rape of a minor person or ensuring access to pornographic content to minors. In specific cases it is difficult to determine whether and how and which way the mentioned actions had negative effect on sexual development of a minor.[128]

Wrongdoings involving abstract threatcomprise such actions that often encroach upon or pose specific threat to legal goods, but their formulation is such that a judge is not required to establish encroachment or a specific threat, but is rather required to merely establish the commissioning of a prohibited action. For example, in case of rape a judge is required to determine the commitment of a prohibited action and not whether alegal good – sexual freedom (in case of raping an adult) or sexual inviolability (in case of raping a minor, a person under 16) was encroached upon by implementing a prohibited action. Rape[129] itself implies encroachment upon sexual freedom or sexual inviolability. It is unimaginable to rape without encroaching this legal good, but rape, still, does not belong to encroachment or a wrongdoings involving specific threat. The reason why rape belongs to wrongdoing involving abstract threat is not because it does not encroach upon legal goods, but because legislator has liberated judge from the duty to determine the violation of legal goods.

Legislator also creates wrongdoings involving abstract threat when encroachment takes place and the result is evident; though it cannot be imputed since objective or subjective feature of a given wrongdoing cannot be established[130]. Crime envisaged under Paragraph 231 of the German Criminal Code is considered as the example of this by German scientists.[131] The mentioned paragraph penalizes involvement in beating, provided it is followed by death or severe bodily injuries of a person. Under Paragraph 231 of the German CC an action is qualified when it is impossible to Seracxvaoccurred result. Occurred result, demonstrated by the death of a person or harm to health is an objective condition for penalizing an action. In such case an offenderis penalized not for occurred result, but just for an action that has caused death or harm to health of a person. According to Georgia CC, crime envisaged under Article 225 should be regarded as a wrongdoing involving abstract threat. The mentioned article penalizes "organizing group action, leading it or involvement in it, followed by violence, plundering, damaging or ruining another person's article (possession), use of weapons, opposing and/or assaulting government representative by using weapon."

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128 See*Anastasopoulou I.,* Deliktstypen zum Schutz kollektiver Rechtsgüter, München, 2005, 65.

129 *Todua N.,* lists rape to the so-called material constitution. See in the Book: *Lekveishvili M.,Todua N.,Mamulashvili G.,* Private Part of Criminal Law, Book 1, Edition 5, Tb., 2014, 196 (In Georgian). Some scientists rightly indicate that rape belongs to so-called formal constitution. See *Tsulaia Z.,* Criminal Law, Private Part, Volume 1, Tb., 2000, 179; *Gotua Z.,* Responsibility for Rape, Tb., 1994, 7 (In Georgian); Criminal Law, General and Private Parts, 2nd Edition, under genera edition of *ZhuravlevM.P.,* and *Nukulin S. I.,* M., 2008, 382 (In Russian). In German Criminal Law literature sexual wrongdoings are regarded as a variety of wrongdoings involving abstract threat. See *Arzt/Weber/Heinrich/Hilgendorf*, Strafrecht, BT, Lehrbuch, 2. Aufl., Bielefeld, 2009, 297, §10 4.

130 *Anastasopoulou I.,*Deliktstypen zum Schutz kollektiver Rechtsgüter, München, 2005, 65.

131 *Rengier R.,* Strafrecht, BT II, Delikte gegen die Person und die Allgemeinheit, 13. Aufl., München, 2012, § 18, 1; *Anastasopoulou I.,*Deliktstypen zum Schutz kollektiver Rechtsgüter, München, 2005, 65.

Although damaging another person's article may follow the crime envisaged under Article 225, such crime is still not considered as that having an outcome. A judge is no longer required to establish specifically which offender's action was followed by the damage of another person'sarticle or what was the offender's subjective attitude towards the result. Given the nature of crime, the large number of persons involved in it renders it impossible to determine who can be Seeracxos with the occurred result. Although the result has occurredand it is an objective precondition for penalizing an action, but because it is difficult to determine objective and subjective features, such crime is not Seeracxosto a specific offender. A

Crime envisaged under Article 407 of the CCG (genocide) is also a wrongdoing involving abstractthreat. Genocide is directed against a group united under national, ethnic, racial, religious or other feature, but achievement of the mentioned objective is not necessary for implementing the genocide in its complete form. Genocide may be demonstrated by murder of the members of the group, damaging health, etc. Murder, taken separately, is the composition with an outcome. It envisages the occurrence of a criminal outcome by killing although in relation to a genocide murder of a member of a group is considered as a means for genocide and not as a separate composition. Killing a group member is an objective condition for penalizing the action and not the feature of objective composition of genocide. We have to differentiate result, as a sign of objective composition of an action and result, as an objective condition of penalizing an action.When the outcome is a sign of objective composition, it is necessary to establish causal relationship and objective Seracxva is necessary. While, when legislator does not deem this necessary, outcome of an action indicated in the constitution of an action is an objective condition of penalizing just an action.

Ispenalization of an offender despite the fact that it is impossible to objectively Seracxcvaan offender with the indicated outcome caused by a wrongful action and the outcome indicated in the constitution of an action contrary to the principle of culpability? We can give the following answer to the posed question: when it is impossible to objectively Seracxvaan offender with the outcome of a wrongful action, an outcome indicated in the constitution of an action, penalizing an offender not for an occurred outcome, but for commissioning a wrongdoing involving abstract threat not only does not violate, but, on the contrary even reinforces the of culpable responsibility principle of Constitutional law. In such case, an offender is penalized for committing wrongdoing involving abstract threat so as to avoid violation of the above-mentioned principle.

Legislator creates wrongdoings involving abstract threats also in cases when an action is effected in the conditions of no or limited contacts among individuals, thereby the action is anonymous.[132] As an example of this the crime envisaged under Article 198 of the CCG may be listed; it implies producing, introduction or realization of products hazardous to human life or health.When a producer of products hazardous to health (offender) and consumer (victim) have neighborly, close relationship, a producer's action may be qualified under the article of killing or damaging health due to negligence considering the occurred result, but when a producer is unknown, who sells produced products thereof by means of numerous distributors to anonymous consumers, situation changes as well. In the anonymity of a number of persons, the chain of foreseeable causality vanishes. In suchsituation, it is impossible to effectively protect legal goods by using encroachment or a wrongdoing involving specific threat, that is why lawmaker creates the constitution of wrongdoings involving abstract threat.[133]

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[132] See *Anastasopoulou I.,*Deliktstypen zum Schutz kollektiver Rechtsgüter, München, 2005, 65.

[133] Ibid, 66.

10. Conclusion

Protection of legal goods is the basis for penalizing wrongdoings involving hazard and legitimization of criminal law. Criminalization of wrongdoing involving threat is reasonable and necessary, since it contributes the protection of legal good. There may not be criminal law provision which purpose would be just penalizing a person without the goal to protect legal good. Such provision is contrary to the spirit of a democratic and just state.

Legal good is actual condition or ideal value protected by the provision of the law. Legal good, in turn, is divided into individual and suprai ndividual legal good. If wrongdoings involving specific threatare directed against individual legal good, wrongdoings involving abstract threat endanger individual as well as supra individual legal goods.

Legal good should be separated from an object of an offence. Wrongdoing involving hazard poses threat to legal good, which does not preclude encroachment upon the object of an action. However, in a number of cases, wrongdoings involving threat also involve encroachment upon legal good. Still, violated good is another good, and not the one the protection of which is the goal of the relevant provision of criminal law.

Nataliya Glinskaya*

The Significance of Criminal Procedural Decisions Good-Quality Standards

1. Introduction

The history of the administrative science development has shown the impossibility of improving any managerial decision quality beyond working out and arranging the system of their quality standards. And this is reasonable, as, particularly, requirements for a judgment are basic for developing the qualitative model of such act, and compliance with them ensures enforcing the functional purposes of a judgment. Definition of the concept and system of qualitative distinctiveness standards in the context of working out conceptual basis for ensuring good-quality of criminal procedural decisions (further – CPD) is one of the central questions in the structure of constructing the mentioned comprehensive theory.

The study of indicated questions allows defining criminal procedural decisions good-quality standards (further – CPDGS) as a total set of certain normative prescriptions (norms, requirements and rules) which CPD form and content should comply with in order to fulfill its functional purpose in the common dynamics of criminal procedure.

Although, clarifying practical and theoretical benefits of formulating CPDGS is impossible without a substantial study of these standards in the common law-enforcement mechanism in the scope of criminal procedure. The system of these standards should evolve into a strategic basis (benchmark) in the common mechanism of a corresponding procedure for providing their good-quality.

Describing the level of this issue's *scientific development*, it should be stated that the problem of defining CPDGS, as well as clarifying their meaning hasn't been outlined before in the contemporary scientific literature. Simultaneously, the theory of criminal procedural law was always paying significant attention to requirements, claimed for CPD that confirms their theoretical and practical value.

At the same time the conditions of legal ideology transformation in our state and essential criminal procedural model modification after having accepted the new Criminal Procedural Code of Ukraine cause an objective need both for rethinking the substantial content of traditional law-enforcement principles, e. g., legality, reasonableness, justifiability and constructing new, naturally following from the rule of law conceptual requirements. The issue of CPDGS is especially difficult and ambiguous under the modern conditions of common legal integration and globalization process that includes Ukraine from the end of XX century, as well as active implementing international legal standards in the national criminal procedural legislation.

The outlined above determines the need for CPDGS essence comprehensive research, for what the article states as a goal to define the place of CPDGS in the common mechanism of law-enforcement in

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criminal procedure. Solving two interrelated tasks appears to be necessary for reaching the mentioned goal: 1) defining the main aspects of CPDGS functional purposes; 2) characteristics of main directions of CPDGS functional purposes.

2. Main Content

On the basis of considered legal phenomena essence we can assume that the role of CPDGS is multifaceted and can be studied in the following directions – the aspects of their functional purposes for: those who make CPD (TWMD); the trial participators in respect of which the act was approved; those who examine a certain decision from the angle of its legality and reasonableness; constructing rational practice of pre-trial investigation bodies, prosecutor's office and justice in common interests; as well as public (or external) CPDGS objective.

The above said determines the structure of this article outlay.

1. *CPDGS is a set of certain binding provisions, imperatives, implementing which is considered to be a tool for compliance law-enforcement acts with desired features that are first of all addressed to TWMD. The significance CPDGS for them can be analyzed in two aspects.*

1.1. The total set of such standards is a fixed model, prototype of a future desired result, "really achievable concretized objective", thus guiding law-enforcers on making a high-quality legal act (guiding for the value of CPDGS). If the investigator, prosecutor or judge knows beforehand the requirements his CPD must meet, particularly, that the act should include the motivation besides the conclusion, it helps to realize the foundations for rejection or admitting as unreliable information on the crime commitment, the convict's fault, his personality, i. e. to realize the motives of personal decision. All this facilitates working out a justified sureness, certitude of law-enforcer in a particular legal issue on a concrete procedural stage and firmness of his procedural position and readiness to defend his own opinion in all the procedural instances.

1.2. In turn, the realization by TWMD the fact that complying with the total set of CPDGS during decision-making ensures a high level of the approved act's qualitative definition (its good-quality), and gives this person a sense of stability in conducting his activity. This is connected to another aspect of CPDGS value for TWMD, namely: making good-quality (logical, persuasive, with a detailed justification) decisions prevents, from the one hand, their possible unjustified appealing by interested persons, and, from the other hand, their abolishment by the superior institutions. Yet the existence of integrated CPDGS provides also the precognition of a final instance court's decision considering the circumstances of a particular criminal procedure that allows TWMD to forecast the prospects of their decision in case of its compliance with all the standards, including the ingrained judicial practice. Thereby are being created real preconditions for decision's stability, providing the fulfilment of its functional purposes, producing necessary effects, expected and predicted by the law-enforcer.

2. The CPDGS significance for those who examine this act from the angle of its quality. The outlined aspect of guiding significance of CPDGS that direct on a proper law-enforcement level in a legal state can also be called one of the closest functions of CPDGS category. Its final purpose is to be a measure of CPD quality, estimated by certain procedural participators on different stages. If a standard is a model, taken for initial in order to compare with similar objects, then it's completely clear that for particular decision quality estimation it is necessary to compare its features with the corresponding

normative prescriptions, which would fulfill the function of a "criterion" or estimative basis. A standard, as V. Gmyrko reasonably admits in this scope, "is designed to serve as a method of assessment … a standard is devoted to help in solving the ambiguity of appropriateness/inappropriateness of a certain product for fulfilling the purposes of its creation[1]". In this scope the particular applied significance of CPDGS for organizing procedural decisions evaluation from the angle of their quality by appropriate competent official bodies (the examining judge, the court, the prosecutor, the superior prosecutor, the head of the pre-trial investigation body) is unconditional.

3. The CPDGS significance for participators of the procedure, whose interests refer to the taken CPD is the following.

3.1. Firstly, it is about making necessary pre-conditions for a desired law-enforcement result, expected by such persons, thus also needed for ensuring the rights of a participator, involved in the criminal procedure. The Universal Declaration of Human Rights of 1948 prescribes that everyone has a right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law (Art. 8). The right to an effective remedy is also foreseen in the International Covenant on Civil and Political Rights (Art. 2) and in the Convention for the Protection of Human Rights and Fundamental Freedoms (Art. 13). However, the criminal proceeding is connected with a possibility for a substantial restraining constitutionally stipulated human and civil rights and freedoms as well as taking towards person procedural coercive measures. The mentioned restraints can be applied only based on the CPD, made by the competent bodies in a manner set forth in law. Respectively, the existence of an agreed, socially adequate normative system any CPD must comply with allows such persons to expect a correct, reasonable, persuasive and just CPD with more certainty, thus contributes to creating the atmosphere of confidence and relative rapport between the participants of the criminal proceedings.

3.2. In turn, the CPDGS implementation in everyday practice ensures making completely reasoned and logically agreed CPD by investigators, examining judges and judges, what in particular cases allows to persuade a person in the fallaciousness of his position and the futility of appealing this CPD in the superior bodies. In case of mistaken CPD, a study of the CPD motivated text by the suspect, the convict, his advocate or the victim allows to appeal to the superior body, thus also to defend effectively personal rights and legitimate interests.

4. *The CPDGS significance for constructing proper high-quality law-enforcement practice in the interests of society.*

This aspect of CPDGS significance is that the practice of making good-quality CPD during the comprehensive complying with all the standards in particular criminal procedures contributes to building a habit of TWMD to work out logical thinking, develops their system analysis skills, supports strengthening the legality in the activity of pre-trial investigation bodies, prosecutor's office and the court, as well as implementing the social justice principles.

4.1. Taking into consideration that, in general, any standard is a basis for industrial technologization, called to organize the activity in a certain sphere, its strengthening, stabilizing significance in a corresponding scope of application is evident. In fact, any norm exists to ensure something permanent, stable and resistant in a particular relationship – a common criterion for coordinating certain human activity. In turn, technological approach to the CPD making foresees guiding on CPDGS that, from the

[1] *Гмирко В.,* Доказування в кримінальному процесі: діяльнісна парадигма., Дніпропетровськ, 2010, 179.

one hand, must ensure gaining a certain result in a certain manner and from the other hand – minimize or exclude undesirable or unscheduled consequences[2].

4.2. Regarding the mainstreaming social and legal value of such a law-enforcing feature as *coherence of court practice* it is necessary to pay special attention to the following CPDGS significance aspect. Any act that embodies justice should be an example for solving other, similar situations when positive legal norms, concerning the particular case, are somewhat defective (lacunae in legislation, its unconstitutionality, social inadequacy etc.). Respectively, a good-quality CPD, complying with all the necessary standards in case of overcoming certain legal defectiveness in this decision (by law analogy application, interpretation of law) is objective and law-making. Literally, conclusions, contained in such CPD, in case of their persuasiveness and comprehensive reasonableness often receive further "acknowledgement" of other law-enforcers while solving similar legal situations. In other words, in these cases CPDGS themselves have a certain *law-making significance* for forming "precedential" practice. Although the question of judge's right for referring to case law was not given a univocal answer among scientists and lawyers, it seems to be correct that on the occasion of a difficult and often controversial situation a careful study of CPD made in a similar situation by judges would contribute to a proper problem solution. As V. Yershov has appropriately pointed, whether a particular decision becomes a sample or not, depends mostly on the decision itself, its persuasiveness, and justification of formulated therein norms as well as the compliance of its conclusions with the principles of law, justice and reasonableness. It is precisely this regulation that could be admitted by other law-enforcers, and hereafter possibly by the legislator as well. The essence of the demand and repeatability of such decision is currently determined not by its binding nature but by the need for stability and uniformity of judicial regulation and predictability of public relations' results[3]. It appears that the latter scientist's statement describes the considered aspect of CPDGS significance brightly enough – particularly, their *ensuring role* in constructing such social and legal value as uniformity of judicial practice, its accuracy, gaining justice in case of legal uncertainty that in turn enables predictability of judicial practice. Indeed, the orientation of TWMD on the judicial practice (in the broadest sense) contributes to its unification, legal system's stability and simultaneously guarantees legal confidence of people who apply to judges for protecting their rights … in other case the citizens won't understand, which values are in the priority in courts[4].

5. *Public (or external) CPDGS significance*, from our point of view, consists of a range of aspects – *preventive (or precautionary), administrative, social, political, anti-corruptive and training*, that are tightly inter-connected, what, however, doesn't exclude a possibility for their separate consideration.

5.1. *The preventive significance of CPDGS* in case of their compliance in law-enforcement is stated in making conditions for citizens' lawful behavior, ceasing negative consequences of their activity, guiding for adequate fulfilling legal prescriptions, contained in particular procedural acts and, often, social intensification of fighting crime.

5.2. *The administrative significance of CPDGS* is that the standards as the criteria for individual CPD quality assessment are basic for constructing a system of qualitative indicators for law-enforcement

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2 *Мизулина М.Ю.,* Власть. Политика. Технологии , М., « ДиАр», 2002, 216-217.

3 *Ершов В.В.,* Самостоятельность и независимость судебной власти Российской Федерации, М., «Юристъ», 2006, 268.

4 *Валанчус В.*, Навіщо потрібна уніфікована судова практика, «Право України», №.11-12, 2012, 138.

results in criminal procedure in general, thus also receiving objective information about the qualitative condition of justice in our country. Another manifestation of the existing standards system's managerial significance is that the majority of system administration issues in the judicial framework, prosecutor's office and pre-trial investigation are solved exactly based on the qualitative criterion of CPD, made by these bodies' representatives.

5.3. *The social and political CPDGS significance* reveals in a clear conceptually agreed system of norms, binding for any CPD making by all the official bodies of criminal procedure, that creates a foundation for persuading society that the administration of justice is fulfilled on high standards, thus also is a pre-condition for increasing the trust in judicial and law-enforcement bodies and their public prestige. Of course, reaching this result is possible only under the condition of CPDGS compliance with public needs, implementing social expectations, particularly, regarding just and timeous remedy of violated human rights.

5.4. The anti-corruptive CPDGS significance requires particular considering.

5.4.1. CPDGS are a substantial component of a more common legal phenomenon – anti-corruptive criminal procedural standards (a system of requirements for criminal procedural legislation, compliance with which determines its ability to be an effective mechanism of preventing and counter-acting corruption in this sphere).

5.4.2. During all the stages of criminal procedure CPD is the main object of bribery deals, when involves law-breaking. Making a legitimate, reasoned and just CPD during the criminal procedure is an indicator of all the criminal procedural activity's good-quality, thus also its decency. And, on the contrary, the essence of various corruptive activities often is that the investigator, the prosecutor or the judge, using own discretional powers (frequently involving violations of law), following illegal interests, for a certain corruption payment or profit make consciously lawless procedural decisions (illegal, unreasoned, unjust, evidently not timeous – sudden or, vice versa, delayed etc.). Besides, this happens on different stages of criminal procedure in line with different goals (continuous delay of the proceedings by the means of red tape or oppressing the parties, assisting to the suspect or the convict in destroying crime traces, hiding the assets which can be subject to distraint, disguise from pre-trial investigation bodies etc.). Using specific entries, such decisions, made with law-breaking, are an object of corruptive exchange.

5.4.3. Therefrom it is obvious that the set of activities for providing CPD good-quality is simultaneously one of the effective means for fighting corruption in this sphere. And this regards, first of all, the excellence of CPD making technology legal regulation. In fact, its normative regulation, including the elimination of legal uncertainty during constructing foundations and conditions for CPD admission (particularly, because of excessive overload of these norms with subjective value judgments and univocal terms) determines certain "difficulties" and makes an "unpleasant micro-climate" for corruption misfeasance of TWMD in their discretional powers. In these cases the subjects of corruption offences in order to receive corruptive profits meet more difficulties in maneuvering within the legal framework – they have to neglect legal requirements, what makes corruption more evident and harder in realization, considering the control over criminal procedure. And, on the contrary, the drawbacks of procedural and substantive legislation, which, in opinion of experts, comparatively with other circumstances aren't, however, the main corruption factor, though contribute the origin of a range of corruption activities during the criminal procedure.

5.5. It is therefore unthinkable to leave unseen the significance of worked out CPDGS for the effective organization of training personnel for the bodies of investigation, prosecutor's office and justice.

3. Conclusions

Summing up, it is necessary to set the following statements:

· CPDGS, being a total set of normative prescriptions, binding for any CPD making, under the condition of their adequate construction, obtain a huge regulative potential in the common mechanism of law-enforcement in the criminal procedure.

· The role of CPDGS is multifaceted and manifests in various (internal and external) directions.

· The main CPDGS significance for a particular criminal procedure parties reveals in their orienting function for law-enforcing, criterial and evaluative – for those who examine CPD from the angle of its quality and ensuring – for the parties whose interests refer to the admitted decision.

· External or public (exceeding the boundaries of a particular criminal proceeding) CPDGS significance is considerable enough as well. The main manifestation of these standards positive role in regulating public relations is their *preventive, social, political, anti-corruptive and training effect.*

· Besides, on the modern stage of national society's development, under the condition of active corruption-fighting, including the law-enforcement sphere, the CPDGS anti-corruption significance is especially up-to-date. The existence of adequately reflecting the legal reality requirements for the main object of the corruption exchange in the criminal procedure – CPD and appropriate control on upholding them is exactly the powerful preventive factor for various trespasses in this sphere.

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Problem Aspects of Realizaion of The Function Of Justice According to the CPC of Ukraine In the Context of Court Activity in Examination of Evidence

1. Introduction

Criminal and procedural activities cannot exist beyond the processes taking place in the state - political, social, legal, etc. whereit plays a secondary role. Separate areas of criminal and procedural activities (functions) also cannot exist apart from these social processes, ensuring normal functioning of society.

So, the existence of the function of criminal prosecution isdetermined by the need of society in combating crime, and the function of protection by the need of citizens in protection from arbitrary rule of the state through its officials that carry out criminal prosecution. Criminal prosecution is carried out by officials of the competent state bodies, which are increasingly referred in the legal literature as the bodies of criminal prosecution[1]. The latter (the bodies of pre-trial investigation of Internal Affairs bodies, Security Service of Ukraine, bodies exercising control over the observance of tax legislation, operational units) are included in the structure of executive power. Public prosecutor's office also belongs to the bodies of criminal prosecution. These bodiesare also referred to as the «bodies of prosecuting authorities» in the literature[2].

The existence of the function of the criminal justice is determined by the need of state and citizens in ensuring just resolution of criminal and legal conflicts. However, we cannot agree with the position of those authors who single out the function of resolution of the criminal case, performed by the court, in the triad ofcriminalprocedural functions alongside with the functions of the prosecution (criminal prosecution), and defence[3].The purpose of any criminal proceeding is makingthe final decision in criminal case. At the same time, from the functional point of view, making a decision is only a part of criminal procedural activities. The latter in a trial court and courts of higher instances it is not only scaled tomaking the final decision, which proves or disproves the charge. Besides making the final decision the activities of the court with the participation of parties in competitive procedure, i.e. in the conditions under which the parties hope forthe resolution the case in their favor, consists, also of

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1 Проблеми забезпечення ефективності діяльності органів кримінального переслідування в Україні: монографія / *В. І. Борисов, Л. В. Дорош, В.С. Зеленецький та ін.* – Харків: Право, 2010, 400.

2 *Фойницкий И. Я.,* Курс уголовного судопроизводства. - В 2-х томах. - Т. 1. / *И. Я. Фойницкий*. Санкт Петербург: Альфа, 1996, 70-72.

3 *Дуйсенова Э. Г.,* Функция суда по разрешению уголовных дел в системе уголовно-процессуальных функций России и Казахстана:дис. … доктора юрид. наук: спец. 12.00.09 / Дуйсенова Эльмира Габиденовна. – Оренбург, 2004, 167.

a significant number of criminal procedural and intermediate procedural decisions. All of them taken together form the meaning of the notion «function of justice» in criminal cases.

Function of justice is a mechanism of implementation of the judiciary in the state. The latter is realized not in general, but in relation to the particular case wherethere are certain claims from the state or a private person to another person due to the probablecommission of criminal offence by the latter.

The mechanism of realization of judiciary through the criminal process is studied in L.Voskobitova's doctoral thesis[4]. Therefore we shall linger round those general provisions of criminal procedural activities, that form the content of the function of justice, which, first, are the most disputable in the science of criminal proceedings and, secondly, the solution of the problems with implementation of which will allow to provide theoretically substantiated proposals regarding the fulfillment of its functional purpose by criminal procedural activities in adversarial criminal proceedings. Let us analyze the following problems briefly.

2. The Activity of Court in the Study of the Circumstances of Criminal Proceedings is a Sign of Inquisitional Process

History of the issue. For many decades, of «Soviet history» exercising of criminal and procedural activity court, as well as the parties, was obliged to take measures for the full and complete investigation of the circumstances of criminal case (article 22 of the Criminal Procedure Code of Ukraine - the CPCof 1960). The introduction of the principles of competitiveness of parties and freedom to provide their evidence to the court and to prove their cogency before the court (article 22 of the CPC of 2012) into criminal procedural legislation should havetaken the court beyond the range of subjects which are obliged to establish the circumstances of criminal proceedings fully, comprehensively and impartially. However, it did not happen. The fact that the court has the responsibilityto investigate all the circumstances of criminal proceedings fully and completely (part 1 article94, paragraph 1 part 1 article 485 of the CPC) casts serious doubt on the «extension of competitiveness of the parties», declared by the Concept for reforming of criminal justice of Ukraine[5], which played a methodological role in the preparation of the CPC of 2012.

Recent changes to legislation in the Russian Federation (RF) on cognitive investigative activity of court.In some countries of the CIS, where the principle of competitiveness was introduced, attempts are made to return to inquisitional procedure of investigation of circumstances in criminal proceeding. So, in the Russian Federation according to the project of the Federal Law «On amendments to the Criminal Procedural code of the Russian Federation due to the introduction of the instituteof establishment of objective truth in a criminal case»[6], court wascharged with the duty of taking all measures provided by law for comprehensive, full and objective clarification of the circumstances to be proved for the establishment of objective truth in a criminal case (article 16-1 of the project). Scientists proceduralists

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4 *Воскобитова Л. А.,* Механизм реализации судебной власти посредством уголовного судопроизводства:дис. … доктора юрид. наук : спец. 12.00.09 / Воскобитова Лидия Алексеевна. М., 2004, 463.

5 Concept for Reforming of Criminal Justice of Ukraine, 2008: Офіційний вісник України. 2008, № 27, 838.

6 Проект Федерального Закона «О внесении изменений в Уголовно-процессуальный кодекс Российской Федерации в связи с введением института установления объективной истины по уголовному делу», 2012, размещен на:<http://www.sledcom.ru/discussions/?SID=3551>.

of the Russian Federation after the presentation of this draft law had a number of questions: does the court deal with the search for objective truth, even when establishing the issue is avoided (actively avoided) by the bodies of preliminary (in Ukraine - pre-trial –L.K.) investigation and the prosecutor? Does the court seek ways to objective truth itself or listen to opinion of the parties? How should the court find what itis not able to reveal and entrust the parties to search for «it», or guide them?[7]Taking into consideration the fact that the truth is the result of cognitive activity, and the comprehensiveness, completeness and objectivity (impartiality) - is the path to it, Ukrainian legislator may be asked such questions because of the wording of articles 94 and 485 of the CPC.

Reflection of the court activity in the new CPC of Ukraine.Criminal procedural activity, organized on the basis of competitive proceedings, excludes the activity of the court in research of circumstances of criminal proceedings. Such activity must be shown by the parties. In accordance with those innovations that occurred in criminal and procedural legislation in 2012,we could actually abandon charging thecourt with the duty to investigate *all*the circumstances of criminal proceeding full and comprehensively. The fact that the CPC of 2012 has significantly expanded opportunities for evidence gathering by the parties and their representation before the court speaks in favor of this conclusion.It especially concerns the party of defense, which got the right to engage an expert independently, and the accused is in fact provided with the right to free legal assistance of a lawyer. Under such conditions, forcing the court to « complete » the wok for the parties is unreasonable.

Meanwhile, according to part 11article 352 of the CPC court (the presiding judge and judges) has a right to ask the witness questions after the interrogation[8]. Moreover, this right is not restricted by any conditions.

In the course of criminal procedural activity,where the principle of competitiveness is in action, the main feature is the division of procedural functions between the court and the parties, and the court cannot perform any functions other than to delivering justice. In this regard it would be logical for the legislator (for the sake of «purity» of the principle of competitiveness) to establish certain restrictions which would prevent the court from coming down on one of the parties positionvoluntarily or involuntarily. For example, the court should not have the right to ask such questions, which cast doubt on the charges introduced (modified, supplemented) by the prosecution, for the disposal of the latter is the exclusive competence of the prosecutor. The court shall conduct proceedings only within the charge according to the indictment (part 1 article 337 of the CPC). The only case when the court for the purpose of making a fair judgment and protection of human rights and fundamental freedoms has the right to go beyond the limits of the charge specified in the indictment, concerns the change of *legal qualification* of the criminal offence, if it improves the situation of a person against whom criminal proceedings is implemented (part 3 article 337 of the CPC). But the court has the right to change the legal qualification of the act in the course of adopting a decision on results of court consideration. In the course of clarifying the circumstances of the criminal case and their check by evidence, the court may not express its position regarding the qualification of the act in both ways neither to worse nor to improve the situation of the

[7] *Колоколов Н. А.*, Глава 14 «Поиск объективной истины или погоня за утопией?» // Теория уголовного процесса: состязательность: монография / под ред. докт. юрид. наук Н. А. Колоколова. Ч. І. Юрлитинформ, М., 2013, 329.

[8] The court has the same right in the course of questioning of the other participants of criminal proceeding – victim, experts etc.

accused. So, the questions of the court to the participants of judicial review should lie only within the clarification of the circumstances which have already been the aim of cognitive activity of the parties. Otherwise the court will remain as active as it was in the Soviet criminal proceedings and declarations on the expansion of the principles of competitiveness will remain only declarations.

The proposed solution of the problemofcourt activity in investigation of circumstances of criminal proceedings will allow to reach a compromise between the two polar technologiesof court activities (activity). That is, between completecompetitiveness, where the court is passive in research, and the parties do not need the truth in principle, and completelyinquisitorial, where the court needs only the justice (the truth), even when the parties do not need it. Besides it, the court, «without infringing » upon the «truth» of the parties and not coming down on either sidewill be able to make a fair (in terms of both substantive and procedural law) decision according to the results of court consideration.

In addition, the realization of this proposal will not hurt the ideato promote quality of cognitive-accusatory activities conducted under the procedure supervision of the prosecutor during the pre-trial investigation and by the prosecutor independently in a trial court. The prosecutor counteracts the crime. The prosecutor's problem of efficient activity in courtto prosecuteon behalf of public prosecution, and the problem of accused and his defensecounselor to protect from this charge is not a problem of the court.

3. Prohibition for the Prosecutor to Provide Evidence to the Court Together with the Indictment-the Method to Increase Activity of the Court the in the Examination of Evidence

A significant step towards the eradication of inquisitorial principles from criminal procedural activities is to deprive the court of possibility tomake a decision in advance on the question of guilt by studying the materials of the criminal case submitted by the prosecution together with the indictment. Law prohibits the prosecutor to provide the court other documents than the established by part 4 article 291 of the CPC (the register of materials of pre-trial investigation, a civil action, the receipts of particular participants for obtaining certain procedural documents), *prior to trial*. Of course, the introduction of such innovation was to move away from the negative procedure of the past, when the prosecutor sent all the materials of a criminal case to court before the hearing, even those which did not contain any evidence against the accused.

However, the legislator, having said «a», failed to say «b». The study of the practice of criminal procedural activities in trial courts shows that prosecutors understand the provisions of part 4 article 291 ofthe CPC literally: « it is prohibited to submit procedural documents created in the course of pre-trial investigation before the start of the trial, and after its beginning is permitted to submit all documents».

Such understanding of the provision of the law mentioned above by prosecutors in some particular cases leads to the fact that immediately after the beginning of the trial, prosecutors place *all* the materials of pre-trial investigation «at court's disposal», while the party of defense submitsits documents gradually during the trial as the study of certain circumstances. Thus, the insight of the court into the prosecution party materials (i.e. forming the accusatorytrend in the activities of the court) under the new CPC is only delayed in time[9], compared to how it was under the CPC of 1960.

[9] The time of delay equals the term of preparatory proceeding that is five days.

It can be assumed that the legislator, by prohibiting the party of prosecution to submit all procedural documents to the court before the beginning of the trial supposed that the partyof prosecution will do it gradually to substantiate its position on certain issues, which make the substance of the charge. However, this procedure must be specified in a more detailed way to avoid ambiguous understanding ofcurrent regulations in procedural law by the prosecutors and the judges. This can be done by including a prohibitiveregulation into the law, regarding the provision of all the materials of pre-trial investigation by the prosecutor after the trial started before the beginning of studies on the circumstances of the criminal proceedings.

4. As for the Chief Judge's Duty to Question the Accused about the Confession of Guilt

The manifestation of inquisitionof procedural activities undertaken at the trial stage, is also a duty of the chief judgeto ask the accused if he pleads guilty after reading the indictment out (part 1 article 348 of the CPC), i.e. whether he agrees with the indictment presented to him by the prosecution. The duty to prove the charge is entrusted to the prosecutor. Therefore, it is illogical toask the accused about his attitude to the charge before the beginning of the examination of evidence in court. It would be quite different, if defendant's pleading guilty (agreement with the indictment) were important to determine the order and scope of the study circumstances of criminal proceedings. But even the application of the procedure of the so-called «reduced study of evidence as for the circumstances that nobody challenges»regulated in part 3 article 349 of the CPC does not provide clarification of the accused attitude to the indictment.

Debates can be held about the impact of pleading guilty as a way of repentance for the actions committed, onsolving the issue of exemption a person from criminal responsibility. But neither the process of investigation of circumstances of the criminal proceedings, northe varieties of solutions at the final stage of the trial (conviction or verdict of not guilty, ruling of applying or not applying compulsory measures ofmedical or educational nature) are irrelevantto the declaration of a person about his/her personal attitude to the charge (pleading guilty or denying the charge)[10]. Moreover, asking the accused a question of the recognition of the guilt before the beginning of examination of evidence by the court affects the rule of the presumption of innocence because the affirmative answer strengthens the conviction of judges of the guilt before the establishment of any actual circumstances of the criminal act which the person is charged of.

5. The Problem of Influence of Parties on Making Judicial Decision

Illegal influence on the activity, that forms the content of the functions of justice, is prohibited. It is an axiom, which is not a subject to question. Virtually[11] all the types of procedural activities of the parties in the court hearing are legitimate influence of the parties at the court for to make adecisionsuitable for them.

[10] Affirmative answer of the defendant to the answer of the chief judge as for pleading in Ukrainian criminal proceeding cannot be considered as confession of criminal action which is a characteristic feature of Anglo-Saxon (common law).

[11] Except the cases when prosecution provides evidence discharging the defendant and when defense provides evidence of his/her guilt.

The legal effect of the parties on the court according to the current CPC depending on its obligatory nature can be divided into two types.

The first type of legal effect of the parties on court is connected with the fact that the participant (party) of the criminal proceedings convinces the court of the need to adopt a particular decision. This refers to the type of the latter - sentence, decision of applying compulsory measures of medical or educational nature, as well as its content (as for the severity of punishment etc.). The court may or may not agree with these proposals and at its sole discretion, guidedby law, take a decision, which will coincide with the proposed or will not.

The second type of influence, introduced into the criminal procedural legislation by the CPC of 2012, is that the participants of trial both at pre-trial stage and at the stage of trial have the right to determine the penaltyfor the accused independently, and court must approve it in case of consent. According to part 1 article 475 of the CPC if the court is convinced that the agreement can be approved, it passes the sentence, which approves the agreement and assigns the degree of punishment agreed by the parties. The court has discretion on solving the issue of approval or disapprovalof the agreement, but itdoes not have such a right as for the extent of punishment agreed by the parties. Consequently, the court in such a situation is excluded from the process of making decision on the extent of punishment and the determination of his justice, for the particular case[12].

Traditionally, in the legal literature talks were held about the inadmissibility of assuming the functions of prosecution (criminal prosecution) and/ordefense in terms of implementation of the principles of competitiveness.The current procedural regulations of the procedure of determining penaltyby the parties to the agreement allows to single out ignoring of the principles of competitiveness in the part of assuming the functions of justice by the prosecution (the prosecutor) or by a victim.

The court as the only judicial authority in the state should have the power to determine the type and extent of punishment in all cases of making decisions in essence of the charge independently, including in case of approval of agreements on reconciliation and recognition of guilt. In criminal procedure law it is expedient to introduce a legal regulation about such a procedure of concluding agreements on reconciliation and plea, according to which the court would be a participant of the process of concluding agreement in the course of court proceedings.

It is more difficult to solve the question about the influence of court on decision makingfor approval of agreementif it has been made during pre-trial investigation, i.e. without the participation of the court. According to the current CPC the court may, inter alia, refuse to approve the agreement, if the conditions do not correspond to the interests of society. It is obvious that the punishment agreed by the parties to the agreement, due to its excessive severity or mildness (which is more likely for the institution of agreements), can be perceived by the society as clearly unfair,although it is not for the parties to the agreement.

In order to improve the situation with legal regulation of punishment assignment according to agreements, as well as to ensure fairness of a judicial decision for the parties of agreement and the society

[12] Havronyk gave the term «lawprocuratoring» to the right, given to prosecutor by the CPC of 2012, to indemnify the defendant or to administer punishment and to specify which one. (See: *Хавронюк М. І.,* «Правопрокурорря», або деякі проблеми угоди про визнання винуватості, міститься на: <http://www.pravo.org.ua/index.php/2011-07-05-15-26-55/2011-07-22-11-18-16/637>. Admeasuring the penalty without the participation of court by concluding it in the course of negotiation between the defendant and the victim seems to be even more illogical.

in general, it is expedient to establish the following order of the court's activity as for assigning the punishment. If the court considers the agreement concluded during the pre-trial investigation, ithas the right, should no objections from the parties arise, to modify it in the part of extent of penalty (within the sanctions of article of the law on criminal responsibility) to improve the position of the accused. Introduction of such a provision into the law does not limit the free will of the parties to the agreements on other terms of the agreement, and the court modificationof the penalty determined by the agreement can be blocked by the party (parties) of agreement by way of filing an objection.

If the judge comes to the conclusion about the necessity to change the penalty towards deterioration in the position of the accused, it makes a decision to refuse from the approval of the agreement. After that criminal proceedings should continue in the usual manner.

It seems that if, the court may go beyond the limits of the charge, specified in the indictment (part 3 article 337 of the CPC), to make a fair judgment and to protect human rights and fundamental freedoms, thanwith the same purpose it must have the right to «go beyond the limits» of the agreement, and not be «bound» by the position (although a joint one) of parties to the agreement.

6. Conclusions

1) the court's questions to the participants of judicial review should be only within the clarification of circumstances which previously were aimed by the cognitive activity of the parties, that will allow to reach a compromise between the two polar court technology activities (activity)–competitiveness and inquisition; 2) it is expedient to prohibit the prosecutor in the law to provide all the materials of pre-trial investigation after the beginning of the trialbefore the beginning of the study ofspecific circumstances of criminal proceedings; 3) asking the accused before the beginning of examination of evidence by the court the question if he/she pleads guilty affects the rule of the presumption of innocence because the affirmative answer strengthens the conviction of judges of the guilt of the person still before the establishment of any actual circumstances of the criminal act which the person is charged of; 4) it is expedient to establish in the criminal procedural law such a procedure for concluding agreements on reconciliation and plea, according to which court should be a part of this process in court proceedings.

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