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Medea Matiashvili*

Homicide of Wife-Husband in the Old Georgian Law

Present article refers to the issue of homicide of wife-husband in the old Georgian law. Objective of the article is to determine, how the homicide of wife/husband was regulated in the old Georgian law, to define the relevant norms prohibiting such a crime and distinguish the responsibilities of spouses. For the achievement of set objective, it is necessary to study direct (positive, ecclesiastic and customary law norms) and indirect (hagiographic and historical monuments) sources of the law. As a result, it is defined, that according to the old Georgian law, homicide of wife/husband is a crime. Georgian Positive law is familiar with the general composition of wife's murder as well as separates the issue of murder of adulterous wife (including catching on the offence and committing crime based on the latter motive). It is a crime to murder husband; this type of murder is considered under the law of Vakhtang VI and the Armenian law.

***Key words**: homicide of husband, homicide of wife, homicide of spouse, homicide of adulterous wife, murder of innocent wife, husband's right over his wife, punishment of wife, moral crime, adultery, mounting on the donkey, pelting.*

1. Introduction

There are norms regulating relationships between wife and husband in abundancy in the old Georgian law. Among them one can encounter the guarantees for the protection of right for life of wife/husband.

Old Georgian family was patriarchal. Wife was obeying the husband. This rule was effective for individual as well as larger families. But despite the above, the head of the family, the man did not have unlimited power over the wife, he could not kill her. However, Georgian law was making some exceptions and in some cases, decided on the right of husband over the wife's life based on her guiltiness.

Certainly, old Georgian law protected husband's right on life and punished severely the woman committing such crime. Moreover, unlike the murder of wife, Georgian law did not know any exceptions from the above rule and despite the guiltiness of the husband, the responsibility was imposed over the person committing such action.

Objective of present article is to determine, how the old Georgian law regulated murder of wife/husband, to define relevant norms prohibiting such crimes and identify the responsibility of spouses. For the achievement of the above objective, the norms of old Georgian law and indirect sources of law history – hagiographic and historical monuments – will be discussed.

Article discusses murder of wife and husband individually. Murder of wife is conditionally divided into the murder of innocent and adulterous wives. Murder of wife is evaluated separately

* Doctoral Student, TSU Faculty of Law.

based on the "Martyrdom of the Holy Queen Shushanik". The second type of murder – murder of husband, is presented in the second part of the article. This section discusses norms regulating murder of husband and provides analysis of one real case of such crime.

2. Homicide of Wife

2.1. Homicide of Wife Based on "Martyrdom of the Holy Queen Shushanik"

It is unimaginable to review one of the forms of domestic violence, in particular, issue of physical violence, murder of wife in the old Georgian law without study and understanding the first written Georgian monument "Martyrdom of the Holy Queen Shushanik". As rightly noted by *En. Giunashvili:* "None of the hagiographic monuments have been discussed in so many books and scientific articles, none of the hagiographic texts have been published so many times, none of Georgian hagiographic works caused such an excitement, as "Martyrdom of the Holy Queen Shushanik"**.**[1] Scientists interested in the history of law have not either left this work without attention. At the time, *Iv. Javakhishvili,*[2] *Iv. Surguladze,*[3] *G. Nadareishvili,*[4] *I. Putkaradze*[5] and others expressed number of positions, worth noting, about this work. However, the question, whether the actions of Varsken were legitimate and accordingly, whether there was domestic violence in place, remains without answer. Although, above mentioned authors do not review the manuscript specifically in the light of domestic violence, however, each of them attempt to assess Varsken's actions and to answer question – Whether the Bidaxae had right to torture and liquidate her? The task is complicated, first of all, by the fact that **"Martyrdom of the Holy Queen Shushanik"** is the first written monument survived. There are no legislative, or other types of documents, clarifying the legal condition of Georgia in V century available. Scientists attempt to search for such information based on the text itself and historical materials about the V century.

It must be taken into account, that **"Martyrdom of the Holy Queen Shushanik"** is hagiographic manuscript and it is only indirect source of history. However, the fact that author was contemporary to the main hero of the manuscript, equips the monument with a huge advantage. Accordingly, however overstated or in contrary, understated were the events by Jacob the Priest, the story is still distinguished with high credibility; therefore, answers to the questions raised above shall be found in the text itself.

"Martyrdom of the Holy Queen Shushanik" is classical hagiographic work, describing the self-sacrifice of main hero, Shushanik for the religion. There is a position in the scientific literature

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1 *Gabidzashvili En.,* Works, I, Monographic opuses, Tbilisi, 2010, 151 (in Georgian).

2 *Javakhishvili Iv.,* Objective, Sources and Methods of History in the Past and at Present, I, Old Georgian Historical Literature (V-XVIII), Tbilisi, 1945, 45-54 (in Georgian).

3 *Surguladze Iv.,* Opuses from the History of Georgian Political Doctrines, Tbilisi, 2001, 8 (in Georgian).

4 See: *Nadareishvili G.,* Rules of Divorce in Feudal Georgia, Works of Stalin Tbilisi State University, 63, Tbilisi, 1956, 229-231. *Nadareishvili G.,* Woman's Legal Conditions in Feudal Georgia, Journal, "Soviet law", 3, (May-June), 1968, 56-57 (in Georgian).

5 *Putkaradze I.,* Work on Issues of the History of Georgian Family Law, Journal "Soviet Law", 2, March-April, 1968, 88-91 (in Georgian).

that unlike other hagiographic works, "Martyrdom of the Holy Queen Shushanik" is based on the uncommon form of martyrdom and the reason for the above position is that in this work Christian martyrdom victim does not oppose the official political-religious power.[6] The author of this position is *En. Gabidzashvili.* The scientist considers the confrontation of Shushanik against the bidaxae of Kartli, first of all, as domestic, family conflict: "Although official power in the face of Varsken, Kartli bidaxae is confronting Shushanik, however, his actions against Shushanik are not based on either political or religious motives, but on the Shushanik's decision, not to live in the family of spouse who adopted Mazdeism religion. The only goal of Varsken is to return Shushanik back home".[7] Moreover, scientist does not decline the social basis of the conflict: "Christian woman is convinced with all her being that living with the spouse who adopted Mazdeism religion is encroachment of the sacredness of Christian religion".[8] Position that conflict between Shushanik and Varsken is first of all family type confrontation is quite widely spread in the scientific literature. *Iv. Javakhishvili* is also supporter of the above position. According to his view, Varsken's actions are conditioned by Shushanik leaving husband's house and his ferocity is related to this fact.[9] *N. Janashia* also fully shares this positon.[10] *V. Inauri* refers to the conflict "conditioned by the religious-political situation" and "family aspect".[11] *R. Siradze* has different position; according to *R. Siradze,* fall of one person (in this case – Varsken) or tragedy of one family, is the common misfortune for the country, accompanying our lives. "Therefore, we cannot perceive "Martyrdom of the Holy Queen Shushanik" as family drama".[12]

"Martyrdom of the Holy Queen Shushanik" is artistic image of martyrdom life and tragic decease of its main hero, Shushanik. The key objective of the monument is to idealize the hero, self--sacrificed for the religion and to underline the importance of his/her self-sacrifice. However, one cannot decline that "Martyrdom of the Holy Queen Shushanik" is dual family drama and it also reflects the personal conflict of persons acting, Shushanik and Varsken. The differences in viewpoints are conditioned by the real basis for the above conflict – religious/political dispute, or personal grievance or both together. It must be considered that manuscript is created based on religious motives; its main hero is person, occupying political position and he encounters confrontation in his own family, from his wife; therefore, conflict is based on personal grievance as well as religious confrontation. Moreover, reasons for confrontation for Shushanik and Varsken may differ. For Shushanik such reasons are first of all religious type (Jacob Tsurtaveli draws this very line in the process of describing martyrdom life of the hero), however the above does not exclude, moreover, determines the personal confrontation, with the husband. As rightly noted by *N. Janashia,* disagreement of Shushanik and Varsken, started before he left for Iran and moved to another level, after adoption of Mazdeism religion and apostasy of husband.[13] As for Varsken, conflict with wife has

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6 *Gabidzashvili En.,* Works, I, Monographic opuses, Tbilisi, 2010, 265 (in Georgian).
7 Ibid, 265.
8 Ibid, 265-266.
9 *Javakhishvili Iv.,* Objective, Sources and Methods of History in the Past and at Present, I, Old Georgian Historical Literature (V-XVIII), Tbilisi, 1945, 45 (in Georgian).
10 *Janashia N.,* Martyrdom of Shushanik, Historical-sourcelogical research, Tbilisi, 1983, 253 (in Georgian).
11 *Inauri V.,* Tragedy of Varsken Bidaxae, Tbilisi, 2004, 3 (in Georgian).
12 *Siradze R.,* Georgian Hagiography, Tbilisi, 1987, 39-40 (in Georgian).
13 *Janashia N.,* Martyrdom of Shushanik, Historical-sourcelogical Research, Tbilisi, 1983, 250-251 (in Georgian).

first of all personal nature, however, it is closely related to the political and religious factors. In any case, personal conflict between the spouses is in place and accordingly, "Martyrdom of the Holy Queen Shushanik", can be considered as the first survived written work as well as work describing domestic violence, where husband is violently treating, torturing and in the end murdering his wife. In order to determine, whether husband had such right in V century, it is necessary to determine the rules effective in the Georgian families of that time. These issues are covered by *G. Nadareishvili.* According to his correct comment, one can draw from the text, that family consisted of husband, wife and children and some of the servants might have been members of the family too.[14] It is clear, that family was patriarchal and its head, head of the family was bidaxae Varsken. Woman obeys man and is not equal to him. For 5th century this is natural condition of a woman, which is evident from the text. The above is confirmed by the resentment of Shushanik during the meal at the behavior of Jojik's wife, when the latter sits at the table together with men and has a meal – "when was it ever, the men and women eating together?!"[15] However, later, Shushanik partially changes her mind and even expresses her dissatisfaction about the inequality of men and women in the mundane world and her desire for the heavenly world: "when the time comes, when I and Varsken will be presented in front of the Judge, God, where man and woman are not tried differently, where men and women are equal".[16] The scientists have not missed this fact. For example, *Iv. Javakhishvili*[17]*and N. Janashia*[18] mention the inconsistent nature of Shushanik's position – at the beginning she is against the equality of men and women and later, she expresses her discontent due to such inequality. However, unlike other scientists, *N. Janashia* does not support the view that Shushanik is supporting the idea of equality of man and woman.[19] Author perceives this statement as the way for revenge against Varsken: "She intends to continue fight against Varsken in the other world. Even before the death, when humans often forgive the enemies all their sins, Shushanik is not getting softer. She states with the threat, that will make a word in front of God, in order to duly punish Varsken".[20] Author explains support demonstrated by the queen for the idea of equality by the double standards dominating in the Christian doctrine: "Christians although recognize equality for everyone, at the same time, do not consider it necessary to have everyone socially equal in this world".[21] *G. Nadareishvili* also touches the gender issue in "Martyrdom of the Holy Queen Shushanik" and notes that according to the work, "woman carries the heavy burden of family power of the man"[22] Scientist refers to this circumstances as characteristic to 5th century and as a confirmation, presents the note on the Will of Vakhtang Gorgasali, confirmed by the Georgian historian, Juansher, according to which, the king decides on the marriage of his sister in the following way: "If not alive, marry my sister Khuarandze to

[14] *Nadareishvili G.,* Opus on the History of Georgian Law, Tbilisi, 1971, 53 (in Georgian).
[15] *Jacob the Priest,* Martyrdom of Shushanik, Georgian Literature, I, Tbilisi, 1987, 230 (in Georgian).
[16] Ibid, 240-241.
[17] *Javakhishvili Iv.,* Objective, Sources and Methods of History in the Past and at Present, I, Old Georgian Historical Literature (V-XVIII), Tbilisi, 1945, 45-46 (in Georgian).
[18] *Janashia N.,* Martyrdom of Shushanik, Historical-Sourcelogical Research, Tbilisi, 1983, 277 (in Georgian).
[19] Ibid, 278.
[20] Ibid, 275.
[21] Ibid, 278.
[22] *Nadareishvili G.,* Woman's Legal Conditions in Feudal Georgia, Journal, "Soviet Law", 3, (May-June), 1968, 56 (in Georgian).

Mirian".[23] It is evident that in 5th century, woman is not a subject, it is an object, she obeys man, who is authorized to manage her fate via the Will. But only the fact that in the 5th century the woman talks about the equality of genders even for the heavenly life, is very important. Although, it is organic for Shushanik, to have women and men having meal separately, walking in the scarf and obedience to the husband based on the traditions of the time, however, she feels the unfairness of this rules. The following statement is the repercussion on such discontent: "Where there is no difference between the man and woman". It is unimaginable for this period to talk about equal rights for women and men. It is a confirmed fact that woman obeys man, that she is in his possession. That is why Shushanik's statement is revolutionary and accordingly, equal to the expression of idea of equality for that period.

Position that Varsken is unconditional head of the family and that all members of the family obey him is widely spread in the scientific literature and practically is not subject for argument. For example, *G. Jamburia* notes: "The power of Varsken over the members of his family – wife, brother and etc. – is huge. The greater is such right/power over his servants, who are very scared of Varsken beating them or even killing them".[24] *Sh. Meskhia* draws our attention to the term "lord", according to his right comment, Jacob refers to Varsken in the following way: "My lord, why do you act in this way and mention such evil?"[25] According to the author's interpretation, "Lord was generally the epithet of God, however, the word was also used with the meaning of worldly gods – master, owner, possessor".[26] *G. Nadareishvili* is even more categorical, according to him: "Husband is seen as unlimited lord of wife. Husband beats wife, imprisons her and etc. In other words, he has approximately such power over his wife, as lord for slave".[27] In his other work, researcher provides comparison with III-IV century Persian large family; according to the author: "Head of the family – Dustak Sardari is unlimited in his rights over his wife. Anyway, as we can see it based on Matikin, head of the house has right to kill wife, sell her as a slave and etc".[28] *I. Putkaradze* does not consider Varsken's violence as legitimate and accordingly, declines the unlimited, despotic power of husband in the family for the period.[29] The researcher states that Varsken's action is "violence conditioned by the potential and actual support from invadors and excludes "implementation of right" by him.[30] Moreover, according to the author, in Georgia of the discussed period, husband must not have right to "fully unanimously and willfully decide on the critical issues of his spouse's personal life, he had to seriously consider the position of wife".[31] It is difficult to say, what does "critical issues of personal life" imply, but in any case, whatever the implication of the daily problem, it is unimaginable,

[23] The Kartli Chronicles, Edited by *S. Kaukhchishvili,* I, Tbilisi, 1955, 151, see from the work: *Nadareishvili G.,* Woman's Legal Conditions in Feudal Georgia, Journal, "Soviet Law", 3, (May-June), 1968, 56 (in Georgian).
[24] *Jamburia G.,* Issues of Georgian Feudalism, Tbilisi, 2007, 19 (in Georgian).
[25] Opuses of Georgian history, II, Editor of the Volume *Sh. Meskhia,* Tbilisi, 1973, 141 (in Georgian).
[26] Ibid.
[27] *Nadareishvili G.,* Woman's Legal Conditions in Feudal Georgia, Journal, "Soviet Law", 3, (May-June), 1968, 56 (in Georgian).
[28] *Nadareishvili G.,* Opus on the History of Georgian Law, Tbilisi, 1971, 55 (in Georgian).
[29] *Putkaradze I.,* Work on Issues of the History of Georgian Family Law, Journal "Soviet Law", 2, March-April, 1968, 90 (in Georgian).
[30] Ibid.
[31] Ibid.

that in 5th century husband needed to consider wife's position and moreover, to have her consent for making decision. It is known, that until XX century, woman could not even make decision on her own marriage without her parents,[32] she actually did not have right for inheritance[33] and fully depended on the will of men; therefore, it is impossible to consider that husband had to "seriously consider wife's view".

Based on the fact that "Martyrdom of the Holy Queen Shushanik" is family drama, it contains important information on the old Georgian family, including the relationship between the spouses. The first note on the punishment, considered for the moral crime, mounting on the donkey is also encountered in "Martyrdom of the Holy Queen Shushanik". This fact was underlined by *G. Nadareishvili.* According to the researcher's observation, the "Karad Karauliti" mentioned in the monument, refers to the tradition of mounting on donkey, which considered publicly mounting of guilty wife on the donkey by her husband.[34] According to the rightly comment made by the author, unfortunately the mentioned tradition was not characteristic only for the 5th century Georgia; according to Davit Batonishvili, despite the fact that the above tradition was prohibited by the law, in 1805 year, inhabitants of Bodbiskhevi mounted the woman Barbare, accused for leaving her husband and prostitution, on the donkey in Kiziki and walked her around the houses.[35] Moreover, notes on the application of above punishment, are also found in the materials of XIX -XX centuries.[36] It is known that old Georgian law in some cases was forgiving husband even murder of his wife, if he caught her in the process of adultery.[37] Therefore, ruling of husband over the wife was not surprising at all. But even in cases of punishment of wife by husband, this was reaction against the crime committed by wife, for example – adultery, insulting husband and etc. The question is – in case of Shushanik, whether there was other type of offence in place? i.e. what preceded the violence from Varsken?

In order to answer these questions, the text itself must be reviewed. After adoption of Mazdeism by Varsken, Shushanik leaves the palace without his consent and will, leaves the house. Varsken's reaction is as follows: "You have overturn my image, and insulted my bed, you left your place and left for

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[32] The article by *H. Abashidze* "Voice of Georgian Muslim woman" is devoted to the rightless status of woman at the beginning of XX century; in the article author describes parent's unlimited power in the decision on marriage of daughter: "Parents treat them as the goods for sale, love is forbidden for them; father chooses as the future son in law the man his daughter has not seen even once, and gives her away under his will and order.". *Abashidze H.,* Voice of Georgian Muslim woman, newspaper "Batumi newspaper", 18, 1914, from the work: *Bekaia M.,* Old Georgian Marriage Traditions in Adjara, Batumi, 1974, 97 (in Georgian).

[33] Georgian women were requesting securing the right for the inheritance even at the beginning of XX century. In 1917 year first Georgian feminist newspaper "Voice of Georgian woman" was issued; in the first issue, in the rubrics "What are we requesting", it was stated: "To annul present inheritance privilege for man and each child, whether female or male, to get equal share of parents' property". What Are we Requesting – Daily Political and Literature Newspaper, "Voice of Georgian Woman", 1, 1917, 5 April, 1 (in Georgian).

[34] *Nadareishvili G.,* Divorce According to the Georgian Law, Leaving, Separation, and Divorce Itself, as the Stages of Divorce Rule Development, Issues of History of Georgian Law, I, Tbilisi, 1973, 314-315 (in Georgian).

[35] *Bagrationi D.,* Review of Georgian Law and Legislation, Edited by *Ap. Rogava*, Tbilisi, 1959, 983; from the work: *Nadareishvili G.,* Divorce According to the Georgian Law, Leaving, Separation, and Divorce Itself, as the Stages of Divorce Rule Development, Issues of History of Georgian Law, I, Tbilisi, 1973, 315-316 (in Georgian).

[36] *Davitashvili G., Crime* and Punishment in Georgian Customary Law, Tbilisi, 2011, 459 (in Georgian).

[37] Vakhtang VI, Article 42, Section 9, Law Book; Law of Vakhtang the Sixth, text was defined and references attached by *Is. Dolidze,* 1981, 194 (in Georgian).

the other place".[38] He feels himself insulted due to the Shushanik's behavior. The response of Shushanik is following: "I have insulted you, in the same way as you have rejected your creator".[39] It is remarkable, that Shushanik's behavior is evaluated negatively not only by Varsken. Outsiders also criticize the queen for the above behavior. For example, Jojik condemns Shushanik's demarche in the same categorical manner: "You are our sister, do not insult the house, place of queens". Therefore, Shushanik's action – leaving the palace, leaving husband, is a huge humiliation for Varsken and moreover, it is not only his subjective evaluation. In the 5th century such behavior of wife was "overturning of image" and "destroying" the house". Simply, leaving the husband equals to insult, particularly so, if the husband is bidaxae. Shushanik does not decline the above, she also evaluates her behavior as insult of husband. Moreover, queen acts in this way intentionally, to punish the husband or/and for his betterment. It is known that leaving husband/wife was criminalized in old Georgian law. The object of crime was protection of family as an institution, as well as respect and dignity of spouse. Therefore, in the 5th century leaving of husband by wife must have been huge offence.

At a first glance, it seems that Shushanik herself acts violently, infringes husband's respect and dignity. However, the issue is not as simple. Shushanik's action is reaction on the immoral behavior of Varsken – he changes his religion, gives promise on marrying Shah's daughter, betrays his homeland. According to *G. Nadareishvili,* based on law of Georgian Christian period, Shushanik would have right to divorce Varsken.[40] However, author questions the effectiveness of Georgian Christian law in the period of Varsken's ruling.[41] It must be considered, that Shushanik leaves house and husband, as well as declares disobedience. At the dinner arranged by Varsken, Varsken demonstrates first attempt for reconciliation; during the dinner, the queen expresses her protest on the behavior of Jojik's wife, "inappropriate" for a woman and treats her rudely. At this moment, the physical confrontation between Varsken and Shushanik starts: "Then Varsken started inappropriate swearing and beating her with his feet. And he got hold of the scraper and hit her on the head, and hit her and injured one of her eyes".[42] Christianity itself considered the obedience to husband: "Wives shall obey their husbands, as their lord", "as husband is head of his wife, as the Christ is the head of the church", "and as the church obeys to the Christ, the same way – the wives shall obey their husbands" (Epistle to the Ephesians 5, 22-24). But was this condition effective in case of rejection of the Christianity by husband? It is not likely that wife retained the obligation to obey Mazdeist husband, the person who betrayed the god. However, this rule would be effective only under the condition of full reigning of Christianity and in the period of strong church power. It is known and one can understand from the text that in the 5th century the church lacked the actual power and was fully subordinated to the secular leader. The contemporary political situation must be also taken into account. According to Sh. Meskhia observations, 'This unlimited power of Varsken and his full inaccessibi-

[38] Jacob the Priest*, Martyrdom* of Shushanik, Georgian Literature, I, Tbilisi, 1987, 228 (in Georgian).
[39] Ibid.
[40] *Nadareishvili G.,* Divorce According to the Georgian Law, Issues of the History of Georgia Law, I, Tbilisi, 1973, 314 (in Georgian).
[41] Ibid.
[42] Jacob the Priest*,* Martyrdom of Shushanik, Georgian Literature, I, Tbilisi, 1987, 230 (in Georgian).

lity was based on the power of Persians'.[43] It is a fact that, according to the monument, Shushanik's right to confront husband and not to obey him is not evident. On the contrary, "Martyrdom of the Holy Queen Shushanik" describes the violence of Varsken and underlines his power. Although, Jakob the Priest condemns bidaxae 's behavior, however, the monument does not describe the resistance from the Church and effective reaction on Varsken's behavior.

It is interesting to look at the review of Shushanik's martyrdom in historical sources. Author of "Life of Vakhtang Gorgasali", Juansher describes the major family drama of 5th century in the following way: "When his wife, Shushanik heard about her husband abandoning Christianity, she did not stay as the wife. And she forgot her love to her husband and with whole heart started following the commandments of the Christ".[44] Juansher is not evaluating the episode and only describes Varsken's reaction: "Then Varsken put his efforts – first with coaxing and imploring and promises, then torturing, and I will not in long describe the torment Saint Shushanik has undergone and then her husband, Varsken principal has killed her".[45] Hence, according to the above note, Varsken first tortured and then killed his wife. It is important that Juansher describes torturing of wife by Varsken, as a result of which she died, as well as directly qualifies actions of bidaxae – "then her husband, Varsken principal has killed her".[46]

Evidently, there are also Armenian sources on "Martyrdom of the Holy Queen Shushanik". Moreover, manuscript has not been translated in full into Armenian and represents the brief account of the original.[47] For example, one of such sources is Ukhtaneli's opus "History on separation of Georgians from Armenians"; 67th chapter refers to the Martyrdom of Shushanik.[48] Although the above monument differs with the original with few details,[49] however, unfortunately it does not provide additional information on martyrdom or generally, on the family life of 5th century. It seems that in the historical as well as literature monuments, preserved up to date, there are no direct assessments of the above family conflict, on the one hand, assessment of Shushanik's actions – her leaving the palace and disobedience of husband, or on the other hand – Varsken's responsibility or implementation of his right. However, there is one Georgian historical note about the death of Varsken, which confirms his execution due to the murder of Shushanik.[50] This note caused different views among the scientists and is not shared by the majority. However, it must by noted that there are no other sources about death of

[43] Opuses of History of Georgia, II, editor of the volume, *Sh. Meskhia,* Tbilisi, 1973, 93 (in Georgian).
[44] *Juansher,* Life of Vakhtang Gorgasali, Kartli Chronicles, I, Tbilisi, 2012, 182 (in Georgian).
[45] Jacob the Priest*.,* Martyrdom of Shushanik, Georgian Literature, I, Tbilisi, 1987, 230 (in Georgian).
[46] *Juansher,* Life of Vakhtang Gorgasali, Kartli Chronicles, I, Tbilisi, 2012, 182 (in Georgian).
[47] *Abuladze Il.,* Relationship of Georgian and Armenian Literature, During IX-X centuries, Research and Ttexts, Tbilisi, 1944, 0172 (in Georgian).
[48] *Ukhtanesi,* History of Separation of Georgians from Armenians, Armenian text with Georgian translation and research was published by Z. Aleksidze, Tbilisi, 1975, 386-393 (in Georgian).
[49] In the process of work discussion, *Z. Aleksidze* talks about one detail, by which the works of Armenian historians are distinguished from Georgian and Armenian versions of Martyrdom, which have survived until today. Namely, *Ukhtanesi* describes the fact of dragging Shushanik by Varsken from the church in the following way: First Varsken "dragged Shushanik in the streets and roads, beat her and broke her mouth and jaw…" neither Georgian nor Armenian versions of Martyrdom cover these details of the episode, preserved versions do not mention streets or roads. See: *Ukhtanesi,* History of Separation of Georgians from Armenians, Armenian text with Georgian translation and research was published by *Z. Aleksidze*, Tbilisi, 1975, 388 (in Georgian).
[50] *Juansher,* Life of Vakhtang Gorgasali, Kartli Chronicles, I, Tbilisi, 2012, 182 (in Georgian).

Varsken. It is known that Varsken's death is not mentioned in the Martyrdom of Shushanik"; there is widely spread view that one of the reasons for the above is the date of monument creation.[51] And indeed, if Jacob the Priest knew about Varsken's death, he would surely mention the fact in his work, especially if such death was a result of punishment of Varsken due to the torture of the queen. Juansher describes Varsken's death as follows: "Then Bakur, the King of Georgians, appealed to all principals and secretly gathered the forces; Varsken went to the field, on the bank of the Mtkvari river, at the point where river Mtkvari joins river Anakerti; the forces attacked Varsken, cut him into pieces and hung on the tree. And Shushanik's corpse was taken with the great respect and buried in Tsurtavi".[52] As mentioned, the above episode caused disputes in the scientific circles. It is noteworthy that, in general, reputation of Juansher's work is heterogenous. Part of scientists are of the view that there are many unrealistic stories presented in the work, it is even referred to as the half-work of art.[53] Accordingly, assessment of work in terms of motives for execution of Varsken is greatly questionable. For example, according to the comment of *Iv. Javakhishvili,* the position that Varsken was liquidated due to murdering his wife, "is the desire of later historian" and does not correspond to the reality.[54] According to *Iv. Javakhishvili*, the above is confirmed by the fact that Varsken was killed in 12 years after the death of Shushanik. Therefore, it is less likely that Vakhtang Gorgasali paid off Varsken only after 12 years' time.[55] Vakhtang Inauri considers political reasons for the death of bidaxae; in his view, Varsken was "doomed for political and not religious purposes".[56]

Indeed, Iv. Javakhishvili's position, that at the time of Varsken's punishment, Vakhtang Gorgasali was not guided "by religious considerations", has to be taken into account.[57] It is difficult to imagine that it took Vakhtang Gorgasali 12 years to punish Varsken and this took place under the condition that bidaxae's actions were known for the contemporary society and deserved evident disapproval. This is confirmed by the last scene of "Martyrdom of Shushanik", when people express their respectful farewell to the queen. According to the right observation of *N. Janashia,* although bishop Samuel did not attend Shushanik's burial, he sent his assistant, Ioane to the ceremony.[58] According to the position of the scientist, the above fact is the evident confirmation of the fact that "Kartli church assigned huge importance to the Martyrdom of Shushanik, by which Varsken and his behavior was publicly disapproved one more time".[59] Position of author, Jacob the Priest is straightforward. And it is not surprising, with the consideration of literature genre and attitude of author towards the queen. Fact that Varsken's actions caused criticism in the 5th century is very important. However, proving that Varsken did not have right to punish Shushanik, and that the power of husband did not extend over her, is quite difficult. We can assume, that protest about Varsken's actions in the contemporary society and

[51] See: *Tsurtaveli I.,* Martyrdom of Shushanik, *Merchule G.,* Life of Grigol Khandzteli, text was prepared for publicshing, vocabularies and research attached by *Z. Sarjveladze, K. Danelia, E. Giunashvili; Editor: E. Gabidzashvili,* Tbilisi, 1986, 43; *Kekelidze K.,* History of old Georgian Literature, I, Tbilisi, 1951, 105-106 (in Georgian).
[52] *Juansher,* Life of Vakhtang Gorgasali, Kartli Chronicles, I, Tbilisi, 2012, 182 (in Georgian).
[53] Opuses of History of Georgia, II, editor of the volume *Sh. Meskhia,* Tbilisi, 1973, 90 (in Georgian).
[54] *Javakhishvili Iv.,* Works in Twelve Volumes, I, Tbilisi, 1979, 326-327 (in Georgian).
[55] Ibid, 327.
[56] *Inauri V.,* Tragedy of Varsken Bidaxae, Tbilisi, 2004, 18 (in Georgian).
[57] *Javakhishvili Iv.,* Works in Twelve Volumes, I, Tbilisi, 1979, 327 (in Georgian).
[58] *Janashia N.,* Martyrdom of Shushanik, Historical-Sourcelogical Research, Tbilisi, 1983, 361(In Georgian)
[59] Ibid, 262.

clerical circles, first of all, was conditioned by the fact, that queen was fighting for the religion and not the fact that husband tortured and murdered wife. Moreover, this indignation has not been expressed clearly and nobody could confront Varsken, due to his official position. Even clerical persons behaved with reverence before him and only limited themselves by comforting the queen. Of course, such situation is not surprising for 5th century. Therefore, Juansher's position on the motives for Varsken's punishment, could be assigned to author's desire. However, even unprecise interpretation, presented by the chronicler, provides us with large information. It seems that, according to the evaluation of historian, Varsken deserved punishment for murdering his wife, i.e. according to his view, bidaxae should not have legitimate right to torture and finally kill the queen. But even at this point, we should not create illusion, that by XI century murdering the wife is regulated in general and that form of domestic violence – murder of wife is prohibited, in any case. It is evident, that Juansher's position is also based on the martyr death of Shushanik and her sacrifice for the religion.

Hence, monument of 5th century – "Martyrdom of the Holy Queen Shushanik" – provides unique information about the contemporary family life. Although, Shushanik's motives are deeply religious, however, there is also family type conflict in place. Wife leaves husband, does not obey him and therefore gets the cruel punishment – beating, imprisonment, putting into irons, dragging with hair, and finally – death. Nobody assigns responsibility for the above over Varsken. He is master-owner of his wife. Although, Varsken's actions condition negative attitude of society, and certain disapproval, but due to his position, nobody manages to confront him. At the end Vakhtang Gorgasali executed Varsken, but the actual basis for such punishment was treason and not torture and murder of his wife. Therefore, based on the preserved written materials, we can conclude that there were no norms regulating domestic violence in Georgia in 5th century.

2.2. Homicide of Adulterous Wife

Georgian positive law was familiar with the norms prohibiting encroachment upon the life of wife and husband, excluding the absolute right of husband over his wife. However, it was also noted that in certain cases, Georgian justice considered exceptions and was assigning responsibility over the husband murdering wife with the consideration of guiltiness of the latter (wife). For the illustration of the above practice article 42 of Vakhtang VI's law book will be discussed. The article contains the list of circumstances excluding the responsibility: "Their blood is not requested and such responsibility is not generated", among others, part 9 names murder of adulterous wife – "if the man catches wife on adultery and kills her, no blood feud from brother or relative is requested".[60] Forgiving murder of adulterous wife did not mean the existence of unlimited power of husband over his wife. By this article legislator considered wife "caught for adultery", i.e. catching woman on adultery, emotional condition of husband and therefore, was releasing husband from the responsibility. According to G. Nadareishvili's right comment, the fact that husband did not have unlimited power over his wife is confirmed by another responsibility releasing condition envisaged under the other paragraph of the same article; according to the mentioned article "Insulted husband was entitled to kill wife as well as wife's

[60] Law of Vakhtang the Sixth, text was defined and references attached by *Is. Dolidze,* 1981, 194 (in Georgian).

lover"[61] Moreover, in case of adultery, legislation forgets social inequality and grants the serf with the right to kill even the master, if "he is caught lying with his wife".[62] Based on the above, legislator pays particular attention to the wife's adultery as the motive for her murder, considers the damage incurred by husband and forgives him the commitment of offence for the above damage. Of course, according to the monument, only the man is released from the responsibility and does not consider such action committed by the woman, in other words murdering adulterous husband, as the condition for releasing woman from the responsibility or as the extenuating circumstances. The above is not surprising, as it is known that in ancient Georgia, adultery was considered as mainly offence committed by women, and accordingly, only women had to expect punishment for such offence. However, it is noteworthy, that murder of guilty wife is not considered as the circumstance releasing from responsibility by all Georgian law monuments. The Armenian law included in the law collection of Vakhtang the 6th, does not forgive such action to the committer and accordingly punishes the offender – "The man murdering his wife for adultery must be responsible by the law, as the law envisages divorce with a woman for adultery and not her murder".[63] The same line is drawn by article 75 of Davit Batonishvili law; however unlike Armenian law, it punishes the person committing the crime, symbolically, by cutting his right hand. It is clear that Georgian law is inconsistent in relation to this issue. Although law of Vakhtang the 6th occupies higher level compared with the above-mentioned monument with its relevance and influence, and, moreover, the Armenian law is part of Vakhtang VI law and has only supplementary, additional function, but the above-discussed collision is still important. It indicates that homicide of wife by the husband even with such a "legitimate" basis, was questionable. Probably, for this very reason, legislator (Davit Batonishvili) deemed the provision of Vakhtang VI law book as unfair and attempted by his own legislative act to change the defined rules. He was punishing murderer husband despite the guiltiness of wife.

It is interesting to find out what was the attitude of Georgian Customary law towards the similar cases. According to the general rule, husband did not have right over the life of his wife, however, there is a valid question – could he murder adulterous wife? *D. Jalabadze* covers the above issue in the process of review of Pshavi customary law. Author presents two examples.[64] First example refers to the murder of fiancé. The bridegroom kills his fiancé, as the latter did not fulfil the promise and married other person.[65] And in other case, husband kills his wife, who did not wait for the spouse who went to the army and married the other person.[66] According to *D. Jalabadze,* as the teller of the above stories does not mention the punishment of persons, these circumstances "make the punishability of murder committed under the similar motive questionable and one should consider it as one of the forms of revenge admissible under the law".[67]

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[61] *Nadareishvili G.,* Old Georgian Family Law, Tbilisi, 1974, 49 (in Georgian).
[62] Ibid.
[63] Georgian Law Monuments, I, Collection of Vakhtang VI's laws, texts were published, studied and vocabulary attached by *Is. Dolidze,* 1963, 286 (in Georgian).
[64] *Jalabadze D.,* Crime and Punishment in Georgian Customary (Folk) Law, (based on Pshavi Customary Law), Tbilisi, 2003, 55 (in Georgian).
[65] Ibid.
[66] Ibid.
[67] Ibid.

Punishment of adulterous wife was not unfamiliar for Georgian Customary law. Such punishments as pelting, mounting on donkey, cutting the nose and mutilating were imposed over the persons committing the above-mentioned crime. Moreover, the last two punishments were conducted at the initiative of husband and by husband. Despite the above, it is not likely that in Georgia, including Pshavi, husband had right to kill adulterous wife. More so, it is difficult to imagine that rejected bridegroom could kill his fiancé and not to get punishment. Note provided by *Vazha-Pshavela* on rejecting the bridegroom is confirmation of the above. According to the author, "IF woman manifestly rejected the husband and would add to this rejection the impudence, adultery, then husband would mutilate such wife, i.e. Pshavi resident would say "mutilate" – cut her nose or hand, would take away from woman the feature attracting the man's heart and eye – her beauty".[68] Accordingly, based on the above note, it becomes clear that betrothed had right to mutilate the woman rejecting him and not to kill her. The same rule was valid in Khevsureti. According to *S. Makalatia's* notes, for rejecting husband, the woman was endangered to have nose and thumb cut, as "the ambitious Khevsurian man considered leaving of wife as a great insult, he would not accept the repudiation payment and would feud the family of woman".[69] *M. Kovalevski* also talks about the same form of punishment of adulterous wife in Pshavi. According to the scientist, husband could mutilate adulterous wife, the offence would cause expelling of wife from house.[70] Again, in this case, author does not mention her killing. *M. Kovalevski* also excludes the right of husband to murder adulterous wife in Svaneti. According to author's definition, husband did not have right to kill wife for any reason in Svaneti; even if wife was betraying him, husband would still be punished for such an action.[71] *V. Itonashvili* discusses the issue of murder of betraying wife in central Caucasus. According to *V. Itonashvili,* although story tellers talked about husband's right to murder adulterous wife, however, at the same time, they noted that for such an action husband could become object of revenge from the side of woman's relatives.[72] According to the scientist, based on the customary rules, execution of adulterous wife was acceptable in Chechnia-Ingushia.[73] According to the tradition, man could "kill man caught for adultery, and could cut wife's nose and expel her".[74] In case of Adigians "punishment for adulterous wife depended on the husband, who could kill her or mutilate her or disgrace her (by means of cutting ear or hair) and to return her in this condition to parents".[75]

We can conclude that, according to the Georgian Customary law, husband should not have right to murder adulterous wife. He could punish her: mutilate and even expel her, however, could not kill woman without punishment even for such an excusable reason.

Hence, old Georgian law separately draws attention to the issue of murder of adulterous wife. According to the law book of Vakhtang the 6th, catching "wife on adultery" is considered as the circu-

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[68] *Vazha-Pshavela,* Ethnographic Letters, Tbilisi, 1937, 127 (in Georgian).
[69] *Makalatia S.,* Khevsureti, Tbilisi, 1935, 183 (in Georgian).
[70] *Kovalevski M.,* Primitive Law, II, Family, Moscow, 1886, 94 (in Russian).
[71] Ibid, 49.
[72] *Itonishvili V.,* Family Life of Mountainous Population of Central Caucasus, I, Family Life of Nakhebi and Ossetins, Tbilisi, 1969, 84 (in Georgian).
[73] Ibid.
[74] Ibid, 85.
[75] *Okujava K.,* XIX Century Ethnographic Motes on Black Sea Cost Adigians, Tbilisi, 2003, 31 (in Georgian).

mstance excluding the responsibility. It has to be considered, that law envisages committing of homicide at the moment of catching wife on the offence and not murdering adulterous wife in general. On the other hand, Armenian law and Davit Batonishvili's law set prohibition for husband to kill adulterous wife and impose responsibility for such action. As for the Customary law, similar to the norms of Positive law, homicide of adulterous wife is a crime. Husband can punish and expel wife, but cannot murder her.

2.3. Murder of Innocent Wife

According to the article 62, law book of Vakhtang VI, murder of innocent wife was punished strictly. Namely, husband had to pay in blood to the family of killed wife and to additionally get the following punishment: "The bishop is aware of the legal part of the punishment".[76] Moreover, in case of unclear situation, husband had to justify himself by means of "oath, boiled water or red-hot-iron". In addition to discussed crime, the above type of justification was considered only for revealing persons under the suspicion of killing the king or robbery of the church.[77] Moreover, it is known that provision "The bishop is aware of legal part of punishment" meant transfer of the case to the church court. Qualified compositions included in the law book of Vakhtang VI, including cases on the homicide of family members, were subject of review at the royal and bishop's courts and in certain cases, considered the highest punishment – execution.[78] *Al. Vacheishvili* expresses his position that clauses "You know" or " We know" on the one hand, transfer the case to other unordinary court and, moreover, are so undefined, that could mean nothing else than execution.[79] To state, for sure, that homicide of innocent wife conditioned execution is difficult, as composition of the article does not directly specify the punishment. Crime considers "blood" according to the line, however, as the cases were transferred to the church court it cannot be excluded, that similar to the homicide of husband or brother, to assume that legislator implied highest sentence, or at least admitted such possibility.

In the above chapter the norms from the customary law were discussed in relation to the homicide of adulterous wife and it was stated, that Georgian customary law did not grant such right to the husband. Accordingly, fortiori the admission of homicide of innocent wife by husband has to be ruled out.

The fact that under the customary law certain crimes directed against the life and health of close relatives are considered as private law violations, is not something new.[80] Accordingly, such crime represents circumstances excluding or extenuating the responsibility.[81]According to the general rule, the blood was not taken within the persons with the same family name, and in case of homicide of family member, the responsibility was limited to only the moral reprehension.[82] However,

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[76] Vakhtang VI, Article 42, Section 9, Law Book; Law of Vakhtang the Sixth, text was defined and references attached by *Is. Dolidze,* 1981, 201 (in Georgian).

[77] *Nadareishvili G.,* Old Georgian Family Law, Tbilisi, 1974, 49 (in Georgian).

[78] *Vacheishvili Al.,* Opuses from the History of Georgian Law, I, Tbilisi, 1986, 105 (in Georgian).

[79] Ibid.

[80] *Davitashvili G., Crime* and Punishment in Georgian Customary Law, Tbilisi, 2011, 212 (in Georgian).

[81] Ibid, 220.

[82] Regarding this issue, see *Davitashvili G., Crime* and Punishment in Georgian Customary Law, Tbilisi, 2011, 214; Georgian Customary Law, edited by *M. Kekelia,* III, Tbilisi, 1991, 75 (in Georgian).

evidently release from the Blood payment, does not mean acceptance, encouragement of such action or/and implementation of husband's right. The situation that in Georgia, in most cases the murderer of family member was not imposed the blood feud, was conditioned by the economic factors. Within the family taking the blood did not have any sense, as in such case, the family would incur the double damage. *M. Kovalevski* directed his attention to the above mentioned and explained the situation with the lack of public bases for the crime.[83] However, in some regions of Georgia homicide of wife, as well as murder of other member of the family, considered vendetta, but at the same time, there were regions, were such responsibility was not defined. For example, in Khevsureti, vendetta was not considered for the homicide of wife and small payment was envisaged: "If husband kills wife or father murders child, he must pay to the wife's relatives" five cows.[84] But for the murder of father or brother Khevsurian tradition considered payment with blood. For example, in the event of homicide of father, the other child could make the homicide brother to pay the "half-blood",[85] and in case of murder of brother – grandchild of murdered brother requested Blood and his request was satisfied.[86] Husband did not have right to murder wife in Svaneti too.[87] However, unlike Khevsureti, wife's murder "generally caused vendetta".[88] Based on the above, Georgian Customary law prohibited homicide of wife by the husband and the guilty person was punished accordingly.

Old Georgian law considered composition on the murder of wife and like the other members of the family, protected her life too. Law book of Vakhtang VI devotes separate article to the murder of wife and threatens husband with blood payment and legal responsibility. Georgian Customary law like the Positive law does not grant to husband the right to kill wife and considers such case as the crime.

3. Homicide of Husband

3.1 Norms of Old Georgian Law on Homicide of Husband

According to the law of Vakhtang VI, homicide of husband belonged to the category of heavy crimes and presumably, was punished via the execution. The article 65 of the above law contains the clause on homicide of husband, subject is wife, object – husband's life, mean for the crime could be murder of husband with medicine or other means. As for the responsibility, the legislator defines as follows: "If she commits something she can justify, You know. Simply murdered – again, You know. God forbid, if it happened in our times – then we know".[89] Accordingly, if crime was committed in "our times", i.e. during the reigning of legislator King, then case would be presumably reviewed by the royal court, if later – similar to the homicide of other members of the family, the case would become subject of review for the ecclesiastic court. Moreover, the latter had to clarify the

[83] *Kovalevski M.,* Primitive Law, II, Family, Moscow, 1886, 34 (in Russian).
[84] *Makalatia S.,* Khevsureti, Tbilisi, 1935, 88 (in Georgian).
[85] *Ochiauri Al.,* Personal Archive, Khevsurian Justice, Manuscript, Notebook 2, 13, 1945, see from the work: *Davitashvili G.,* Crime and Punishment in Georgian Customary Law, Tbilisi, 2011, 213 (in Georgian).
[86] *Baliauri N., Stsorproba* (relationship between woman and man) in Khevsureti, Tbilisi, 1991, 80 (in Georgian).
[87] *Nizharadze B.,* Historical-ethnographic Letters, Tbilisi. 1962, 111 (in Georgian).
[88] *Davitashvili G., Crime* and Punishment in Georgian Customary Law, Tbilisi, 2011, 216 (in Georgian).
[89] Law of Vakhtang the Sixth, text was defined and references attached by *Is. Dolidze,* 1981, 202 (in Georgian).

crime motives and determine the guiltiness – "If there are circumstances justifying such an action, You know". It is difficult to say, what could be bases for forgiving her such an action or extenuating the responsibility. Possibly, we can only assume, that if wife killed husband for his guilty actions, court could consider such circumstances. Husband's guilty actions could include torturing of wife by husband, bed treatment or humiliation. We are able to state the above based on the norm in the monument itself, which prohibits physical violence of husband against wife and by this way protects wife's health, respect and dignity (article 64).

Husband's right for life is also protected by section two, article 169 of the Armenian law, according to which: "If woman murders her husband by means of lethal poison or by other action, she will be responsible in this world and get responsibility in the heavenly world too".[90] Similar to the law of Vakhtang Batonishvili, the Armenian law mentions killing husband by means of medicine or other mean for committing the crime. Moreover, unlike the homicide of wife (section one, article 169), legislator makes woman murdering her husband punishable even in the heavenly world.

Based on the above, Georgian positive law considers homicide of husband as crime and punishes the murderer woman. In particular, this type crime is covered in the law of Vakhtang Batonishvili as well as Armenian law. The latter makes woman murdering her husband punishable even in the heavenly world. According to the law of Vakhtang Batonishvili for such crime, similar to the composition on murdering other members of the family, type of punishment is not provided directly, however, it is assumed that for such crime execution could be envisaged.

3.2 About One Case on Homicide of Husband

There is one question to be answered – what was the court practice like for the homicide of spouse in old times? How often were the above-mentioned norms applied in real life? In this regard, there is one very interesting note in the scientific literature. Namely, *N. Khizanishvili (Urbneli)* describes widely discussed case, which had caused different views in the society and even deserved attention of the contemporary media (press).[91] The case was related to the fact of murdering the husband, Datika Tugushi by Pupi Tugushi via the killer (ordered murder).[92] Case circumstances were as follows: Pupi Tugushi, residing in Guria, made lover and ran away with him to Lechkhumi. Such behavior of woman became the subject of huge disapproval, however, Datika Tugushi's bad fortune has not ended by the above. His mutilated corpse was found in the forest night before the Christmas. Finally, it was identified that his wife murdered husband by order – "It turned out that Pupi ordered somebody else to murder her husband" – mentions Khizanishvili.[93]

Information about the case was published on 8 April, 1895 year in the newspaper "Iveria". Author of the article criticizes the idea to request "military tribunal", initiated by people and supported by investigator and mentions the murder as "ordinary homicide", and evaluates the diligence

[90] Georgian Law Monuments, I, Collection of Vakhtang VI's Laws, texts were published, studied and vocabulary attached by *Is. Dolidze,* 1963, 286 (in Georgian).
[91] *Khizanishvili N.,* Selected Legal Works, Tbilisi, 1982, 527-533 (in Georgian).
[92] Ibid.
[93] Ibid, 527.

of investigator as irresponsibility: "If today people request military tribunal for the ordinary homicide and administration and court endorse such request, tomorrow, if people apply the Lynch laws – who shall be blamed for that".[94] In the newspaper issue of 01 March of the following year correspondent again refers to the issue and provides the readers with the information on case outcome – Pupi and her accomplices were arrested, case was reviewed by the Kutaisi district court: "Court has found guilty for homicide As. Bolkvadze and Bes. Imnadze, as they have confessed into the committing the murder and released Jorbenadze. The criminals noted that the latter was not participating in the murder. Court, following the seizure of all rights, decided to send the accused persons to the works in mines – for 15 years in case of Pupi Tugushi, 20 years – Silovan Baramidze and 27 years – for Besarion Imnadze. On 27 February Tbilisi Court Chamber reviewed the case and approved the decision made by the Kutaisi district court".[95]

The discussed case, itself, is quite interesting, as provides information on the domestic violence, namely murdering of husband by wife, in XIX century; based on the information, one can conclude that according to the contemporary criminal law, for the ordered murder, court was imposing the sentence of work in the mines over the convicted person. In this period Code of Vakhtang VI is already annulled and legislation of Russian Empire is effective. Accordingly, in order to determine the approach of Georgian law to the wife/husband homicide, this note cannot be used. However, article of *N. Urbneli* devoted to this case is quite interesting; in the article author discusses the crime based on old law.[96] According to the author, it is only possible to understand the huge agitation generated in the society due to the crime, by understanding the old Georgian criminal law: "If Lanchkhuti society was requesting to execute murderers of Datika Tugushi via hanging, this is the influence of old law; possibly, people still have not forgotten that Pupi's guilt was very complex and heavy".[97] *N. Urbneli* argued that Pupi was responsible not only for the homicide of husband but also for the crime prohibited under the old Georgian law – adultery- "Pupi's adultery is the composition of separate crime. Whether this woman left herself or Silovan Baramidze took her, in both cases, husband was insulted".[98] Woman first left and insulted husband and then "ended her evil with murdering husband".[99] According to the s atement of *N. Urbneli,* it was unimaginable to commit homicide of husband in old Georgia – "Hardly said and heard".[100] Therefore, law of Vakhtang VI considered such composition, but considering its heaviness, was not assigning punishment or the crime and was transferring the case for the review to the King and bishop.[101] In case of Pupi, this crime, was aggravated by the motive; therefore, author understands the request of people to hang the

[94] *Lali,* Newspaper "Iveria", 72, 1895, 8 April, Saturday, 1-2, <http://dspace.nplg.gov.ge/bitstream/1234/60833/1/Iveria_1895_N72.pdf> [28 May, 2015] (in Georgian).
[95] Newspaper "Iveria", 48, 1896, 1 March, Friday, 2, <http://dspace.nplg.gov.ge/bitstream/1234/66569/1/Iveria_1896_N48.pdf> [28 May, 2015] (in Georgian).
[96] *Urbneli,* From the Chronicle of Criminal Law, Homicide of Husband, Newspaper "Iveria", №50, 1896, 3 March, Sunday, 1-3, <http://dspace.nplg.gov.ge/bitstream/1234/66571/1/Iveria_1896_N50.pdf> [28 May, 2015]. Also, see: *Khizanishvili N.,* Selected Legal Works, Tbilisi, 1982, 527-533 (in Georgian).
[97] *Khizanishvili N.,* Selected Legal Works, Tbilisi, 1982, 528 (in Georgian).
[98] Ibid, 530.
[99] Ibid, 532.
[100] Ibid.
[101] Ibid.

criminals. Although Georgian law, unlike Armenian law, was assigning to woman certain status, however, "Georgian woman was slave and servant of her husband and in old times, if such a creature murdered her husband, she would be burnt or pelted".[102] Therefore, according to *N. Urbneli's note,* in the past wife for the murder of husband could be pelted or burnt in Georgia. Although old Georgian law monuments do not directly consider such punishment for the homicide, but as the punishment for murder of husband is undefined, and the crime – very heavy, it cannot be ruled out, that criminal could be executed, including, via pelting or burning. Evidently, the practice and traditions dominating in old Georgia must have been known to *N. Urbneli* and presumably, his above position was based exactly on such knowledge.

4. Conclusion

Old Georgian law is familiar with the norms prohibiting homicide of wife and husband. Georgian positive law separates the homicide of adulterous wife. Law book of Vakhtang VI considers "catching" wife on "adultery" as the circumstance excluding the responsibility. In addition, it must be taken into account, that law implies murdering of wife by husband at the moment of catching her in the process of offence and not homicide of adulterous wife in general. On the other hand, Armenian law and law of Davit Batonishvili forbid husband to murder adulterous wife and assign responsibility for such action. As for the customary law, similar to norms of Positive law, here the homicide of adulterous wife is a crime. Husband can punish woman, mutilate and expel her, but he cannot kill her.

Old Georgian law also considers general composition of wife homicide. Namely, Georgian law prohibits murder of innocent wife. Law book of Vakhtang VI devotes separate article to this type of murder and threatens husband with blood payment and legal punishment. Georgian custommary law too, similar to the Positive law, does not provide husband with the right to kill wife and considers such action as crime.

In addition to direct source, we can get some information on homicide of wife from the first Georgian written monument "Martyrdom of the Holy Queen Shushanik". The work provides us with the unique information about the family life of the time. Based on the analysis of the manuscript text and other historical documents it becomes clear that in this period there were no norms in Georgia regulating the domestic violence.

As for the homicide of husband, old Georgian law considers such murder as crime and strictly punishes woman murdering her husband. In particular, Law book of Vakhtang VI as well as Armenian law are familiar with this type of murder. The latter assigns punishment for wife even in heavenly world. According to the law of Vakhtang Batonishvili, for such crime, similar to the murder of other family members, the type of punishment is not provided directly; however, it is assumed, that for this type of crime execution was envisaged.

[102] *Khizanishvili N.,* Selected Legal Works, Tbilisi, 1982, 528 (in Georgian).

Natia Chitashvili[*]

Framework for Regulation of Mediation Ethics and Targets of Ethical Binding[**]

Following formation of mediation legal framework, timely introduction of ethical rules is essential and inevitable necessity for comprehensive development of the corresponding practice. Representatives of parties to the mediation, third parties, mediation centres, exercising mediation administration – so called "mediation service providers" are also considered as targets of ethical standards in international practice in addition to mediators Existence of standards of mediation ethics, is indicative of mediation professionalization, since representatives of mediation domain undertake responsibility for their own professional behaviour in accordance with the above mentioned standards.

The paper reviews necessity of ethical regulation of mediation in Georgia and existing challenges, difficulties of enforcement of ethical norms, addresses of ethical limitations and set of issues which is appropriate to be covered by the Code of Mediation Ethics.

***Key words**: mediation ethic, party self-determination, neutrality, conflict of interest, competence, confidentiality, quality of the process, advertising, solicitation, mediation fees, mediation charges.*

"...mediation requires some formal rules
but I hope they are few.
Too many and we will lose the essence".[1]

I. Introduction

Heading towards institutionalization of mediation in Georgia, representatives of academic circles and practitioners unanimously agree that timely establishment of ethical rules is an inevitable prerequisite for sound advancement of mediation practice.

Ethics, considering its essence, is difficult to be given precise definition. In general terms it can be determined as a set of rules, recognized for certain professional group.[2] "Conduct, meeting established professional standards is considered to be ethical".[3] "Study of ethics implies survey of

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[*] Doctor of Law, Assistant Professor, TSU Faculty of Law, Certified Mediator, Executive Director at Ivane Javakhishvili TSU National Center for Alternative Dispute Resolution.

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[1] Letter from *Jacob A. Stein, Esq., Partner, Stein, Mitchell and Mezines*, Washington, D.C. to *Carrie Menkel-Meadow,* Professor of Law, Georgetown University Law Center, April 29, 1997, cited: *Menkel-Meadow C.,* The Silences of the Restatement of the Law Governing Lawyers: Lawyering as Only Adversary Practice, Georgetown University Law Center, 10 Geo. J. Legal Ethics 631, 1997, 631.

[2] *Wilson B.,* Mediation Ethics: An Exploration of Four Seminal Texts, 12 Cardozo J. Conflict Resol., 2010-2011, 122.

[3] *Merriam Webster's* Collegial Dictionary 398 (10th ed., 1993), cited in: *Kovach K.K.,* Mediation, Principles and Practice, 3rd ed., Thomson West, United States of America, 2004, 395.

moral decisions, determination of their appropriateness from the perspective of moral commitments".[4] "According to traditional legal definitions, "ethical" refers to moral conduct, activity, motive or characteristics of professional conduct standards".[5]

"Strengthening of ethical norms indicates establishment of relevant field as a profession",[6] since "self-regulated professions, as a rule, require their representative to be subject to certain ethical norms".[7] Establishment of ethical rules means, that representatives of relevant field are ready to take responsibility for their professional actions.[8]

Mediation ethics requires substantially different conceptual analysis, since here we deal with interlinked professional conduct standards of a lawyer and ethical norms of a mediator. "It is difficult to differentiate between ethical conduct and that complying with standards of mediation activity. E.g. issues related to confidentiality and impartiality of a mediator is are covered under ethics, though, with the development of mediation profession, boundaries between them will be naturally separated".[9]

"Mediation ethics norms mostly forbid conduct, which serves to obtaining unjustified and inappropriate benefit by a mediator, party, representative or a client,"[10] or getting an advantage at the expense of other persons.[11] "Necessity to identify ethical standards equally refers to mediators, as well as parties to the mediation, their representatives and third parties. It is also important to identify ethical liabilities mediation for provider agencies, which exercise administration of mediation services"[12] and thus have significant impact on development of the relevant practice.

The article reviews need for regulation of mediation ethics in Georgia, existing challenges, difficulties of enforcement of ethical norms, entities subject to binding by ethical standards and scope of issues, which would be desirable to be covered by Mediation Ethics Code.

II. Need for Regulation of Mediation Ethics and Existing Challenges

"Existence of standards for ethical conduct is characteristic for many professions, though establishment of mediator conduct rules originally implies conceptual contradiction with essence of mediation, since its substantial feature is voluntariness, non-mandatory nature, and flexibility of the process – is one of the main advantages of mediation.[13]

"Flexibility of mediation process implies capacity to settle wide range of disputes within mediation confines. Establishment of strict conduct rules will lead to losing this flexibility by a media-

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4 *Merriam Webster's* Collegial Dictionary 398 (10th ed., 1993), cited in: *Kovach K.K.,* Mediation, Principles and Practice, 3rd ed., Thomson West, United States of America, 2004, 395.

5 Black's Law Dictionary, 573, 7th ed., 1999.

6 *Shapira O.,* A Theory of Mediator's Ethics, Cambridge University Press, 2016, 35; *Schein E.H.,* Professional Education: Some New Directions, 1972, 8-9, cited: *Kovach K.K.,* Mediation, Principles and Practice, 3rd ed., Thomson West, United States of America, 2004, 395.

7 *Kovach K.K.,* Mediation, Principles and Practice, 3rd ed., Thomson West, United States of America, 2004, 395.

8 *Pritchard M.S.,* Professional Integrity: Thinking Ethically, Univ. Pr. of Kansas, 2006, 87.

9 *Kovach K.K.,* Mediation, Principles and Practice, 3rd ed., Thomson West, United States of America, 2004, 396.

10 *Riskin L.L.,* Awareness and Ethics in Dispute Resolution and Law, Why Mindfulness Tends to Foster Ethical Conduct, Tex. L. Rev.,Vol. 50:493, 2009, 496-498.

11 *Shapira O.,* A Theory of Mediator's Ethics, Cambridge University Press, 2016, 187.

12 *Kovach K.K.,* Mediation, Principles and Practice, 3rd ed., Thomson West, United States of America, 2004, 396.

13 Ibid.

tor".[14] "In order to ensure development of mediation of different styles and techniques, it is necessary to ensure elasticity of mediation ethical standards. Establishment of certain frames, standards and ensuring their strict enforcement is incompatible with mediation, similarly as excessive flexibility is not compatible with ethical norms.

Since mediation is a category, related with interdisciplinary domain, automatic reception of any related professional ethics standards would be inappropriate. Similarly it would not be right to say that mediators should be bound with professional standards of their initial profession as those could be incompatible within mediation context.[15]

Interdisciplinary nature of mediation domain, unacceptability of strict mechanisms and sanctions for ensuring enforcement of rules, complexity of subjecting mediation to regulations and justification of its necessity might be considered as significant obstacles in the process of establishment of mediation ethical standards.[16]

Ethical dilemma appears when a mediator, following his/her profession is restricted by ethical standards of other profession, such as: physician, lawyer, psychologist, and issue of applicable conduct rules should be determined. Therefore, "along with competition of conduct rules, it is important to identify a competent institution, which will have capacity to enforce sanctions and measures for responsibility, responding to violation of ethical rules".[17] Generally speaking this institution might be mediation provider organization, agency, association of mediators, the judiciary, exercising mandatory mediation, etc. Though, when a mediator is concurrently bound by ethical norms of other professions it is impossible to clearly indentify the entity, imposing responsibility.

Ethics of any domain have a common goal of preventing inappropriateness, deceit, conflict of interests and dishonesty. Though finally, professional standards of other fields may be not just incompatible with mediation, but often might be directly contradicting to the principles of impartiality of a mediator,[18] which once again proves need for establishing independent ethical standards in mediation domain.[19]

Ethics regulation is directly connected with ensuring enforcement of relevant rules. Regarding the issue of enforcement of ethics, as non-binding standards, there is an approach, that approval of code of ethics, as such by large and influential provider organizations,[20] acting in the field of dispute resolution[21] automatically ensures binding of mediators with these standards of conduct [22]. On the other hand, there is a different opinion that in order for the rules to be complied with, it is necessary to define measures of responsibility, such as: depriving a mediator's license, restriction of activity,

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[14] *Kovach K.K.,* Mediation, Principles and Practice, 3rd ed., Thomson West, United States of America, 2004, 400.
[15] Ibid, 397.
[16] Ibid, 400.
[17] Ibid, 401.
[18] Ibid, 397.
[19] On limitations by Lawyers' professional ethical rules of a lawyer participating as a mediator in the process see *Furlan F., Blumstein E., Hofstein D.N.,* Ethical Guidelines for Attorney-Mediators: Are Attorneys Bound by Ethical Codes for Lawyers When Acting as Mediators?, 14 J. Am. Acad. Matrimonial Law, 1997, 267-331.
[20] As were three associations, ABA, ACR and AAA in USA adopting Model Standards of Conduct for Mediators
[21] *Young M.,* Rejoice! Rejoice! Rejoice, Give Thanks and Sing: Adopt Revised, Appalachian Journal of Law, Vol. 5, 2006, 195.
[22] *Waldman E.,* Mediation Ethics, Cases and Commentaries, Jossey-Bass, A Wiley Imprint, United States of America, 2011, 10.

imposing disciplinary responsibility by mediators' association, imposing criminal or civil responsibility, if required.[23]

Despite the above mentioned challenges, considering the impact, mediation may have on individuals' lives, regulation of mediators conduct seems to be inevitable. Therefore, taking into account protection of two above mentioned important interests, mediators' conduct should be regulated while preserving certain degree of freedom of action of the latter".[24]

At the same time ethical evaluation of mediators by other entities of mediation and protection of professional authority and reputation would be impossible without existence of certain rules. Therefore, establishment of ethical conduct rules is a mechanism to protect mediators themselves, along with other persons/entities, involved in mediation.

III. Scope of Regulation of Mediator Ethics Code

1. Codes of Ethics of USA and Europe and Common Standards of Regulation

While developing mediation ethics standards, it is important to identify range of common issues, confines, which fall under regulation of majority of Codes of Ethics of foreign countries.[25] European Code of Conduct for Mediators acts on the territory of EU.[26] Independent codes were enacted by states, such as: Austria, Bulgaria, Greece, Poland, Malta, Rumania.[27] Code of civil and commercial mediation practice of legal society (England and Wales),[28] Code of domestic mediation practice of legal society (England and Wales)[29], Code of Conduct for neutral persons of effective dispute resolution centre (CEDR)[30], Code of Mediators' Practice of Mediation College[31], Code of Mediators' Conduct of Core Solutions Group (Scotland)[32], draft Code for mediators' practice of Civil Mediation Council[33], NMI (Holland) Code of Conduct for mediators[34], Cepani (Belgium) Rules of ethical conduct for mediators[35] and IMI Professional Conduct should be separately mentioned.[36]

Majority of Codes of Ethics, mentioned above covers regulation of issues, such as: conflict of interest, impartiality, neutrality, mediators' role, self – determination of parties, protection of family

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[23] Florida Supreme Court was the first one in USA to justify need for strengthening mechanisms for enforcing ethical rules. On this issue see. *Bernand P., Garth B. (eds.), Kovach K.K.,* Enforcement of Ethics in Mediation in ABA Section of Dispute Resolution, Dispute Resolution Ethics, A Comprehensive Guide, 2002, See *Alfini J.J., Press Sh. B., Stulberg J.B.,* Mediation, Theory and Practice, Reporter's Notes, 3rd ed., LexisNexis, 2013, 435.

[24] *Kovach K.K.,* Mediation, Principles and Practice, 3rd ed., Thomson West, United States of America, 2004, 396.

[25] E.g. for the purpose of their definition, 80 mediators were surveyed in Florida, USA regarding issues which had put them in front of ethical dilemma. see *Kovach K.K.,* Mediation, Principles and Practice, 3rd ed., Thomson West, United States of America, 2004, 402.

[26] European Code of Conduct for Mediators, 2004, <http://ec.europa.eu/civiljustice/adr/adr_ec_code_conduct_en.pd f>.

[27] *Esplugues C., Louis M.,* New Developments in Civil and Commercial Mediation, Global Comparative Perspectives, Ius Comparatum, Springer International Publishing Switzerland, 2015, 55.

[28] Law Society (England and Wales) Code of Practice For Civil/Commercial Mediation, 2009.

[29] Law Society (England and Wales) Code of Practice For Family Mediation, 2009.

[30] CEDR Solve Code of Conduct for Neutrals, 2008.

[31] College of Mediators Code of Practice For Mediators, <www.collegeofmediators.co.uk>.

[32] Core Solutions Group Code of Conduct for Mediators, Scotland, <www.core-solutions.com>.

[33] Civil Mediation Council – Draft Code of Good Practice for Mediators, 2009.

[34] Code of Conduct for NMI Registered Mediators, <www.nmi-mediation.nl>.

[35] Cepani (Belgium) Rules of Good Conduct, <www.cepani.be>.

[36] IMI Code of Professional Conduct, <www.IMImedaition.org>.

and children's rights, quality of proceedings, grounds for refusing the proceedings by a mediator, qualification, accreditation, confidentiality, mediation charges/service fee, advertising and solicitation of mediation, professional liabilities.[37]

Colorado Dispute Resolution Centre [38] can be considered to be a leader in USA in the field of developing ethics rules. This centre developed mediators' conduct rules as early as 1982. The above act was approved by Colorado Mediation Council [39] and the similar organizations. In 1986 a large interdisciplinary association – Society of Professionals In Dispute Resolution *(SPIDR*[40]*)* – adopted ethics rules and applied them to all neutral persons of dispute resolution process, including a mediator.[41] Since then more than 100 acts regulating ethics issues have been approved in USA specifically for mediation, as well as its various sectors.[42]

Among Codes of Ethics, approved in USA we need to specially mention Model Standards of Conduct for Mediators[43], which is common for mediation of all domains. [44] The present paper studies confines of regulation of Code of Ethics of mediation, considering its importance, on the basis of this very act.

Model Standards of Conduct for Mediators sets 9 principles: self-determination of parties, impartiality, conflict of interests, competences, confidentiality, quality of proceedings, advertising and solicitation of mediation, service fees/other charges and development of mediation practice.[45]

2. Principles Set by Model Standards of Conduct for Mediators

2.1. Self-determination of Parties

Self-determination of parties is fundamental principle of mediation,[46] which is reflected in Model Standards of Conduct for Mediators as rule N1. In act of 1994, in accordance with amend-

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[37] *Riskin L.L.,* Awareness and Ethics in Dispute Resolution and Law, Why Mindfulness Tends to Foster Ethical Conduct, Tex. L. Rev.,Vol. 50:493, 2009, 498; *Kovach K.K.,* Mediation, Principles and Practice, 3rd ed., Thomson West, United States of America, 2004, 402.

[38] CDR Associates in Boulder, Colorado.

[39] Colorado Mediation Council.

[40] Society of Professionals in Dispute Resolution was the largest interdisciplinary association, which joined other organizations for the purpose of establishing Association of Conflict Resolution ACR, see: *Kovach K.K.,* Mediation, Principles and Practice, 3rd ed., Thomson West, United States of America, 2004, 397.

[41] *Kovach K.K.,* Mediation, Principles and Practice, 3rd ed., Thomson West, United States of America, 2004, 397.

[42] Standards for Private and Public Mediators in the State of Hawaii, 1986 (revised in 2003); ABA Model Rules of Professional Conductand ABA Model Code of Professional Responsibility, 1983; A Draft of Principles of ADR Provider Organizations, CRP-Georgetown Commission on Ethics and Standards in ADR, 1999, 2000-2002; Standards of Practice for Lawyer Mediators in Family Disputes (Adopted by the House of Delegates of the American Bar Association, August 1984); Special Standards of Practice for Postal Service Mediations, 1998; Academy of Family Mediators, Texas Association of Mediators (TAM), National Association of Social Workers and other providers' Ethical Guidelines for Mediatorsetc.

[43] Model Standards of Conduct for Mediators, AAA, ABA, ACR, 1994, Revised 2005. This act was adopted by three association of USA of AAA, ABA, ACR in 1994. The same act was revised in September, 2005, thus the act being adapted to mediation practice.

[44] *Alfini J.J., Press Sh. B., Stulberg J.B.,* Mediation, Theory and Practice, Reporter's Notes, 3rd ed., LexisNexis, 2013, 612.

[45] *Sherill J.A.,* Ethics for Lawyers Representing Clients in Mediation, 6 Am. J. Mediation, 2012, 29-30; *Ware S.J.,* Principles of Alternative Dispute Resolution, 2nd ed., Concise Hornbook Series, Thomson West, 2007, 323.

ments of 2005, right of self – determination of parties is not just confined to freedom of parties to make decision at the end of the mediation, but it also refers to preparatory stage of the mediation process and later to its all important stages.[47]

Achievement of a mediated agreement is a priori focused expectation from court implementing mandatory mediation. Such expectations are also often held by courts in relation to mediators. Such "pressure" naturally bears certain threat in relation of full realization of autonomy of will and right of self-determination of parties[48] and has negative impact on the primary liability of a mediator – to encourage self- determination of parties in the process.[49]

Self-determination of parties, neutrality of a mediator and restriction of providing professional legal advice by a mediator are interrelated in mutually conditioning manner, which frequently influences confines of role and engagement of a mediator in the mediations process. Namely, in case a party has no adequate knowledge about the matter to be considered during mediation,[50] is a mediator authorized to provide to him/her relevant legal, financial, or technical information or to give advice? In this case we have collision of obligation of neutrality of a mediator and his/her parallel obligation to support parties for making informed decision.[51]

In case a mediator has to encourage the process, based on autonomy of will and self-determination, he/she has to ensure informed decision are made by the parties. Frequently in the mediation process there is need that the party has legal information. If there is expectation that a mediator should provide such information, then "it is possible that his/her role is approximated to professional liability of a representative, advocate; In such case roles of a mediator and that of a representative overlap with each other and such circumstances, from the point of view of ethics, lead to a number of contradictions ".[52]

USA Model Standards of Practice for Family and Divorce Mediation[53] allows possibility of providing information by a mediator within the confines of knowledge obtained via his/her experi-

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[46] *Bartlett F., Mortensen R., Tranter K.,* Alternative Perspectives on Lawyers and Legal Ethics, Reimagining the Profession, Routledge Research in legal Ethics, London and New-York, 2011, 207; *Waldman E.,* Mediation Ethics, Cases and Commentaries, Jossey-Bass, A Wiley Imprint, United States of America, 2011, 12; Model Standards of Conduct for Mediators, 2005, Standard I (1); *Shin C.P.,*Drafting Agreements as an Attorney-Mediator: Revisiting Washington State Bar Association Advisory Opinion 2223, Wash. L. Rev., 2014, 1040.

[47] *Alfini J.J., Press Sh. B., Stulberg J.B.,* Mediation, Theory and Practice, Reporter's Notes, 3rd ed., LexisNexis, 2013, 617, 619.

[48] *Welsh N.,* The Thinning Vision of Self-determination in Court-Connected mediation: the Inevitable price of Institutionalization, HarvardNegotiation Law Review, Vol. 6, 2001, 1; *Alfini J.J., Press Sh. B., Stulberg J.B.,* Mediation, Theory and Practice, Reporter's Notes, 3rd ed., LexisNexis, 2013, 619; Model Standards of Conduct for Mediators, 2005, Standard I (B).

[49] *Shapira O.,* A Theory of Mediator's Ethics, Cambridge University Press, 2016, 161; *Alfini J.J., Press Sh.B., Stulberg J.B.,* Mediation, Theory and Practice, Reporter's Notes, 3rd ed., LexisNexis, 2013, 619-620, 622.

[50] On participation of uninformed party in mediation, see: *Herring J.,* Legal Ethics, Oxford University Press, Great Britain, 2014, 310.

[51] *Shapira O.,* A Theory of Mediator's Ethics, Cambridge University Press, 2016, 161; *Kovach K.K.,* Mediation, Principles and Practice, 3rd ed., Thomson West, United States of America, 2004, 403.

[52] *Waldman E.,* Mediation Ethics, Cases and Commentaries, Jossey-Bass, A Wiley Imprint, United States of America, 2011, 13.

[53] Adopted in 2000.

ence and training, provided this information is not of legal content.[54] The above standards allow a mediator to quit the process, in case the parties are going to make an unperceived decision, or if one party attempts to use the mediation process for obtaining unfair advantage over another party. Contrary to this approach, Alabama Code of Ethics' expectations are that "in case of divorce a mediator considers with parties court's possible and tentative decision on partition of property".[55]

According to dominating approach a mediator should only encourage obtaining of independent legal advice from a lawyer or engagement of a representative[56] for prevention of legal risks. Such approach is set by Model Standards of Conduct for Mediators.[57] Though adverse impact of it is that involving a lawyer or inviting an independent expert for legal appraisal of the case often leads to significant increase of mediation costs for parties.[58]

There is no set hierarchy between ethical principles of mediation; it is impossible to predetermine acknowledged *prima facie* advantage or universal nature of any standard. [59] Confines of application of a specific principle should be considered through keeping reasonable balance between fundamental principles of mediation on case to case basis. For example, right for self determination might be dominating in cases, where parties are equally competent and informed on important issues the decision to be made by them does not impact third parties or public interests; whereas, fair proceedings and its quality is considered an important and leading principle, when accord and satisfaction affects well being of persons, who are not present at the negotiation table and are not engaged in the decision making process.[60]

2.2. Impartiality

According to Model Standards of Conduct for Mediators, a mediator should lead the proceedings in unbiased manner[61] and avoid conduct which creates such an impression.[62]

Bias and advantage, based on personal features, education, values, belief, character or any other factors of a participant of the mediation process, is unacceptable for a mediator. It is important that according to this standard impartiality refers not just to a party, but any participant of mediation.[63]

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[54] On a mediator's right, in case of existence of adequate grounds, to suspend, terminate or withdraw from the process, see *Riskin L.L.,* Awareness and Ethics in Dispute Resolution and Law, Why Mindfulness Tends to Foster Ethical Conduct, Tex. L. Rev.,Vol. 50:493, 2009, 498.

[55] *Waldman E.,* Mediation Ethics, Cases and Commentaries, Jossey-Bass, A Wiley Imprint, United States of America, 2011, 12.

[56] *Bush R. A. B.,* Efficiency and Protection or Empowerment and Recognition? The Mediator's Role and Ethical Standards in Mediation, Fla. Law Rev., Vol. 41, 1989, 253, 280.

[57] Model Standards of Conduct for Mediators, 2005, Standard I (2).

[58] *Kovach K.K.,* Mediation, Principles and Practice, 3rd ed., Thomson West, United States of America, 2004, 403.

[59] *Shapira O.,* A Theory of Mediator's Ethics, Cambridge University Press, 2016, 118.

[60] *Waldman E.,* Mediation Ethics, Cases and Commentaries, Jossey-Bass, A Wiley Imprint, United States of America, 2011, 14.

[61] *Alfini J.J., Press Sh. B., Stulberg J.B.,* Mediation, Theory and Practice, Reporter's Notes, 3rd ed., LexisNexis, 2013, 418.

[62] *Shapira O.,* A Theory of Mediator's Ethics, Cambridge University Press, 2016, 187.

[63] Model Standards of Conduct for Mediators, 2005, Standard II (B) (1); *Alfini J.J., Press Sh. B., Stulberg J.B.,* Mediation, Theory and Practice, Reporter's Notes, 3rd ed., LexisNexis, 2013, 621.

Model Standards of Conduct for Mediators entitles a mediator to refuse participation in the proceedings and in the future to withdraw from attendance at the proceedings, in case he/she finds it impossible to comply with impartiality principle.[64] The united commission for reforming of model standards has considered if it was appropriate to add the following conditionality to application of right to withdraw from the mediation: "In case refusal to participate in the process is feasible without damaging interests of any party".[65] Finally, the commission did not consider it appropriate to specify this condition for applying the right to withdraw from the process of mediation.[66]

2.3. Conflict of Interests

Issue of conflict of interests is directly linked to neutrality[67] and impartiality[68] of a mediator. Principle of neutrality is acknowledged as a constitutional basis of mediation ideology. It is a necessary precondition in order to adequately manage the mediation process and generally, even to apply the title "mediation" to the form of dispute resolution. Incompliance with neutrality principle by a mediator undermines the very essence of mediation.[69]

Among regulations under Model Standards of Conduct for Mediators we need to specially mention liability of a mediator to refuse participation in the mediation process at the initial stage, or to refuse it later, as soon as necessity for it arises, in case of existing, active or potential conflict of interests. If both parties, despite the fact that the mediator has revealed the relevant circumstances, express consent for engagement of the latter in the process, a mediator is entitled to continue participation in the proceedings.[70] In case the conflict of interests of a mediator endangers integrity and honesty of the very process of mediation, a mediator has to withdraw from the process even if the parties have expressed clear consent regarding his/her participation.[71]

"It is important to which extent neutrality of a mediator implies restriction to be applied to the right of the mediator to provide different type (namely, legal, financial) advise or other service to the party of mediation in the future; is it acceptable for a mediator to lead the mediation process, where a party to this process is his/her former partner, client, or otherwise related person, in case content of the previous relations has nothing to do with the dispute to be considered by the mediation?"[72] E.G. in case a mediator is divorced, shall he/she be banned from divorce case for certain period of time or forever? If a mediator has experienced car accident, shall he/she be separated from similar cases? Neutrality implies lack of interest towards specific outcome of a case.[73] But if a mediator is inter-

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64 Model Standards of Conduct for Mediators, 2005, Standard II (A) (C).
65 Ibid, Standard II (B) (1).
66 *Alfini J.J., Press Sh. B., Stulberg J.B.,* Mediation, Theory and Practice, Reporter's Notes, 3rd ed., LexisNexis, 2013, 621.
67 *Kovach K.K.,* Mediation, Principles and Practice, 3rd ed., Thomson West, United States of America, 2004, 402.
68 *Shapira O.,* A Theory of Mediator's Ethics, Cambridge University Press, 2016, 187.
69 *Zamir R.,* The Disempowering Relationship Between Mediator Neutrality and Judicial Impartiality: Toward a New Mediation Ethic, 11 Pepp. Disp. Resol. L.J., 2010-2011, 467.
70 Model Standards of Conduct for Mediators, 2005, Standard III (C).
71 *Alfini J.J., Press Sh. B., Stulberg J.B.,* Mediation, Theory and Practice, Reporter's Notes, 3rd ed., LexisNexis, 2013, 622; Model Standards of Conduct for Mediators, 2005, Standard III (E).
72 *Kovach K.K.,* Mediation, Principles and Practice, 3rd ed., Thomson West, United States of America, 2004, 402.
73 *Wilson B.,* Mediation Ethics: An Exploration of Four Seminal Texts, 12 Cardozo J. Conflict Resol., 2010-2011, 122.

ested in parties to achieve accord and satisfaction, especially when through achieving the above result a mediator will have additional opportunity to run a business, naturally there is a big question mark in relation to the principle of neutrality.[74]

Model Standards Conduct for Mediators, restriction of conflict of interests implies post mediation period in addition to the mediation process itself. A mediator is forbidden to establish with any party to the mediation relations, which by its content can raise doubts regarding fairness of the mediation process.[75] In case a mediator establishes personal or professional relations with parties, other persons or organizations, involved in the mediation process, he/she should take into consideration time passed since completion of mediation, nature of relations or professional service, in order to avoid conflict of interests or justified doubts regarding existence of such conflict of interests.[76]

2.4. Competence

According to Model Standards of Conduct for Mediators a mediator can lead the mediation in case he / she has sufficient and necessary competence to meet expectations of parties. Any person may be selected as a mediator if he / she has adequate competence and qualification based on evaluation of parties. [77] Thanks to such regulations model standards have liberated competence of a mediator from artificial and bureaucratic barriers and have linked selection of a mediator to free will of parties.[78] Similar approach is developed by National US standards in relation to court mediation programs.[79]

A mediator is obliged to be engaged in educational programs for the purpose of improving skills and increasing knowledge, also to ensure access to the information about his / her qualification for parties. In case it becomes clear during the mediation process that a mediator is no longer capable to lead the process in a competent manner, then he / she should take relevant measures – withdraw from the process or request relevant assistance.[80]

2.5. Confidentiality

Confidentiality is a determining factor and foundation for mediation. Therefore it is regulated by domestic legislation of particular countries,[81] as well as Code of Ethics of mediation. Consequently, meeting confidentiality requirement is a legal, as well as ethical and fiduciary[82] liability. [83]

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[74] *Kovach K.K.,* Mediation, Principles and Practice, 3rd ed., Thomson West, United States of America, 2004, 402-403.
[75] *Shapira O.,* A Theory of Mediator's Ethics, Cambridge University Press, 2016, 187.
[76] Model Standards of Conduct for Mediators, 2005, Standard III (F); *Alfini J.J., Press Sh. B., Stulberg J.B.,* Mediation, Theory and Practice, Reporter's Notes, 3rd ed., LexisNexis, 2013, 623.
[77] Model Standards of Conduct for Mediators, 2005, Standard IV (A) (1).
[78] *Alfini J.J., Press Sh. B., Stulberg J.B.,* Mediation, Theory and Practice, Reporter's Notes, 3rd ed., LexisNexis, 2013, 623.
[79] National Standards for Court-Connected MediationPrograms, Center for Dispute Settlement and Institute of Judicial Administration, 1992, Standard 6.1. Qualifications of Mediators.
[80] Model Standards of Conduct for Mediators, 2005, Standard IV (A) (2) (3), (B).
[81] *Alfini J.J., Press Sh. B., Stulberg J.B.,* Mediation, Theory and Practice, Reporter's Notes, 3rd ed., LexisNexis, 2013, 422.
[82] *Garner B. (ed.*), Black's Law Dictionary, 8th ed., Thomson West, 2004, 1315.
[83] *Wendel B.W.,* Professional Responsibility, Examples and Explanations, Aspen Publishers, United States of America, 2007, 138.

According to Unified Act on Mediation,[84] adopted in 2003, parties have been entitled a privilege to independently define confidentiality conditions, considering imperative stipulations, provided by the law. This opportunity is also reflected in Model Standards of Conduct for Mediators. [85]

Definition of Model Standards of Conduct for Mediators implies, that a mediator is liable to protect confidentiality of the information which becomes available to him / her in the mediation process. Even if parties agree to disclosure of the information, a mediator is not obliged to do so.[86]

A mediator should encourage accurate definition of scope of confidentiality during and beyond mediation process and its proper interpretation by parties. At the same time a mediator, who is involved in teaching, survey or evaluation of the mediation process is obliged to ensure anonymity of person, involved in the mediation. At the same time it is not reasonable to make him / her liable to meet confidentiality requirement while obtaining permission for each particular matter from parties of the mediation regarding teaching, survey and evaluation.[87]

Model Standards of Conduct for Mediators establish two exceptions from confidentiality principle. Namely, a mediator may disclose the information regarding to circumstances: whether parties have appeared to the appointed mediation process and whether they have achieved accord and satisfaction.[88]

2.6. Quality of the Process

According to Rule №1 of Model Standards of Conduct for Mediators a mediator is liable to balance the right of self determination of parties and to correlate it with commitment [89] of leading high quality mediation process.[90] Mediation Code of Ethics comprise guidelines regarding mandatory trainings and qualification of mediators in order to ensure high quality and competent mediation service.

A mediator should lead the mediation process in such a manner to ensure prudence, timeliness, safety, attendance of all relevant parties, adequate participation of parties, procedural fairness, competence, awareness of parties and adequate respect among parties.

A mediator should agree to lead the mediation process just in case he/she is able to demonstrate attention relevant for efficiency of the mediation process[91] and meet reasonable expectations of parties regarding duration of the mediation process. A mediator and parties may agree about full

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[84] Uniform Mediation Act, 2003.

[85] See Model Standards of Conduct for Mediators, 2005, Standard V(D).

[86] Ibid, Standard V (A)(1). This rule naturally does not relate to the information, which the person, issuing the information has asked a mediator at the private meeting to be transferred to other participants of the mediation process (see Standard V (B)) .

[87] *Alfini J.J., Press Sh. B., Stulberg J.B.,* Mediation, Theory and Practice, Reporter's Notes, 3rd ed., LexisNexis, 2013, 625.

[88] Model Standards of Conduct for Mediators, 2005, Standard V (A)(2); *Alfini J.J., Press Sh. B., Stulberg J.B.,* Mediation, Theory and Practice, Reporter's Notes, 3rd ed., LexisNexis, 2013, 620;

[89] Model Standards of Conduct for Mediators, 2005, Standard VI (A) (B) (C).

[90] Ibid, Standard I (1).

[91] *Alfini J.J., Press Sh. B., Stulberg J.B.,* Mediation, Theory and Practice, Reporter's Notes, 3rd ed., LexisNexis, 2013, 424.

attendance of other persons at certain stage of the mediation process or about them being banned from the process.

A mediator's role substantially differs from that of representatives of other occupations, therefore competences and functions may not be confused. A mediator is allowed to advise the parties to apply other procedures of dispute resolution. With the agreement of parties a mediator may get engaged in the process with different competence, e.g. with the function of decision makers. In this case rules of ethics of relevant field become effective and parties should be comprehensibly informed about third person's new role.

In case a party experiences problems regarding participation in the process, understanding various matters, making decisions or similar issues, a mediator should assist him/her to overcome the above difficulties, and encourage him/her to realize his/her right of self determination.

If it becomes clear during the mediation that the process is being used for implementing future criminal actions, a mediator is liable to convince a participant to reject realization of the above actions, to postpone or stop the process. Based on Model Standards of Conduct for Mediators he/she is not liable to notify relevant agencies about criminal intentions, revealed within the confines of mediation. The reason for this is that such exception from confidentiality principle may not be provided under the law or agreement of parties and in such case a mediator will be considered to violate the principle of confidentiality.[92]

The above mentioned exception from confidentiality principle is provided under Mediation Acts of a number of states[93] and protection of relevant public interest is achieved through legislative restriction.

2.7. Advertising and Solicitation

According to Model Standards of Conduct for Mediators it is forbidden for a mediator use misleading information in the process of advertising mediation services, as well as during dissemination of information regarding qualification, experience and service charges of a mediator. A mediator shall not issue a guaranty for ending the communication with this or that specific outcome. A mediator may only confirm his/her certain competence, accreditation, acknowledged by state of private agency, assigning qualification. A mediator may not use names of other persons in any form of communication without their consent.

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[92] On this issue see *Shapira O.,* A Theory of Mediator's Ethics, Cambridge University Press, 2016, 119.

[93] E.g. Maryland Statute, Virginia Code, cited: *Sharp D.,* The Washington, D.C. Lawyer and Mediation Confidentiality: Navigating the Complex and Confusing Waters, 7 Appalachian J. L., 2007-2008, 200; Florida and New Jersey States regulations, cited: *Menkel-Meado C., Plapinger E.,* Model Rule for the Lawyer as Third-Party Neutral, Preamble, CRP Georgetown Commission on Ethics and Standards in ADR, 2002, 13, <http://www.cpradr.org/Portals/0/Third%20Party%20netural%20create%20new%20cover%20page%202012.pd>. In EU countries similar exceptions from confidentiality principles are set in the following acts: Bulgaria Mediation Act (Art.7), Estonia Conciliation Act (Section 4 (5)),German Mediation Act (Section 4), Greece, Law on Mediation in Civil and Commercial Disputes (Art. 10), Ireland, Draft General Scheme of Mediation Bill (Head 10) etc. On details about confidentiality in EU legislation see: *Trevor M.B., Palo G.,* EU Mediation Law and Practice, Oxford University Press, 2012.

2.8. Fees and Other Charges

Codes of Ethics often strengthen mediators liabilities through offering free mediation processes, increasing public awareness and facilitating advancement of mediation in various ways.[94] Generally speaking, regulation of the above issues under the Code of Ethics is mostly limited to reasonability of mediation charges. Banning of imposing contingencies is another important direction of regulation. The grounds for the above restriction is also related to neutrality of a mediator, since he/she may not have interest in certain result of the case.[95]

According to Model Standards of Conduct for Mediators, while defining the mediation service fee a mediator shall be guided by factors, such as: type and complexity of case to be considered, qualification of a mediator, time needed for considering a dispute and existing tariffs for mediation services. Service fee shall be determined in such a manner that neutrality and impartiality of a mediator are not infringed.

2.9 Advancement of Mediation Practice

A mediator shall facilitate advancement of mediation practice through encouraging diversity in mediation field, increasing access to mediation, participating in educational processes for increasing public awareness about mediation, supporting young mediators, respecting different opinion, and collaborating with other mediators for the purpose of improving mediation profession.[96]

IV. General Standards of Ethics for Parties and Representatives

Setting standards of mediation ethics implies definition of scope of ethical limitations of a party and his / her representative, in addition to that of a mediator; such limitations ensure their honest participation in the mediation process.[97] This may be explained by the fact that the role played by the above persons is decisive for the content of the mediation agreement and often this role is more active compared to that of a mediator.[98]

Preamble of Model Standards of Conduct for Mediators emphasizes a lawyer's liability to take care of a client's positions and as a negotiator, to be targeted on achieving outcomes, beneficial for client, while meeting requirement for honest treatment of other participants.[99] Based on the

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[94] *Kovach K.K.,* Mediation, Principles and Practice, 3rd ed., Thomson West, United States of America, 2004, 404.

[95] Ibid, 404.

[96] Model Standards of Conduct for Mediators, 2005, Standard IX (A) (B). On the above liabilities of a mediator see *Shapira O.,* A Theory of Mediator's Ethics, Cambridge University Press, 2016, 179-180.

[97] On a liability regarding fair participation of parties and representatives in the mediation process see: *Wolski B.,* On Mediation, Legal Representatives and Advocates, 38 U.N.S.W.L.J., 2015, 7; *Sherill J.A.,* Ethics for Lawyers Representing Clients in Mediation, 6 Am. J. Mediation, 2012, 37-38; *Alfini J.J., Press Sh. B., Stulberg J.B.,* Mediation, Theory and Practice, Reporter's Notes, 3rd ed., LexisNexis, 2013, 305-325; *Kovach K.K.,* Lawyer Ethics in Mediation: Time for a Requirement of Good Faith, 4 Disp. Resol. Mag., 1997-1998, 9-13.

[98] *Kovach K.K.,* Mediation, Principles and Practice, 3rd ed., Thomson West, United States of America, 2004, 424.

[99] See Standards of Conduct for Mediators*,* Preamble, §2, cited: *Sherill J.A.,* Ethics for Lawyers Representing Clients in Mediation, 6 Am. J. Mediation, 2012, 30.

summary a lawyer may be engaged in the mediation process as a neutral third party,[100] without a representative authorization, or the purpose of facilitation of dispute settlement by parties.[101]

"Parties engaged in mediation process are limited by their own professional ethical norms. The case to be considered in the mediation process may be related to their professional negligence, e.g. with failure to meet ethical liabilities in relations between a physician and a patient. Certainly these standards continue to act within the confines of mediation".[102] "In case a lawyer is engaged in the mediation process, it is natural that the function of court representation of a client" is covered by lawyer's profession; ethic code; though his / her as a representative's role is substantially dissociated from court representation of a client".[103]

It is important to analyze ethical liabilities of a lawyer – representative party, which act prior to starting mediation process – namely, should a lawyer advise the party about existence of mediation alternative.[104] Frequently this ethical liability of a lawyer is provided for at legislative level[105] and is considered to be an expression of right of self determination of party.[106] The above liability is also confirmed by professional ethics code of lawyers of Georgia.[107] Though in practice we come across the lack of interest of lawyers to provide to a client full information about mediation.[108] It is acknowledged at the doctrinal level that the above liability of lawyer – representative should be given broad and general definition and it should comprise obligation to discuss with a client strategy of negotiations, agreement options and procedures of dispute settlement.[109]According to comment 5 of rule 2.1 of Professional Liabilities of Bar Association of America,[110] a lawyer shall advise a party on possible form of alternative dispute settlement, which can be a reasonable alternative to court

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[100] *Zaleniene I.,* The Main Features and Development Trends of Mediation in Lithuania: the Opportunities for Lawyers, Jurisprudence 2010, 1(119), 233.

[101] Regarding ethical liabilities of a representative towards the court, mediation program administration parties and a mediator, see: *Wolski B.,* On Mediation, Legal Representatives and Advocates, 38 U.N.S.W.L.J., 2015, 1-47.

[102] Ibid.

[103] Ibid.

[104] Regarding this issue see: *Burnett C.G.,* Advising Clients About ADR: A Practical Guide to Having Difficult Conversations About Selecting Options, TSU Alternative Dispute Resolution – Yearbook 2014, Tbilisi State University National Center for Alternative Dispute Resolution, Tb., 2014, 187-198; *Berger M.J.,* Should an Attorney be Required to Advise Client of ADR Options? Geo J. Legal Ethics, Vol. 13, 2000, 427; *Sander F.E.A., Prigoff M.L.,* Should there be a Duty to Advise of ADR Options, A.B.A.J., Vol. 76, 1990, 50.

[105] *Burnett C.G.,* Advising Clients About ADR: A Practical Guide to Having Difficult Conversations About Selecting Options, TSU Alternative Dispute Resolution – Yearbook 2014, Tbilisi State University National Center for Alternative Dispute Resolution, Tbilisi, 2014, 187.

[106] *Burnett C.G.,* Advising Clients About ADR: A Practical Guide to Having Difficult Conversations About Selecting Options, TSU Alternative Dispute Resolution – Yearbook 2014, Tbilisi State University National Center for Alternative Dispute Resolution, Tbilisi, 2014, 187.

[107] Paragraph II of article 8 of the Code of Professional Ethics, approved by General Meeting of Bar Association of Georgia, on April 15, 2006 with amendments and additions, enacted on December 8, 2012.

[108] *Herring J.,* Legal Ethics, Oxford University Press, Great Britain, 2014, 313.

[109] *Cochran R.F.,* Legal Representation and Next Steps toward Client Control, Attorney Malpractice for the Failure to Allow Client to Control Negotiation and Pursue Alternatives to Litigation, Wash. and Lee Law Rev., Vol. Vol. 47, 1990, 819; *Wermbrod M.L.,* Comment, Could an Attorney Face Disciplinary Actions or Even Legal Malpractice Liability for failure to Inform clients of Alternative Dispute Resolution, Cumb. L. Rev. Vol. 27, 1996-1997, 791.

[110] ABA Model Code of Professional Responsibility, 1983, cited: Compendium of Professional Responsibility, Rules and Standards, ABA 2008 ed., American Bar Association, United States of America, 2007, 195.

proceeding.[111] In additions, since there is no rule set by relevant acts for representatives of other professions, contradicting with the above mentioned liability, consequently, they are also covered by an obligation on advising a client.[112]

It is important to note, that New York Bar Association Committee has established responsibility of law firms for violation of ethical liabilities by their lawyers, since these matters are related to the filed, under the control of companies.[113]

V. Mediation Ethical Standards in the Context of Court's and Other Provider Organizations' Activities

In addition to parties, participating in the mediation, ethical liabilities imply limitation for mediation provider private companies, state agencies and courts which have to carry out mandatory mediation.[114] It is acknowledged at the international level, that likelihood for inappropriate mediation practices is very high in the absence of limitations of ethical standards of activates of competent bodies and state agencies. For example, "while transferring a case by mediation provider for mediationit is important to keep confidentiality, to select competent and unbiased mediator by an appropriate procedure; there should be preventive measures in place for sending majority cases to any one mediator or for a judge to obtain confidential information, in order to avoid grounded suspicion for existence of conflict of interest".[115] In addition, there is probability that mediation private providers may practice ethical trade-offs because of interest to get profit.[116]

"While sending a case to a mediator by mediation providers or private persons it is important to define whether it is acceptable or ethical for a mediator share the mediation fee with an individual or an institution sending the case over".[117] In case it is allowed, it becomes doubtful if one can determine the level of impartiality of motivation for selecting the mediator in the process of the mediation case referral.

International standards set responsibility of courts for actions of mediators under court subordination or for those which courts refer mediation cases to for consideration. At the same time, courts are free from such responsibilities if parties have independently selected a person as a mediator without the court involvement.[118]

Ethical liabilities of mediation providing organizations of USA are determined by Georgetown Ethics and ADR Standards Commission under the act – Draft Principles for ADR providing

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[111] *Zaleniene I.,* The Main Features and Development Trends of Mediation in Lithuania: the Opportunities for Lawyers, Jurisprudence 2010, 1(119), 234.

[112] *Kovach K.K.,* Mediation, Principles and Practice, 3rd ed., Thomson West, United States of America, 2004, 425.

[113] *Raske H.J.,* Promoting Better Supervision, A.B.A.J., Vol. 79,1993, 32.

[114] *Waldman E.,* Mediation Ethics, Cases and Commentaries, Jossey-Bass, A Wiley Imprint, United States of America, 2011, 339.

[115] *Kovach K.K.,* Mediation, Principles and Practice, 3rd ed., Thomson West, United States of America, 2004, 425.

[116] *Waldman E.,* Mediation Ethics, Cases and Commentaries, Jossey-Bass, A Wiley Imprint, United States of America, 2011, 339.

[117] *Kovach K.K.,* Mediation, Principles and Practice, 3rd ed., Thomson West, United States of America, 2004, 426.

[118] National Standards for Court-Connected Mediation Programs, Center for Dispute Settlement and Institute of Judicial Administration, 1992, Standard 2.1.

organizations (further referred to as Georgetown principles).[119] The above act, which covers both private and state mediation providers and individuals was developed in 1999, was promulgated for public hearings in 2000 and was finally adopted in 2002.[120]

US National Standards (further – National Standards) for court mediation programs were adopted in the frame work of collaboration of Dispute Resolution Centre, Court Administration Institution and 18 member Advisory Board in 1991 for the purpose of strengthening ethical liabilities of courts, exercising compulsory mediation.[121]

Georgetown Principles emphasize following ethical principles of mediation provider organizations: ensuring quality and competence of service, providing relevant information, fairness and impartiality, guaranteeing affordability of service for low income groups, disclosure of conflict of interest, introduction of litigation mechanisms, subjecting neutral entitles of an organization to ethical standards, prohibiting false and misleading communication, developing safeguards for confidentiality.[122]

Similarly, National Standards have strengthened the following ethical liabilities during court mediation process: providing mediation accessibility and affordability, gaining informed consent, appropriate selection of cases, evaluation of service quality and litigation procedures.[123]

1. Ensuring Quality of Mediation Process and Free Choice of a Party

Georgetown Principles and National Standards impose on mediation providers liability within confines of their abilities to ensure high quality of implementation of the mediation process registered in their field of control.[124]

"Different risks emerge in case of existence of state providers. In case of voluntary mediation a party is free to chose a mediator, while in case of court mediation it is actually deprived of such opportunity. Therefore liability of a provider to ensure quality of the process, regarding both procedural and on – merit aspects is directly linked with the right of free choice of a party. Lack of choice of a party to independently decide on involvement of desirable provider proportionally increases ethical liability of a provider organization to ensure professional, high quality compulsory mediation for the parties".[125]

At the same time Georgetown Principles state that a provider organization may exclude the obligation for ensuring quality of the process through public appeal towards parties and society.[126]

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[119] A Draft of Principles of ADR Provider Organizations, CRP-Georgetown Commission on Ethics and Standards in ADR, 1999, 2000-2002.

[120] *Waldman E.,* Mediation Ethics, Cases and Commentaries, Jossey-Bass, A Wiley Imprint, United States of America, 2011, 340.

[121] National Standards for Court-Connected Mediation Programs, Center for Dispute Settlement and Institute of Judicial Administration, 1992.

[122] *Kovach K.K.,* Mediation, Principles and Practice, 3rd ed., Thomson West, United States of America, 2004, 426-427.

[123] *Waldman E.,* Mediation Ethics, Cases and Commentaries, Jossey-Bass, A Wiley Imprint, United States of America, 2011, 340.

[124] A Draft of Principles of ADR Provider Organizations, CRP-Georgetown Commission on Ethics and Standards in ADR, 1999, 2000-2002, Principle 1 (Quality and Competence of Services).

[125] *Waldman E.,* Mediation Ethics, Cases and Commentaries, Jossey-Bass, A Wiley Imprint, United States of America, 2011, 339-340.

[126] A Draft of Principles of ADR Provider Organizations, CRP-Georgetown Commission on Ethics and Standards in ADR, 1999, 2000-2002, Principle 1, Quality and Competence.

1.1. Mediator's Skills and Competences, as Guarantees of Quality of Mediation Process

According to Georgetown Principles and National Standards, it is considered essential to send the case over to a mediator with adequate skills and competences in order to meet the liability of a provider organization – ensuring quality mediation process.

According to Georgian Principles, since mediation is a multidisciplinary field, without special qualification requirements and examination preconditions, competence of a mediator is often related with trainings, education based on obtaining skills, having experience in teaching and its practical context.[127]

Georgetown Principles and National Standards equally deny need for any academic degree as a condition for mediator's qualification. Quite the contrary, the above acts provide, that the court shall not set barriers which may exclude diversity of mediators according to their gender, race or ethnic belonging.[128]

National Standards define 9 skills which are essential for implementation of quality mediation process. These skills are as follows: proper and adequate perception of negotiation process and role of representative, transforming of interests of parties into positions, assisting parties to asses opportunities for possible alternatives for dispute resolution beyond mediation process in case of failure to achieve an agreement, gaining and retaining trust, sieving caseswhich cannot be settled through mediation, encouraging creative alternatives, assisting parties to define guidelines and criteria in the decision making process, making free and informed decision and assessing feasibility of achieved agreement.[129]

National Standards provide that if interests of legal context are relevant for the case, then the essential component of a mediator 's competence implies preliminary assessment / reconciliation of legal outcomes, which may be predictable for the parties in case of selecting other procedures of dispute resolution.

2. Duty to Inform and Disclosure of Conflict of Interests

National Standards impose on the court the role of an educator, which implies ethical liability of the court to communicate to the parties and their representatives at least 17 types of information, starting from notifying them on mediation costs and procedures, and ending with absence of decision-making power of a mediator, also defining the right to appeal to the court in case of failure by parties to achieve an mediated agreement.[130]

According to Georgetown Principles mediation provider organizations can establish institutional links which may threaten the neutrality of processes administrated by them. Private providers may use their relations with permanent customers as a guaranteed and predictable source of income.

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[127] A Draft of Principles of ADR Provider Organizations, CRP-Georgetown Commission on Ethics and Standards in ADR, 1999, 2000-2002, Principle 1. Ensuring Competence and Quality in Dispute Resolution Practice, Report No. 2, of the SPIDR Commission on Qualifications, April 1995.

[128] National Standards for Court-Connected Mediation Programs, Center for Dispute Settlement and Institute of Judicial Administration, 1992, Standard 6.1. Qualifications of Mediators.

[129] Ibid.

[130] National Standards for Court-Connected Mediation Programs, Center for Dispute Settlement and Institute of Judicial Administration, 1992, Standard 3.2.

In order to avoid such situation, Georgetown Principles set the principle of transparency and requires preliminary consent to be obtained by an organization from the parties.

Similarly to individual mediators, provider organizations also have liability to inform the parties about any relations they are or have been involved in and which may question their neutrality.[131]

3. Ensuring Accessibility of the Process

According to National Standards access to mediation should not be based on criteria like: ability to pay charges for the service (affordability of the process) or ability to have a representative, absence of physical defect or ability to speak English and perceive information in English.[132]

Georgetown Principles, through strengthening provider's liability to take any reasonable measures in order to ensure access to the process by low income parties,[133] oblige neutral affiliated persons to offer dispute resolution procedures at prices lower than market prices or free of charge (pro bono).[134]

4. Developing Safeguards for Fair and Impartial Process

National Principles bind mediation providers to ensure, within the confines of their competence, implementation of fundamentally fair and impartial mediation process. [135] Fundamental fairness of the process is defined according to the following criteria:

- Availability of free choice for parties of a neutral facilitator;
- Opportunity for parties to be provided by adequate fair representativeness and procedures for fair case hearing;
- Existence of adequate length of sessions and fair distribution of reasonable costs.

National Standards impose liability on courts to use necessary and special measures in order the parties to be able to make an informed and free choice without representatives, about mediation and they are notified about accessibility of possible alternatives of dispute resolution.[136]

5. Setting Conditions for Sending a Case for Mediation and Complex Assessment of Anticipated Outcomes

In the process of sending a case for mediation the court shall consider what can be possible outcomes for the court, parties or other persons.[137] National Standards set circumstances, which may be hindering transition of cases for mediation. E.g. an activity to be considered through mediation

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[131] *Waldman E.,* Mediation Ethics, Cases and Commentaries, Jossey-Bass, A Wiley Imprint, United States of America, 2011, 341.

[132] National Standards for Court-Connected MediationPrograms, Center for Dispute Settlement and Institute of Judicial Administration, 1992, Standard 1.0.

[133] A Draft of Principles of ADR Provider Organizations, CRP-Georgetown Commission on Ethics and Standards in ADR, 1999, 2000-2002, Principle IV, Accessibility of Services.

[134] Ibid, Principle IV, Comment.

[135] Ibid, Principle III.

[136] National Standards for Court-Connected MediationPrograms, Center for Dispute Settlement and Institute of Judicial Administration, 1992, Standard 1.4.

[137] Ibid, Standard 4, Selection of Cases and Timing of Referral.

causes public censorship, repeated violation of certain rules requires uniform approach while defining responsibility, parties and / or representatives fail to carry out effective negotiations.[138]

According to National Standards, certain conditions should be set in order to carry out compulsory mediation. Namely, such service should be funded by the state, parties shall be free from any inadequate pressure in decisions making process, they should possess unrestricted ability to participate in the process, they should be informed about anticipated outcomes, should possess ability to involve their representatives in the process.[139]

Even in case when the case was sent over for mediation in accordance with the adequate rules, National Standards request the courts to take special measures for protecting interests of the vulnerable party[140] (e.g. victims of domestic, psychological or physical violence[141])) and ensure that they are informed about lack of obligation for them to refuse the claim or compromise regardless of being involved in compulsory mediation. [142]

6. Permissible Limits of Monitoring and Supervision of Mediation Process

According to National Standards, court should ensure monitoring and supervision of processes implemented by mediators, it (the court) has sent the case to be considered to, in order to retain continuity of implementation of processes at high quality level.[143]

The above function of monitoring is realized with involvement of an observer, with assessments of a judge and citizens and with analysis of outcome data of disputes considered. In order to increase the quality of mediators' activities the court shall permanently provide opportunities for additional trainings or involvement of co-mediators in the mediation process.[144] Violation of ethical liabilities by mediators automatically results in discrediting of the mediation institution. In order to prevent the above the court shall posses leverages to remove the mediator from the list or to cease sending him/her cases.[145]

7. Introduction of Assessment Mechanisms and Appeal Procedures

In order to ensure enforcement of its ethical commitments the court shall collect quantitative and qualitative data, related to assessment of legitimacy and fairness of mediation process by parties, dispute resolution statistics and cost efficiency.[146]

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[138] National Standards for Court-Connected MediationPrograms, Center for Dispute Settlement and Institute of Judicial Administration, 1992, Standard 4.2.

[139] Ibid, Standard 5.1, Mandatory Attendance.

[140] On participation of a weak party in mediation process see: *Herring J.,* Legal Ethics, Oxford University Press, Great Britain, 2014, 310.

[141] National Standards for Court-Connected MediationPrograms, Center for Dispute Settlement and Institute of Judicial Administration, 1992, Standard 11.1.

[142] Ibid, Standard 11.0-11.2, Inappropriate Pressure to Settle.

[143] Ibid, Standard 6.5.

[144] *Waldman E.,* Mediation Ethics, Cases and Commentaries, Jossey-Bass, A Wiley Imprint, United States of America, 2011, 346.

[145] National Standards for Court-Connected MediationPrograms, Center for Dispute Settlement and Institute of Judicial Administration, 1992, Standard 6.6.

[146] Ibid, Standard 16.1.

The court which has sent the case to be considered through mediation shall provide introduction of appeal procedures for parties related to violation of participation in mediation process and other violations.[147]Appeal procedures shall be equally fair for parties to the dispute as well as for unbiased third party – a mediator.[148]

Provider organizations shall ensure that the information regarding the above procedures are promulgated in accurate and clear manner. In addition it is very important that opportunity for appeal may be allowed for conduct of a mediator or violation of any rules of a provider organization and it cannot be used by parties as a means for avoiding an agreement achieved.[149]

8. Developing Confidentiality Policy

"National Standards and Georgetown Principles assign equal importance to confidentiality, though do not define acceptable scope of meeting confidentiality requirements or grounds for its limitation".[150] "The above acts strengthen liability of a mediation provider organization to develop policy relevant to their goals and to the requirements of the law regarding confidentiality, provided that the above standards will be clearly formulated and communicated to persons, protected by confidentiality principle.[151]

According to Georgetown Principles a provider organization shall take all possible measures in order to meet requirements for confidentiality, set by the law and defined by parties, organizations and mediators.[152]

National Standards set liability of courts to develop policy for ensuring confidentiality in accordance with the law, which will determines in details circle of mediators and cases, protected under the above principles, scope of protection, persons, enjoying privileges and exceptions from the above principle.[153]

In cases, when a court has to balance the aim, ensured by confidentiality against the charge for guaranteeing confidentiality and to identify the priority interest, it has to be guided by the primary task of protection of fairness and integrity of mediation process.[154]

In accordance with the National Standards policy of confidentiality of mediation should not imply capacity for ensuring meeting standards less than those defined in agreement procedures concluded between the parties.[155]

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147 National Standards for Court-Connected MediationPrograms, Center for Dispute Settlement and Institute of Judicial Administration, 1992, Standard 2.6, Complaint Mechanism.

148 A Draft of Principles of ADR Provider Organizations, CRP-Georgetown Commission on Ethics and Standards in ADR, 1999, 2000-2002, Principle IV, Complaint and Grievance Mechanisms.

149 Ibid, Principle VI.

150 *Waldman E.,* Mediation Ethics, Cases and Commentaries, Jossey-Bass, A Wiley Imprint, United States of America, 2011, 347.

151 A Draft of Principles of ADR Provider Organizations, CRP-Georgetown Commission on Ethics and Standards in ADR, 1999, 2000-2002, Principle IX, Confidentiality, (a)-(c).

152 Ibid, Principle IX, Confidentiality.

153 National Standards for Court-Connected MediationPrograms, Center for Dispute Settlement and Institute of Judicial Administration, 1992, Standard 9.1.

154 Ibid, Standard 9.1.

155 Ibid, Standard 9.1. (d).

9. Adoption of Mediation Ethics Code

National Standards and Georgetown Principles impose on a provider organization liability to adopt code of ethics for mediation for the purpose of regulating practice of neutral third party affiliated with it. Similarly, European Code of Conduct for Mediators[156] contains an appeal towards organizations implementing mediation to have mediators under their subordinations to be covered by the above code[157] or to develop more detailed ethical norms considering peculiarities and style of the mediation service, they offer on behalf of the company. According to European Code of Conduct for Mediators provider organizations may similarly establish mediation codes in the field of family and consumer disputes.[158] According to Model Standards of Conduct for Mediators provider organizations, mediation program administrators, courts and other agencies in the field are authorized to set a condition to a mediator, implying that they have to be subject to the above rules of mediation ethics in order to become a member of the above organizations or to be registered on their lists.[159]

While establishing mediation ethic codes, providers should be guided by basic goals of encouraging unity and integrity, fairness and neutrality of the mediation process.

VI. Conclusion

It may be said based on the research that existence of ethical standards ensure regulation of mediators' activities, as well as well functioning of mediation programs operating on the national level.[160] Preamble of Model Standards for Mediators Conduct clearly reflects three main goals safeguarded by adoption of Mediation Ethics Rules: regulation of mediators' conduct, communicating information to participants and increasing trust of the public towards mediation, as a process focused on dispute settlement.[161]

Adoption of Mediation Ethical Standards in Georgia will be a step forward towards mediation professionalization. In addition it serves to implementation of public interest and setting accountability of practicing mediators.[162]

Establishing ethical standards for state and private providers of mediation will also be especially important from the perspective of gaining public trust and increasing awareness. It will encourage readiness of citizens to declare voluntary credibility and refer to mediation, as a process, based on ethical standards.

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156 European Code of Conduct for Mediators, 2004, <http://ec.europa.eu/civiljustice/adr/adr_ec_code_conduct_en.pd f>.

157 *Boulle L., Nesic M.,* Mediator Skills and Techniques: Triangle of Influence, European Code of Conduct for Mediators , Athenaeum Press, Great Britain, 2010, 642.

158 Ibid.

159 *Young M.,* Rejoice! Rejoice! Rejoice, Give Thanks and Sing: ABA, ACR and AAA Adopt Revised Model Standards of Conduct for Mediators,Appalachian Journal of Law, Vol. 5, 2006, 199.

160 *Waldman E.,* Mediation Ethics, Cases and Commentaries, Jossey-Bass, A Wiley Imprint, United States of America, 2011, 347-348.

161 On the above collateral outcomes of regulation of mediation ethics see: *Rozdeiczer L., Campa A.A.,* Alternative Dispute Resolution Manual: Implementing Commercial Mediation, The World Bank Group, IFC, 2006, 51.

162 *Wilson B.,* Mediation Ethics: An Exploration of Four Seminal Texts, 12 Cardozo J. Conflict Resol., 2010-2011, 120.

Giorgi Amiranashvili*

Functions of the Form of Transaction

The article provides analysis of the purposes of form of transaction. Number of most important functions discussed in the work clearly demonstrates purpose of each of them in contemporary law, among them, in the context of E-commerce. Finally, based on the performed study, the conclusion that each form of transaction is intended for simultaneous realization of several functions could be shared.

Key words: *form of transaction, function of the form.*

1. Introduction

In the philosophers' opinion, there are some rules providing to individuals more or less beneficial instruments allowing creation of the structure of rights and obligations that helps him to live within the legal scopes. These are the rules entitling individuals to make agreements, wills, deeds, and generally, make legal relations with the others. These are the rules allowing person exercising and protecting their rights.[1]

In the context of social sciences, law is impossible without formalization and to demonstrate this, the form theory should be built so that it did not contradicted to the content at all. If the law formalism is useful, it should be useful as long as it achieves something with respect of the content. There the form does not correspond to the content, formalism is a pathology; it will never have any desired effect and therefore, overall, it will be unstable. Formalism and formalization serve to maintaining of what is substantial in the content. Where formalization works well, its purpose is the same as of the entire content.[2]

Naturally, compliance with the certain contractual form, specified by the law or by the agreement between parties prevents prompt and flexible development of the contractual relations to certain extent.[3] On the other hand, formality is associated with additional inconvenience of losing time and money; in many cases, erroneous form can invalidate absolutely seriously expressed will. And finally, the forms easily freeze, stay behind the time requirements and become unpopular. In such cases here is a discrepancy between the norm requiring compliance with the form and civil turnover attempting voidance thereof.[4] Though, requirement of the written form does not cause only incon-

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* Doctoral Student and Visiting Lecturer, TSU Faculty of Law.

1 *Hart H.L.A.,* Positivism and the Separation of Law and Morals, in: *Dworkin R.M.* (Ed.), Philosophy of Law: A Very Short Introduction, Tbilisi, 2010, 10-11 (in Georgian).

2 *Stinchcombe A.L.,* When Formality Works: Authority and Abstraction in Law and Organizations, University of Chicago Press, Chicago, 2001, 2-3.

3 *Dzlierishvili Z., Tsertsvadze G., Robakidze I., Svanadze G., Tsertsvadze L., Janashia L.,* Contract Law, Tbilisi, 2014, 89 (in Georgian).

4 *Dernburg H.,* Pandects, Vol. I, General Part, Tiflis, 1928, 243 (in Georgian). See also: *Chanturia L.,* Commentary on Georgian Civil Code, Vol. 3, Law of Obligations, General Part, Article 328, Tbilisi, 2001, 110 (in Georgian);

venience and limitations for the parties. Positive aspects of the written forms of the deals should be appreciated as well. By adoption of the requirement of written form of the whole set of the transactions the legislator attempts to protect the interests of civil turnover participants, ensure stability and security, protect the inexperienced subjects from the abuse from the side of unfair participants of civil law relations.[5] Hence, the legislator sets certain rules with respect of the contract form in cases where there is such need to ensure stability of the contractual relations and establishing of the form has respective purpose.[6]

Contract law within both, civil and common law systems there were long lasting historical trends weakening significance of the contractual formality. Earlier legal systems were formalist and "objectivist" nature. Such antique formalism was associated with magic thinking and this can still seen in certain rules from early period of antique Roman law.[7]

Formality requirements can perform different functions; not all of them are related to protection of individuals from self-damaging contracts. They are the policy instruments and their function is to complicate contract execution and thus make it more prudent (autonomous) and overall, welfare improving to greater extent. Most legal regimes require compliance with the formality requirements to ensure validity and enforceability of the certain contract categories.[8]

In overview of the formal requirements adopted modern contractual law, *Zimmerman* mentioned that all these requirements were adopted to ensure achievement of certain legislative goals: facilitation of the transaction evidencing, possibility of making well-reasoned agreements and thus prevention of making immature and unreasonable statements; or, in case of notarization requirement – ensuring legal consultation.[9]

For certain transactions the legal systems set the relatively strict formality requirements, such as unilateral obligations or transaction of great significance, mostly related to marriage and inheritance.[10]

Though established measures differ with jurisdictions, formality requirements are always stricter where the transaction has great impact. This deals with extremely personal decisions, where particular significance is linked with the autonomy and reasoned judgment of choice, like some deals related to surrogate motherhood, marriage or heritage. As already stated by *Austin, Savigny, Jhering* and other classicists of jurisprudence, legal formalities are useful to protect individuals from imma-

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Chanturia L., Freedom and Responsibility: Law and Judiciary of the Post-Soviet Epoch, "Sani" Publishers, Tbilisi, 2004, 70 (in Russian); *Tatarkina K.P.*, Form Requirements in the Russian Civil Law, TUSUR Publishing, Tomsk, 2012, 55-56 (in Russian).

5 *Tatarkina K.P.*, Form Requirements in the Russian Civil Law, TUSUR Publishing, Tomsk, 2012, 56 (in Russian).

6 *Dzlierishvili Z., Tsertsvadze G., Robakidze I., Svanadze G., Tsertsvadze L., Janashia L.,* Contract Law, Tbilisi, 2014, 89 (in Georgian).

7 *Cserne P.,* Freedom of Contract and Paternalism: Prospects and Limits of an Economic Approach, Palgrave Macmillan, New York, 2012, 106.

8 *Cserne P.,* Freedom of Contract and Paternalism: Prospects and Limits of an Economic Approach, Palgrave Macmillan, New York, 2012, 107.

9 *Zimmermann R.,* The Law of Obligations: Roman Foundations of the Civilian Tradition, Cape Town, Wetton and Johannesburg, 1990, 86.

10 *Cserne P.,* Freedom of Contract and Paternalism: Prospects and Limits of an Economic Approach, Palgrave Macmillan, New York, 2012, 107-108.

ture decisions. From the point of view of soft paternalism, formality works as indicator of serious attitude. The main economic function of formal requirements is to make contract execution more difficult and thus more prudent and, as a result, achieve greater probability of welfare improving.[11]

According to assessments of some authors, the form is not a goal, rather, it is the instrument for achievement of various goals and it is conditioned by such goals.[12] Hence, we should share the view that study of transaction form functions allows better understanding of the goals achievable by virtue of the law or through establishing of certain means for expression of will by the agreement between parties.[13]

The article provides analysis of the purposes served by the transaction form, what its functions are, especially in the sphere of e-commerce.

2. Characterization of Separate Functions of the Form of Transaction

Below are discussed some functions having certain significance characterizing one or another contract form established by the law.

2.1. Function of Clarity

Execution of written agreement allows the parties to accurately distinguish the process of negotiations from the fact of making contract. In case of verbal expression of the will (especially in case of long discussion of the contractual terms and conditions), the dispute may arise, whether each of the parties desired to bind himself with contractual relations with the other party, when expressing his opinion about contracting or only the question of potential contract was discussed. Requirement of making written contract allows be tter establishing of the fact of contracting as such, ensures clarity of the fact of contracting (*Abschlußklarheit*).[14]

In its attempts of stimulating of private persons to ensure that the act of expression of their will stated their intention with sufficient accuracy and clarity to ensure uniform understanding and perception of the transaction contents at all times and by all interested parties, including the court, the legislator adopts the requirement of executing of one or another agreement in simple written form.[15]

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[11] *Cserne P.,* Freedom of Contract and Paternalism: Prospects and Limits of an Economic Approach, Palgrave Macmillan, New York, 2012, 108.

[12] *Kereselidze D.,* General Systemic Doctrines of Private Law, Tbilisi, 2009, 285 (in Georgian).

[13] *Tatarkina K.P.*, Form Requirements in the Russian Civil Law, TUSUR Publishing, Tomsk, 2012, 64 (in Russian).

[14] *Tatarkina K.P.*, Form Requirements in the Russian Civil Law, TUSUR Publishing, Tomsk, 2012, 57-58 (in Russian). This is the function implied where mentioned that the formal deal distinguishes the deal conclusion from preliminary negoiations: *Dernburg H.,* Pandects, Vol. I, General Part, Tiflis, 1928, 243 (in Georgian). See also: *Chanturia L.,* Commentary on Georgian Civil Code, Vol. 3, Law of Obligations, General Part, Article 328, Tbilisi, 2001, 110 (in Georgian); *Chanturia L.,* Freedom and Responsibility: Law and Judiciary of the Post-Soviet Epoch, "Sani" Publishers, Tbilisi, 2004, 70 (in Russian).

[15] *Belov V.A.,* Civil law, General Part, Vol. 2, Persons, Goods, Facts, "Yurayt" Publishing, Moscow, 2011, 635 (in Russian). See also: *Todua M., Willems H.,* Law of Obligations, Tbilisi, 2006, 106 (in Georgian); *Khubua G., Totladze L.* (Eds.), Comprehensive Legal Vocabulary, Berlin, 2012, 114 (in Georgian); *Treitel G.*, The Law of Contract, 11th Ed., Sweet & Maxwell, London, 2003, 176.

Written form of the contract may assist the parties to distinguish terms and conditions provided for by the contract in written and those agreed upon verbally. In addition, it is useful for finding out the extent to which the agreements not provided in written could be applied for the purpose of contractual relations. Clearly formulated written contract allow the parties to act in accordance with the contract terms and conditions.[16]

2.2. Function of Serious Intention/Warning Function

In the opinion of some authors, formal agreement has numerous advantages. Parties better understand the seriousness of the act and preliminary negotiations are put into certain order.[17]

One of the bases for making formal transactions is the legislator's attempt to "induce in the persons exercising the act absolutely balanced serious will"[18]. If the law or agreement between the parties provides for written form of the contract, the participants have to spend certain time and efforts for its execution (formulation of the contract text and agreement thereupon, its signature and in some cases – notarization). It is implied that in such cases the parties perceive the legal act performed by them more seriously. Accidentally said words or even promise given as a joke may be understood by the contractor as an expression of serous will, while, actually, this is not the case. In making written document, the turnover subjects, normally, understand that the document signed by them is intended for achievement of the legal results. The parties are not always ready to confirm their verbal promises in written. Requirement of written contract prevent the parties from expression of the immature will or making unreasonable agreements; it confirms serious nature of the parties' intentions (*Übereilungsschutz*).[19]

Formal requirements were adopted for three political reasons. First of them is that the form is intended to warn the parties (or one of them) that they are going to perform significant act and it is referred to as the warning function (*Warnfunktion*).[20]

The other author calls given function of the regulation establishing the form to ensure that the contents of the expressed will is sufficiently understood by the person stating this will as the preventive function.[21]

Thus, written form of the contract has the warning function[22]. The contract exists in a tangible form. Thus, to make decision on whether to sign the contract or not, the parties have the opportunity

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[16] *Dzlierishvili Z., Tsertsvadze G., Robakidze I., Svanadze G., Tsertsvadze L., Janashia L.,* Contract Law, Tbilisi, 2014, 89 (in Georgian).

[17] *Dernburg H.,* Pandects, Vol. I, General Part, Tiflis, 1928, 243 (in Georgian).

[18] *Mityukov K.A.*, A Course of Roman Law, Typolithography of the Partnership "I.N. Kushnerev and Co.", Kiev, 1902, 43 (in Russian), Cited: *Tatarkina K.P.*, Form Requirements in the Russian Civil Law, TUSUR Publishing, Tomsk, 2012, 58 (in Russian).

[19] *Tatarkina K.P.*, Form Requirements in the Russian Civil Law, TUSUR Publishing, Tomsk, 2012, 58 (in Russian).

[20] *Markesinis B.S., Unberath H., Johnston A.,* The German Law of Contract: A Comparative Treatise, 2nd Ed., Hart Publishing, Oregon, 2006, 84. In the action, signature serves to improvement of awareness, for which a person gives his/her consent, and this property in German law literature is mentioned as the function of warning (*Warnfunktion*): *Laborde C.M.,* Electronic Signatures in International Contracts, Peter Lang GmbH, Frankfurt am Main, 2010, 29.

[21] *Kropholler J.,* German Civil Code: Study Commentary, Tbilisi, 2014, §125, Rn. 1, 50 (in Georgian).

[22] According to *Fuller's* classical differentiation, the warning function is one of the three functions of contractual formality, implying that the formality makes the parties wait and think of what are they doing: *Cserne P.,* Freedom of Contract and Paternalism: Prospects and Limits of an Economic Approach, Palgrave Macmillan, New York, 2012, 110.

to think and analyze, whether they need to execute the contract with given terms and conditions or not[23]. The warning effect of the form is that an individual can think more, before he formalizes properly and makes document with the signature and seal, than he would think, before making verbal promise[24].

Frequently, the regulation requiring compliance with the form performs the function of confirmation of the serious nature of the intention, i.e. protects inexperienced businessmen from immature decisions. Its substance is to ensure that these people had sufficient time to think about the terms and conditions and formulate them, so that the contract was regarded as made according to the serious intention and hence, its enforcement could be ensured by the court. For many people and especially those, who are not professionals, the written form means that the period of oral discussion has ended and the parties face necessity of confirmation of the serious nature of their intentions[25].

Where the norm is intended to protect the parties from immature decisions, in making significant contract or that, containing some danger, a person, whose protection was intended by the regulation, is left without any protection of he/she makes verbal agreement[26].

Supreme Court of Georgia, in one of its decisions, emphasized confirmation of the serious nature of intention as one of significant aspects of contract form. In particular, written form is intended to protect the contracting parties from immature decisions. Reading of the written document and sense of responsibility caused by its signature should make any reasonable person thing. Though, practically, this is not always the case. Though in one of the other decisions, the Supreme Court has regarded signature on the written document as the evidence that the transaction participant was aware in the contents of the contract, the practice frequently shows just the opposite. Especially, where standard contract terms and conditions are applied and the contract party, usually, signs it blindly. Nevertheless, the written form is a significant precondition for seriousness.[27]

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[23] *Dzlierishvili Z., Tsertsvadze G., Robakidze I., Svanadze G., Tsertsvadze L., Janashia L.* Contract Law, Tbilisi, 2014, 89 (in Georgian). See also: *Chanturia L.,* Commentary on Georgian Civil Code, Vol. 3, Law of Obligations, General Part, Article 328, Tbilisi, 2001, 110 (in Georgian); *Chanturia L.,* Freedom and Responsibility: Law and Judiciary of the Post-Soviet Epoch, "Sani" Publishers, Tbilisi, 2004, 70 (in Russian).

[24] *Treitel G.*, The Law of Contract, 11th Ed., Sweet & Maxwell, London, 2003, 176. It should be noted that in accordance with German Law, electronic form is excluded in certain legal actions, where the protection from the immature decision is of primary significance (so called preventive function of the written form): *Kropholler J.* German Civil Code: Study Commentary, Tbilisi, 2014, §126a, Rn. 1, 54 (in Georgian).

[25] *Zwaigert K., Kötz H.,* An Introduction to Comparative Law: The Institutions of Private Law, Vol. II, Contract, Unjust Enrichment, Tort, Tbilisi, 2001, 53 (in Georgian). See also: *Dzlierishvili Z., Tsertsvadze G., Robakidze I., Svanadze G., Tsertsvadze L., Janashia L.* Contract Law, Tbilisi, 2014, 191 (in Georgian); *Bölling H., Lüttringhaus P.,* Systematic Analysis of Separate Grounds of Claim of the Civil Code of Georgia, Tbilisi, 2009, 30 (in Georgian); *Mariamidze G.,* Law of Obligations, General Part, Book One, 1st Ed., Tbilisi, 2011, 37 (in Georgian). To ensure that the acceptor of will expression was sure in seriousness of will expression, this should be done in a visually recognizable manner, e.g. with the seal or scanned signature, dated and other similar methods: *Kropholler J.,* German Civil Code: Study Commentary, Tbilisi, 2014, §126b, Rn. 4, 56 (in Georgian).

[26] *Chanturia L.,* Commentary on Georgian Civil Code, Vol. 3, Law of Obligations, General Part, Article 328, Tbilisi, 2001, 112 (in Georgian)., See also: *Bölling H., Chanturia L.,* The Method of Making Decisions in Civil Cases, 2nd Ed., Tbilisi, 2004, 232 (in Georgian).

[27] *Chanturia L*., General Part of the Civil Law, Tbilisi, 2011, 336-337 (in Georgian).

2.3. Accuracy Function

Advantage of the written form is that this means of expression of will makes the transaction parties to formulate its contents more accurately. In addition, as reasonably stated, "if the details of verbal agreement..., after certain time period, can be lost from the memory of its participants and other persons, written text allows recollection of the contract terms and conditions at any time needed"[28]. There is a presumption that what is objectively written on the paper reflects the will of a contracting person. Necessity of written execution of the will expression can impact the contents of the contract, as, in many cases, the parties, in making written documents, attempt to formulate their will more accurately, clearly and unambiguously. Necessity of written formalization may stimulate the parties to agree upon the terms and conditions that would not be provided in case of verbal agreement; i.e. written form ensures accuracy of formulation of the contract contents (*Inhaltsklarheit*).[29]

Civil Code of Georgia regards that the contract is made if the parties have agreed upon all substantial terms and conditions thereof, in a form provided for this. Substantial terms and conditions shall be formulated in the objective form provided for by the law, ensuring their adequate understanding and interpretation. Naturally, if the accurate content of the contractual terms and conditions is impossible, discussing their legal outcomes become senseless[30]. Thus, the function of the contract form is to adequately state the parties' will and establish them legally. Contract form establishes the expression of the will by the contract parties and fully reflects it.[31]

Overall, providing of the form provides relative protection of the contract parties from the expected misunderstanding. They will have less problems with mutually excluding and ambiguous statements, unusual provisions, unclear standard terms and conditions and interpretation.[32]

2.4. Evidentiary Function

One of the main functions of the written form of the contract is the evidentiary function (*Beweisfunktion*). In executing of written document the parties' will finds its objective expression and is established, for the long period of time. Contents of the expression of will could be established not only in given moment but with time, after it. Document created by the parties expressing the will of contracting parties is the evidence of contracting, confirming not only the fact of cont-

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[28] *Pokrovski B.V.,* The Concept and Significance of Written Form of Transaction in the Soviet Civil Law, in: Proceedings of the Institute of Philosophy and Law of the Academy of Sciences of the Kazakh SSR, Vol. 4, Alma-Ata, 1960, 164 (in Russian), Cited: *Tatarkina K.P.*, Form Requirements in the Russian Civil Law, TUSUR Publishing, Tomsk, 2012, 59 (in Russian).

[29] *Tatarkina K.P.*, Form Requirements in the Russian Civil Law, TUSUR Publishing, Tomsk, 2012, 59 (in Russian). Thus, the requirement of document also simplifies the problem of finding out of the agreement content: *Treitel G.*, The Law of Contract, 11th Ed., Sweet & Maxwell, London, 2003, 176.

[30] *Dzlierishvili Z., Tsertsvadze G., Robakidze I., Svanadze G., Tsertsvadze L., Janashia L.,* Contract Law, Tbilisi, 2014, 52 (in Georgian). Thus, purpose of compliance with the requirement of written form of the contract is accurate determination of the contract content: *Khubua G., Totladze L.* (Eds.), Comprehensive Legal Vocabulary, Berlin, 2012, 114 (in Georgian).

[31] *Dzlierishvili Z., Tsertsvadze G., Robakidze I., Svanadze G., Tsertsvadze L., Janashia L.,* Contract Law, Tbilisi, 2014, 149 (in Georgian).

[32] *Pepanashvili N.,* Business Law (Regulation of International Business), Tbilisi, 2011, 148 (in Georgian).

racting but also the terms and conditions agreed upon by the parties. Written form as the instrument for creation of the evidence is of particular significance in case of contracts significant not only for the parties but for the third persons as well.[33]

Where the parties achieve certain agreement as a result of long verbal negotiations and call such agreement a contract, naturally, certain contractual relations will be made between them. In many cases, the process accompanying the contractual relations and their outcome is certain dispute between contracting parties. The subject of dispute may be even whether the fact of contracting has occurred or not. Naturally, the parties need to have some evidence. Hence, in such cases, written form accepted for certain types of contracts is the best evidence with respect of all contract-related issues.[34]

Adopting legal regulations necessitating compliance with certain formal requirements in contracting the legislator has certain intention.[35] In such case the function of the norm establishing the form is to make evidencing of expression of will easier.[36]

Written form is an additional condition of contract validity and it was adopted in the law to prevent abuse of testimonies in the process of evidencing.[37] Exclusion of the testimonies should be dictated, with respect of legal policies, by poor reliability of given means of evidencing.[38]

Thus, the purpose of the form is to guarantee evidencing of expression of will. In case of form absence, no one can prove that it had ever existed.[39]

Supreme Court of Georgia has emphasized facilitation of evidencing as one of important aspects of the form functions and mentioned that the existence of written document certainly facilitates identifying of the will of contracting parties and thus – the process of evidencing.[40]

2.5 Function of Consultation

In some cases, for contracting, the law requires not only execution of the written document, embodying the parties' will but also participation of a person with special legal knowledge, such as a notary. Involvement of the notary in the contracting process guarantees that the parties received ex-

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[33] *Tatarkina K.P.*, Form Requirements in the Russian Civil Law, TUSUR Publishing, Tomsk, 2012, 59-60 (in Russian). This is the form funtion implied where there is specified that formal contract makes the evidence of the contract more persuasive: *Dernburg H.,* Pandects, Vol. I, General Part, Tiflis, 1928, 243 (in Georgian).

[34] *Dzlierishvili Z., Tsertsvadze G., Robakidze I., Svanadze G., Tsertsvadze L., Janashia L.,* Contract Law, Tbilisi, 2014, 89 (in Georgian). See also: *Todua M., Willems H.,* Law of Obligations, 2006, 106 (in Georgian); *Chanturia L.,* Commentary on Georgian Civil Code, Vol. 3, Law of Obligations, General Part, Article 328, Tbilisi, 2001, 110 (in Georgian); *Khubua G., Totladze L.* (Eds.), Comprehensive Legal Vocabulary, Berlin, 2012, 114 (in Georgian); *Chanturia L.,* Freedom and Responsibility: Law and Judiciary of the Post-Soviet Epoch, "Sani" Publishers, Tbilisi, 2004, 70 (in Russian).

[35] *Zwaigert K., Kötz H.,* An Introduction to Comparative Law: The Institutions of Private Law, Vol. II, Contract, Unjust Enrichment, Tort, Tbilisi, 2001, 60 (in Georgian).

[36] *Kropholler J.,* German Civil Code: Study Commentary, Tbilisi, 2014, §125, Rn. 1, 50 (in Georgian).

[37] *Chanturia L.*, Commentary on Georgian Civil Code, Vol. 3, Law of Obligations, General Part, Article 328, Tbilisi, 2001, 108 (in Georgian); *Chanturia L.,* Freedom and Responsibility: Law and Judiciary of the Post-Soviet Epoch, "Sani" Publishers, Tbilisi, 2004, 68 (in Russian).

[38] *Zwaigert K., Kötz H.,* An Introduction to Comparative Law: The Institutions of Private Law, Vol. II, Contract, Unjust Enrichment, Tort, Tbilisi, 2001, 60 (in Georgian).

[39] *Zoidze B.*, Constitutional Control and Order of Values in Georgia, Tbilisi, 2007, 26 (in Georgian).

[40] *Chanturia L.*, General Part of the Civil Law, Tbilisi, 2011, 336-337 (in Georgian).

planation of the legal significance of their will expression and the outcomes thereof and this, as such, is intended for prevention of abuse from the side of more competent party in legal respect. Notary's participation allows ensuring equality of the contracting parties and thus protecting the interests of the party that has poorer legal awareness. In general, requirement of contract notarization is intended for prevention of possible legal errors in making complex contracts. This function is characteristic for the most strict, notarized form of the contracts and it is called the function of consultation (*Beratungsmöglichkeit*).[41] Thus, the function of the form regulating norm can be ensuring of the party's awareness in the legal outcomes of expression of its will.[42]

Requirement of the form compliance has the function of the intention confirmation, where stating that the given transaction shall be attested by the independent official with legal education.[43] The legislator provides for the notarized form for the transactions with particular significance for civil turnover or playing the key role for the contracting parties, as well as for the contract made in the special circumstances.[44]

In accordance with German law, the notary, by public notarization, attests that the signature, or in case of voting – hand rising has taken place or was recognized in his/her presence and that in case of the person expressing his/her will, this is about the person mentioned in the confirmative statement. The confirmative statement is the evidence of the signature validity; it does not deal with the content of the expression of will; thus, expression of will in the written form exists as the private document. Public notarization is particularly required by the law in cases that are subject to registration with the Public Registry. In this way, the unauthorized person will be deprived of the opportunity of fraudulent registration enjoying public trust.[45]

In making particularly complicated contracts or those with the outcomes of legal significance, the legislator desires to ensure that the parties received the consultation and explanations for the outcomes of the action performed by them in relation with the contract, from the neutral expert well aware in the law.[46] Thus the notary, in addition to the performing of the notary's action, is entitled to provide legal consultation to a person about the "scopes" and outcomes of the contractual relations. The notarized form reduces the risk of invalidation of the contract, by his/her participation in the undisputed cases, by providing unbiased consultations to the parties, preparation of the authentic documents, the notary contributes to development of the system of legal safety.[47]

The opinion that the function of consultation of the notarized form is the most substantial one should be shared but this form performs the other functions as well. In particular, notarization en-

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[41] *Tatarkina K.P.*, Form Requirements in the Russian Civil Law, TUSUR Publishing, Tomsk, 2012, 60-61 (in Russian).

[42] *Kropholler J.,* German Civil Code: Study Commentary, Tbilisi, 2014, §125, Rn. 1, 50 (in Georgian).

[43] *Zwaigert K., Kötz H.,* An Introduction to Comparative Law: The Institutions of Private Law, Vol. II, Contract, Unjust Enrichment, Tort, Tbilisi, 2001, 53 (in Georgian).

[44] *Belov V.A.,* Civil law, General Part, Vol. 2, Persons, Goods, Facts, "Yurayt" Publishing, Moscow, 2011, 635 (in Russian).

[45] *Kropholler J.,* German Civil Code: Study Commentary, Tbilisi, 2014, §129, Rn. 1, 57 (in Georgian).

[46] *Bölling H., Lüttringhaus P.,* Systematic Analysis of Separate Grounds of Claim of the Civil Code of Georgia, Tbilisi, 2009, 232 (in Georgian).

[47] *Shotadze T.,* Property Law, Tbilisi, 2014, 456 (in Georgian).

sures clarity of contracting, accuracy of formulation of the content thereof, protects the parties from making unreasonable, immature deals and performs the evidencing function. Though, for the given form the function of consultation is the decisive one.[48]

2.6. Information Function

Written execution of the contracts is sometimes intended for protection of the third parties interests, i.e. the written form performs the information function (*Erkennbarkeit für Dritten*).[49] The exact translation of *„Erkennbarkeit für Dritten"* is "recognizable for the third parties" though some authors think that such name does not correspond to the function content. Therefore, it seems that it would be more reasonable to call this function of written form the information function.[50]

One of the significant purposes of written contracts is providing legal information to the user. In particular, the contractual formulary contains numerous legislative norms for distinguishing of the rights and obligations of the contracting parties. Therefore, contemporary laws, for the purpose of protection of the user interests, provide for numerous contracts with mandatory written form.[51]

The purpose of informing could be explained so that each type of contract shall contain the norms thoroughly explaining the legal issues of certain nature. Necessity of the mentioned explanation can be caused by the status differences between the contracting parties, e.g. the contract between bank and common citizen shall contain explanations dealing with the interests, the penalties imposed for non-fulfillment of the contract, the fines and other substantial issues.[52]

To justify the information and documenting purposes of the norm, the contents of the will expression shall be recorded by means of the typed symbols (letters and numbers) so that it was suitable for permanent reproduction. Together with the document, any other means allowing storage and reproduction of the statement by the person expressing his/her will. Normally this includes hard copies and electronic documents, as well as the tele- and computer facsimile notifications, e-mail, data stored as the files and web sites that, normally, are suitable for storage.

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[48] *Tatarkina K.P.*, Form Requirements in the Russian Civil Law, TUSUR Publishing, Tomsk, 2012, 61 (in Russian).

[49] *Tatarkina K.P.*, Form Requirements in the Russian Civil Law, TUSUR Publishing, Tomsk, 2012, 61-62 (in Russian).

[50] *Tatarkina K.P.*, Form Requirements in the Russian Civil Law, TUSUR Publishing, Tomsk, 2012, 62 (in Russian).

[51] *Chanturia L.,* Commentary on Georgian Civil Code, Vol. 3, Law of Obligations, General Part, Article 328, Tbilisi, 2001, 110 (in Georgian). See also: *Chanturia L.,* Freedom and Responsibility: Law and Judiciary of the Post-Soviet Epoch, "Sani" Pubslishers, Tbilisi, 2004, 70-71 (in Russian). Thus, in such case, the form has a protective function, as it serves toprotect the weaker party to the contract, guaranteeing that suh party has written records of the contract terms and conditions. For example, the employee shall be informed in written about the details of his/her empoyment: *Treitel G.*, The Law of Contract, 11th Ed., Sweet & Maxwell, London, 2003, 176. According to the assessments of some authors, in the old forms here were closely linked ritual nature and attempt to state the contents accurately and clarely. But soon the protective function of formality was brought forward. This explains the fact that the only known formula of post-classic period was documentary record of the transaction and in many cases this is the tyical requirement for varous forms of the transactions: *Zwaigert K., Kötz H.,* An Introduction to Comparative Law: The Institutions of Private Law, Vol. II, Contract, Unjust Enrichment, Tort, Tbilisi, 2001, 52 (in Georgian).

[52] *Dzlierishvili Z., Tsertsvadze G., Robakidze I., Svanadze G., Tsertsvadze L., Janashia L.,* Contract Law, Tbilisi, 2014, 90 (in Georgian).

It should be taken into consideration also that where the addressee has no technical capabilities for receiving of the expression of the will, the problem is not non-compliance with the form but rather the problem of statement delivery. Similar to the electronic form, a person participating in civil turnover shall allow exercising of expression of the will in relation to him/her by providing e-mail address or fax number.[53]

2.7. Control Function

As specified in the literature, the written form of the contract performs the control function (*Kontrolfunktion*) as well. Some authors mention that written form "facilitates control over the legality of the concluded contracts"[54]. Indeed, if written contract is made, to get familiarized with its terms and conditions and identification of the potential incompliance with the law one can simply read the text. Only a person not interested in the contract and not participating therein may control and supervise lawfulness of the contract between parties. Therefore, written form provides the control function only if supervision over the compliance is performed by the special subject. In case of notarization requirement, this is the notary or any other person entitled to perform the notary's actions and he/she shall examine compliance of the draft contract. In case of execution of the simple written contract the parties may make the written document independently, without participation of any special subject. Therefore, at one glance, it seems that the simple written form does not provide the control function. Though in case of dispute, the parties apply to the court for resolution. Court shall thoroughly investigate and assess the evidences provided and examine, whether the contract complies with the requirements of the law. If the court establishes that the contract does not comply with the legal requirements, is void, the court shall take this into consideration and do not uphold any claim based thereon, even if none of the parties has claimed that the contract is void. Consequently, the simple contract form, similar to the notarized form, provides the control function.[55]

2.8. Function of Identification

Signature put by the own hand provides number of functions. Primarily, it serves to identification of the signatory and thus linking of the document with the person. For example, signature on the check serves to identification of the issuer; signature on the painting shows the identity of a painter. In such cases identification is possible as the signature is made by a specific person's own hand. On one hand, each person chooses the way how to write his/her name independently and creatively and on the other hand and what is most important, the signature is unique characteristic of each person allowing accurate identification of the signatory and distinguishing valid signature from

[53] *Kropholler J.,* German Civil Code: Study Commentary, Tbilisi, 2014, §126b, Rn. 2, 55-56 (in Georgian).

[54] *Pokrovski B.V.,* The Concept and Significance of Written Form of Transaction in the Soviet Civil Law, in: Proceedings of the Institute of Philosophy and Law of the Academy of Sciences of the Kazakh SSR, Vol. 4, Alma-Ata, 1960, 164 (in Russian), Cited: *Tatarkina K.P.*, Form Requirements in the Russian Civil Law, TUSUR Publishing, Tomsk, 2012, 62-63 (in Russian).

[55] *Tatarkina K.P.*, Form Requirements in the Russian Civil Law, TUSUR Publishing, Tomsk, 2012, 62-63 (in Russian).

the false one. In addition, the signature confirms the signatory's will and intent to become bound with the written document, i.e. the intent of the signature. By signing the document the signatory expresses his/her acceptance of the document's content.[56]

The above provides two main functions of the signature: identification of the signatory and establishing of the intention. Though, in the contract the signature provides the other function as well. In particular, the signature contributes to the entirety of the document. Normally, the signature is in the end of the document and any records below the signature are of no value. In German legal literature this function of the signature is mentioned as the function of document ending (*Abschlussfunktion*).[57]

Purpose of the electronic signature is providing of the same functions as in case of the signature made by a person's own hand, though it is adjusted to the characteristics of the electronic transactions. Signature made by a person's own hand and electronic signature, though apparently different, serve to achievement of similar goals in the different media. UN International Trade Law Commission applied the term "functional equivalence" to emphasize this feature. In this case attention is paid not to the form of the signature but rather to the functions performed by it. Thus, in case of electronic signature, the main requirement is that it could provide identification[58] of the signatory and establishing of the intention[59]. According to German law, the of the document shall put on his/her statement the qualified electronic signature as per the Law author on Electronic Signature. This corresponds to the signature made by one's own hand in case of the usual document and therefore ensures correspondence of the content of expression of the will with the content of the relevant document.[60]

2.9. Function of Enforceability

According to *Fuller's* classical differentiation, the contractual formality provides one more function known as channeling function. In particular, formality is the simple and cheap test of enforceability, It is the signal for the court and non-professionals that the contract is good and enforceable. The form is most useful for the parties desiring to achieve agreement enforceable by the court. In the other words, if one desires to give legally binding promise, whether this is the promise giver or promise acceptor, form application would be very useful.[61]

In the literature, the similar name denotes the other function of the form. In particular, the form can serve to what is called a "channelling" purpose, i.e. use of certain form can help in differentiating one transaction type from the other.[62]

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[56] *Laborde C.M.,* Electronic Signatures in International Contracts, Peter Lang GmbH, Frankfurt am Main, 2010, 27-28.

[57] *Laborde C.M.,* Electronic Signatures in International Contracts, Peter Lang GmbH, Frankfurt am Main, 2010, 28.

[58] Indeed, with technologies development, this issue becomes more and more signiticant for the transactions of e-trade as in such transactions there is a danger that a person made error, with respect of the identity of desired contractor: *Amiranashvili G.,* Mistake as to the Identity of a Contracting Party – Feature of the Regulation in the Georgian Legislation, "Journal of Law", №2, 2013, 27 (in Georgian).

[59] *Laborde C.M.,* Electronic Signatures in International Contracts, Peter Lang GmbH, Frankfurt am Main, 2010, 29-30.

[60] *Kropholler J.,* German Civil Code: Study Commentary, Tbilisi, 2014, §126a, Rn 2, 54 (in Georgian).

[61] *Cserne P.,* Freedom of Contract and Paternalism: Prospects and Limits of an Economic Approach, Palgrave Macmillan, New York, 2012, 110.

[62] Treitel G., The Law of Contract, 11th Ed., Sweet&Maxwell, London, 2003, 177.

3. Conclusion

To study the legal significance of the contract form numerous opinions of various authors were compared and analyzed and this contributed to making of the entire picture. In addition, this has confirmed the fact that study of specific functions of the contract form allows better understanding of the legislator‘s intention when adopting the specific formal requirements.

The article offers discussion of number of the most important functions of the contract form and this has clearly demonstrated the purpose of each function of the form in contemporary law, among them, in the context of technological development. Analysis of the contract form functions, overall, allows sharing of the conclusion that each form of the contract is intended for simultaneous realization of several functions. It would be wrong to regard that the form requirement is intended for ensuring only any one of the functions.[63]

[63] *Tatarkina K.P.*, Form Requirements in the Russian Civil Law, TUSUR Publishing, Tomsk, 2012, 64 (in Russian).

Nino Ioseliani*

Disproportionally High Contract Penalties and Role of the Court in the Sphere of Protection of Civil Interests

The contractual penalty clause is a cash amount agreed between the parties, payable by a debtor to creditor for non-fulfillment or improper fulfillment of the obligations. Frequent use of the contractual penalty clause in civil turnover makes necessary studying of the legal scopes of disproportionally high contractual penalty clauses. Reduction of the disproportionally high contractual penalty clause is within the court's authority. In such cases the court adjusts the contractual penalty clause to the outcomes of non-fulfillment or improper fulfillment of the obligations rather than rejection thereof.

Key words: *contractual penalty clause, reduction of excessive contractual penalty clause, Article 420 of Georgian Civil Code.*

1. Introduction

According to the Civil Code of Georgia[1], the penalty is cash amount agreed between the parties, payable by a debtor to creditor for non-fulfillment or improper fulfillment of the obligations (Article 417). For validity of the agreement written document is required and other related issues like quantity, payment form, calculation rules etc. shall be subject to agreement between the parties.

GCC does not specify any lower and upper limits for the penalties but this does not imply the possibility of setting of the unreasonably high amounts. "The court may, taking into consideration the circumstances of case, reduce the disproportionally high penalty" (Article 420). "This is an imperative norm and the parties cannot exclude or limit its action by the contract".[2]

Due to frequent use of the penalties in civil turnover study of legal scopes of applicability of Article 420 of GCC is of great significance. Legal regulation of disproportionally high penalties in the civil law of the foreign countries is subject of the study as well.

2. Disputes on Disproportionally High Penalties, Dispute Subjects, Scopes and Stages

Consideration of reduction of the disproportionally high penalty by the court results from development of the legal institute of the penalty. Roman Civil Law have not provided for reduction of the agreed upon penalties as it added great significance to the parties' free will and by this reason no intervention was provided into the contents of the agreements between the parties.[3] In Rome, the

* Doctoral Student, TSU Faculty of Law.

1 Civil Code of Georgia №786-II 26.06.1997, hereinafter referred to as GCC.

2 *Dzlierishvili Z., Tsertsvadze G., Robakidze I., Svanadze G., Tsertsvadze L., Janashia L.,* Contract Law, Tbilisi, 2014, 603 (in Georgian).

3 The Max Planck Encyclopedia of European Private Law, Vol. II, Ed. by *Basedow J., Hopt K.J., Zimmermann R., Stier A.,* 2012, 1260.

amount of the penalty was limited by prohibition of the concealed usurious activities and the amount was reduced to the extent in excess of the allowed quantity.[4]

Regarding of the penalty as disproportionally high, as well as reduction thereof, is the court's authority. In case of dispute, examination of this issue is the court's obligation.[5] Court provides reduction of the disproportionally high penalty based on the application of the interested party, usually the debtor under the contractual obligations. He/she shall bear the burden of evidencing existence of disproportionally high penalties. Creditor claims the penalty imposed as a security in full. Purpose of the penalty is restoration of the rights violated by non-fulfillment of the obligations, rather than enrichment of the creditor.[6]

If the penalty amount is not disputed, the court shall not be authorized to reduce the agreed upon penalty with its own incentive. Possibility of disputing of the penalty is excluded at the stage of judicial procedure when new claim cannot be submitted.[7]

The issue of penalty reduction by the court's incentive is deprived of legal possibility, together with the material one, in the procedural legislation as well. According to the disposition principle adopted by Georgian Civil Procedure Code[8] the parties have opportunity to commence procedures at court based on their own decision, via submission of the claim or application and determine the subject of dispute. The parties may end the procedures with conciliation; the claimant may withdraw his claim and the defendant may accept the claim (Article 3). The court's decision is the answer to upholding of the claim in full or in part or rejection thereof.[9] "The court has no right to award to the claimant more than claimed, even if the case materials provide basis for greater claim".[10]

The debtor, by unconditionally paying of the penalty does not dispute its disproportion. Proper fulfillment of the contract terms and conditions excludes the creditor's right to claim the penalty.[11]

In this process the court is presented as the assessor, creditor is the party in relation to which the contractual obligation is broken and the debtor regards that the penalty set for non-fulfillment or improper fulfillment of the secured obligation is inadequately high and demands its reduction. The creditor and debtor should be able to identify beneficial, substantial and disputable circumstances in addition to those generally known to the court.[12] They oppose one another in presentation of the preference of their interests assessment of which is the court's authority and it shall serve to estab-

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4 *Pergament M.Ya.,* Contract Penalties and Interest in Roman and Modern Civil Law, Odessa, 1899, 271-272 (in Russian).

5 Penalty reduction cases could be found in the arbitration practice as well. See *Chanturia L.,* Credit Security Law, Tbilisi, 2012, 242 (in Georgian).

6 *Sergeev A.P., Tolstoy Yu.K.* (eds.), Civil Law, Vol. I, 6th ed., ed., 2006, 694 (in Russian).

7 *Meskhishvili K.*, Penalty, Theoretical Aspects, Judicial Practice, "Overview of Georgian Business Law", 3rd ed., 2014, 23 (in Georgian).

8 Georgian Civil Procedure Code, №1106-I 14.11.1997, hereinafter referred to as GCPC.

9 *Liluashvili T., Khrustal V.,* Comments to Georgian Civil Procedure Code, Tbilisi, 2004, 416 (in Georgian).

10 Ibid.

11 *Ioseliani N.,* Penalty, "Notariate of Georgia", №2-3, 2005, 20 (in Georgian).

12 *Schmidt SH., Richter, H.,* Process of Making Decision by the Judge in Civil Law, Brief Introduction to Relation Method, with Case Studies Developed Based on the Civil Code, 2013, 22 (in Georgian).

lishment of fair justice. The above mentioned process can be conditionally divided into four stages and this facilitates decision on the penalty inadequacy.[13]

2.1. Identification of the Case Circumstances and their Study

GCC does not specify the circumstances that should be taken into consideration to regard that the penalty is disproportionally high. According to the principle of competitiveness recognized in the civil procedure (Article 4.1), the parties have equal opportunities for providing of evidences for proving of their positions. Court makes decision on dispute based on the circumstances specified by the parties and presented evidences. "Principle of competitiveness excludes the court's obligation to collect evidences at its own incentive".[14]

In the cases provided for by the law the court may provide evidences' collection and their examination at its own incentive or based on the party's motion to gain better understanding of the circumstances of the dispute and this does not imply that the court may deliberately, independently regard certain circumstances as the significant evidence and rely on them to resolve the disputed issue.[15]

Damages caused by the non-fulfillment of the obligations provide significant basis for regarding that the penalty amount was disproportionally high. Contractual damage is unfavorable and harmful outcome that would not exist in case of proper fulfillment of the obligations. At the same time, penalty payment obligation is not associated with the actual damages.[16] If the amount becomes subject to dispute, all other circumstances, based on which the penalty could be assessed as disproportionally high or be excluded in its given form, should be assessed.[17] E.g. the debtor's efforts to fulfill the obligations properly, degree of fulfillment of the improperly performed obligations, creditor's expectations, with respect of benefits to be gained as a result of proper fulfillment, property and non-property statuses of the parties etc.

2.2. Calculation of the Penalty

Penalty shall be determined only as an amount of money and provided in a form of a fine or surcharge. In the former case the exact amount is known from the outset and in the latter case, the penalty calculation conditions are agreed for each day, week, month, quarter or other period of delay, as the percentage of the contract value. Giving preference to any of the forms unambiguously to prevent disproportionally high penalties has no any legal basis. The court regards that the penalty amount is disproportionally high not based on its calculation form or amount but rather on excessive

[13] In the opinion of *Karapetov A.G.*, in deciding on this issue, three elements could be distinguished: evaluation of the outcomes caused by non-fulfillment of the obligations, calculation of the penalty and establishing apparent. disproportion between them. See: *Karapetov A.G.,* Penalty as the Instrument for Protection of the Creditor's Rights in Russian and Foreign Law, Moscow, 2005, 188-216 (in Russian).

[14] *Kobakhidze A.,* Civil Procedure Code, Tbilisi, 2003, 43 (in Georgian).

[15] See articles 4.2, 120, 162.1, 134.2, 154.2 and others of GCPC.

[16] *Akhvlediani Z.,* Obligation Law, 2nd ed., Tbilisi, 1999, 78 (in Georgian).

[17] Decision by the Department of the Cases of Administrative and other Categories, Georgian Supreme Court №BS-446-425 (K-09), 05.11.2009.

disproportion between the agreed amount and outcomes caused by non-fulfillment or improper fulfillment of the obligations.[18]

Penalty reduction dispute takes place not at a time of contracting but in case of non-fulfillment of the obligations, in particular, at a time of penalty payment. At a time of fulfillment of cash obligations, the principle of nominalism is applied, according to which, "the debt shall be covered nominally in the amount according to which the contract was made".[19] This approach shall be complied with in case of the contractual penalty as well.

2.3. Regarding Penalty as Disproportionally High

Decision on disproportionally high penalty is the issue of individual assessment by the court. In such cases the court determines, whether the contract penalty is fair, reasonable and legal.

For examination and assessment of the circumstances of the case, significant source is the contract secured by the penalty and in case of its interpretation the court clarifies the parties' statements or fills in the open areas, so called gaps.[20] For example, in one of the disputes it was impossible to quantify the work performed by the debtor based on the terms and conditions of the disputed contract, actually, the obligations were fulfilled improperly and the penalty was not provided for the specific improper performance and therefore, the court imposed on the debtor the penalty specified for complete non-fulfillment of the obligations.[21]

In each specific case, in examination of the issue of unreasonably high penalty, all circumstances from the moment of contract conclusion to the date when the penalty amount became disputable must be measured, that allow determination of the penalty disproportion.[22]

2.4. Reduction of the Disproportionally High Penalty

When the court regards that the agreed penalty is disproportionally high, it is authorized to reduce it. In such case the court adjusts the penalty to the outcomes of non-fulfillment or improper fulfillment of the obligations rather than neglecting it.

The law does not contain any directives with respect of the penalty reduction scopes. As the penalty, as such, includes the civil responsibility for non-fulfillment of contractual obligations, even in case of recognition of its disproportion, reduction shall be lawful, fair and reasonable.

Lawfulness of the contract penalty means its compliance with the law. Reasonability implies such reduction that the debtor's interests were protected and the penalty had not lost its legal function. Creditor shall receive the compensation for the interest of proper fulfillment of the obliga-

[18] Decision by the Department of the Cases of Administrative and other Categories, Georgian Supreme Court №BS-302-285 (K-07), 31.01.2008.

[19] *Chantladze M.*, Explanation of Expression of the Will, Reduction of the Penalty, Nominalism Principle, "Overview of Georgian Law", №5/2002-1, 174 (in Georgian).

[20] *Ioseliani N.*, Interpretation of the Contract, "Justice", №3, 2007, 103 (in Georgian).

[21] Decision by the Department of the Administrative Cases, Georgian Supreme Court №BS-1840-1794 (K-10), 09.06.2011.

[22] Decision by the Department of the Civil, Entrepreneurial and Bankruptcy Cases, Georgian Supreme Court №3K/467-01, 27.06.2001.

tions.[23] Penalty reduction shall not break equality between the parties and the principle of fairness of the contract terms and conditions.[24]

The court's authority is to reduce the penalty but not cancel it (with the exclusion of case where the penalty invalidation basis exists). The court is not authorized to increase the penalty as well. Payment of the agreed upon penalty excludes the debtor's claims with respect of the penalty amount.[25]

3. Penalty in the Law of Continental Europe

Continental European law recognizes the concept of penalty in its wide sense, provides in details the bases for reduction of disproportional penalties and circumstances to be taken into consideration.[26]

According to the CC of Germany, the penalty is an amount of money promised to be paid in case of non-fulfillment of the obligations (§339),[27] that could be stated in the form other than cash (§342),[28] according to the CC of France, it is the condition, on which, as a fulfillment security, a person has undertaken certain obligations (Article 1226).[29] In particular, it is a provision intended for securing fulfillment of the contract.[30] There is an opinion that it shall be set as the fixed amount specified in numbers.[31] According to CC of the Netherlands, provision imposing on the party in breach of obligations payment of certain amount or fulfilling of certain obligations, is the penalty (Article 91).[32] In the CC of Greece, penalty is a fixed amount of money or acceptance of the other fulfillment.[33]

According to the Law of Obligations Act of Estonia[34], penalty is payment of the amount of money or performing of certain actions (§158).[35] In Latvian CC, it is the insufficiency that a person agrees to suffer for non-fulfillment of the obligations, in a form of money or other values (articles 1716-1717).[36] According to the CC of Moldova, penalty is the obligation to provide payment of certain amount or certain property (Article 624.1)[37]. In the CC of Ukraine, this is amount of money or

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[23] *Grishin D.A.*, Penalty: Theory, Practice, Legislation, Moscow, 2005, 100 (in Russian).
[24] Decision by the Department of the Administrative Cases, Georgian Supreme Court №BS-1522-1501 (K-11), 26.12.2011.
[25] Decision by the Department of the Civil Cases, Georgian Supreme Court №AS-1015-1287-09, 04.02.2010.
[26] In this paragraph CC is the abbreviation of the Civil Code.
[27] Civil Order of Germany, translation from German: *Bergmann B.,* 2nd ed., Moscow, 2006, 83 (in Russian).
[28] Ibid, 84.
[29] Civil Code of France, translated from French by *Zakhvataev V.N.,* Berlin, 2012, 346 (in Russian).
[30] *Bell J., Boyron S., Whittaker S.*, Principles of French Law, 1998, 351.
[31] *Morandier L.J. de la,* Civil Law of France, Vol.2, translated from French by *Fleishitz E.A.*, Moscow, 1960, 344 (in Russian).
[32] *Warendorf H., Thomas R., Curry-Sumner I.*, The Civil Code of the Netherlands, 2009, 659.
[33] Introduction to Greek Law, 3rd revised ed., Ed. by *Kerameus K.D., Kozyris P.J.,*, 2008, 114.
[34] Hereinafter referred to as LOAE.
[35] Law of Obligations Act of Estonia, <https://www.riigiteataja.ee/en/eli/506112013011/consolide>, [20.01.2016].
[36] Civil Law of the Republic of Latvia, Part 4, Riga, 2005, 56 (in Russian).
[37] Civil Code of the Republic of Moldova, <http://lex.justice.md/viewdoc.php?action=view&view=doc&id=325085&lang=2>, [20.01.2016], (in Russian).

other property (Article 549.1),[38] and according to Kyrgyz CC, this is amount of money or other values (Article 320.1).[39]

In the Continental Law, only judicial authorities are entitled to reduce the penalty. The disputes are mostly initiated by the debtors though there are the different approaches as well. For example, according to French CC, the penalty may be reduced by the judge among them at his/her own incentive, compared with the benefits obtained by the creditor through partial fulfillment (Article 1231).[40] If a party in breach is imposed the obligation to pay fixed amount for compensation of damages, the other party may not be awarded amount lower or higher than stated. The court may, at its own incentive, increase or reduce the penalty, where it is apparently excessive (Article 1152).[41] Disproportion of the penalty implies its inadequately high, as well as inadequately low (funny) amount.[42] The difference shall be apparently inadequate and the amount shall not be reduced below the actual damages.[43]

According to the CC of Spain, the judge may change the penalty fairly, if the main obligation is fulfilled partially or improperly (Article 1154).[44] At the same time, change does not mean that inadequately low amount may be increased.[45]

According to Italian CC, the court may reduce the penalty reasonably, where the obligation is fulfilled partially or where the penalty is disproportionally high and the creditor's interest with respect of fulfillment of the obligation shall be taken into consideration (Article 1384).[46] The court may apply this norm at its own incentive as well[47] and this is interpreted as the control mechanism for securing fair terms and conditions in contractual relations.[48]

Mostly, the main basis for recognition that the penalty is disproportional is excessive amount of the penalty compared with the negative outcomes of the contract violation (damages), as well as the other circumstances. According to the CC of Germany, disproportionally high penalty shall be reduced to the reasonable amount (§343.1) and any legal and not only property interests of the creditor shall be taken into consideration (§343.2).[49] If the penalty secures the commercial deal, the norm of the Commercial Code of Germany (§348) shall be applicable. According to this norm, the amount

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[38] Civil Code of Ukraine, <http://meget.kiev.ua/kodeks/grazdanskiy-kodeks/glava-49>, [20.01.2016] (in Russian).

[39] Comments to the Civil Code of Kyrgyz Republic, Part I, Vol. 2, editors: *Gallyamova N.S., Kucheryavaya G.A., Tsarnaeva A.Z.,* Bishkek, 2005, 248 (In Russian).

[40] Civil Code of France, translated from French by *Zakhvataev V.N.,* Berlin, 2012, 347 (in Russian).

[41] Ibid, 335.

[42] The Max Planck Encyclopedia of European Private Law, Vol. II, Ed. by *Basedow J., Hopt K.J., Zimmermann R., Stier A.,* 2012, 1260.

[43] *Nicholas B.,* The French Law of Contract, 2nd ed., Oxford, 1992, 236.

[44] Spanish Civil Code, Madrid, 2009, <http://www.elra.eu/wp-content/uploads/file/Spanish_Civil_Code_(C%C3%B3digo_Civil)%5B1%5D.pdf>, [20.01.2016].

[45] *Garcia I. M.*, Enforcement of Penalty Causes in Civil and Common Law: A Puzzle to be Solved by the Contracting Parties, European Journal of Legal Studies, Vol. 5, Issue 1, 2012, 94.

[46] The Italian Civil Code and Complementary Legislation, Book 4, transl. by *Beltramo M., Longo G.E., Merryman J.H.*, NY, 1991, 49.

[47] European Contract Law, Materials for a Common Frame of Reference: Terminology, Guiding Principles, Model Rules, Ed. by *Fauvarque-Cosson B., Mazeaud D.*, Munich, 2008, 316.

[48] Ibid.

[49] Civil Code of Germany, translation from German: *Bergmann B.,* 2nd ed., Moscow, 2006, 84 (in Russian).

of the penalty promised by the businessman shall not be reduced based on the regulations of German CC.[50] The approach to the commercial contracts is similar in Austria as well.[51] In the other deals, if the debtor proves that the penalty is excessive, it may be reduced only based on the expert's opinion (§1136(2)).[52]

According to the CC of the Netherlands, the basis for reduction of the agreed upon penalty is requirement of justice, due to which the penalty shall not be reduced below the caused damages (Article 94.1).[53] Similar is the approach in the civil law of Belgium (Article 1231).[54] Moreover, according to the regulations established by the cassation court, the penalty shall not be in breach of the public order and it should be intended for compensation of damages expected as a result of non-fulfillment.[55]

According to LOAE, unreasonably high penalty shall be reduced to the reasonable amount, taking into consideration the scopes of fulfillment of the obligation, justified interest of the other contracting party and economic status of the contracting parties (§162.1).

According to the Lithuanian CC, the penalty may be reduced if it is apparently disproportional and the creditor has already obtained some benefit as a result of partial fulfillment of the obligation. Therefore, the amount of penalty shall not be reduced below the damages or incomplete fulfillment (Article 6.73.2).[56]

Under CC of Azerbaijan, in reducing of the penalty not only property but all reasonable interests of the creditor shall be taken into consideration (Article 467).[57]

Civil Codes of Moldova and Uzbekistan, penalty reduction is regarded as exclusion. In the former case the court decision shall be made taking into consideration all circumstances of the case and shall rely upon the creditor's property and other interests protected by the law (Article 630.1). In the latter case, the basis for reduction is apparent disproportion between the penalty and outcomes for the creditor, the degree of the non-fulfillment by the debtor, property status of the parties participating in the obligation, the creditor's interests shall be taken into consideration (Article 326).[58]

According to CC of Armenia, penalty reduction is associated with the damages caused by non-fulfillment (Article 372).[59] CC of Ukraine, together with the above, focuses on the other circumstances of particular significance to be taken into consideration (Article 551.3). According to Kazakh CC, basis for penalty reduction is its disproportion with the caused damages, with due regard of the

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[50] Commercial Code of Germany, translation from German: *Dubovitskaya E.A.*, Moscow, 2005, 183 (in Russian).

[51] The Max Planck Encyclopedia of European Private Law, Vol. II, Ed. by *Basedow J., Hopt K.J., Zimmermann R., Stier A.,* 2012, 1260.

[52] Common Civil Provisions of the Republic of Austria, translation from German: *Brordskaya – Karir D., Znamenskaya N., Karnholz E., Kuleshova Yu., Traunmuller K., Ushkova Yu*., Moscow, 2013, 290 (in Russian).

[53] *Warendorf H., Thomas R., Curry-Sumner I.*, The Civil Code of the Netherlands, 2009, 659.

[54] *Bocken H., De Bondt W.,* Introduction to Belgian Law, 2001, 241.

[55] *Herbots J.,* Contract Law in Belgium, Deventer, Boston, 1995, 149-150.

[56] Civil Code of the Republic of Lithuania, <http://www3.lrs.lt/pls/inter2/dokpaieska.showdoc_e?p_id=245495>, [20.01.2016].

[57] Civil Code of the Republic of Azerbaijan, <http://online.zakon.kz/Document/?doc_id=30420111# sub_id=4620000>, [20.01.2016], (in Russian).

[58] Civil Code of the Republic of Uzbekistan, <http://fmc.uz/legisl.php?id=k_grajd>, [20.01.2016], (in Russian).

[59] Civil Code of the Republic of Armenia, <http://www.parliament.am/law_docs/050598HO239rus.html?lang=rus>, [20.01.2016], (in Russian).

extent of obligations fulfilled, parties' interests (Article 297)[60]. Civil Codes of Belarus (Article 314)[61], Russian Federation (Article 333)[62], Tajikistan (Article 358)[63] and Kyrgyzstan (Article 323),[64] the court shall have authority to reduce the penalty where it is disproportional to the outcomes of non-fulfillment of the obligations.

The law excludes consideration of the penalty reduction issue after payment thereof: German CC (§343.1), LOAE (§162.3), Civil Codes of Lithuania (Article 6.73.2), Azerbaijan (Article 467) and Moldova (Article 630.2).

4. Liquidated Damages and Fines in Common Law

In the countries of common law, the civil law remedies are of compensation nature and these are not applied as the instrument of punishment in case of non-fulfillment of the obligations[65]. There are distinguished concepts of *liquidated damages*[66] and *penalty*. Concept of the LD is close to the concept of the penalty in the continental law countries though it is not the value equal to the non-fulfilled obligations. These are reasonably forecasted potential damages. Such instrument is mostly used in the long-term contractual relations, including contracts on purchase in installments, lease, construction, engineering, marine, wholesale distribution, franchising etc.[67]

According to English law, the concept of LD is used in relation to the damages agreed upon by the parties in advance and/or provided for by the law, in relation with the damages caused by the negligence with respect of the obligations undertaken based on the issued promissory notes / checks.[68] Term *unliquidated damages* means the damages that shall be assessed by the court or jury using so called causative test *remoteness of damage*[69]. Causal remoteness of non-fulfillment and damages is of decisive significance, further is the damage from non-fulfillment, more doubtful is relation between them and vice versa. Only the damages naturally sequential from non-fulfillment of obligations or those, reasonably subject to compensation by the contracting parties shall be covered.[70] LD is mostly amount of money, though in case ***Jobson v. Johnson* [1989] 1WLR 1026** it was agreed as the property (football club shares) subject to transfer.[71]

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[60] Civil Code of the Republic of Kazakstan, <http://online.zakon.kz/Document/?doc_id=1006061>, [20.01.2016], (In Russian).

[61] Civil Code of the Republic of Belarus, <http://etalonline.by/?type=text&regnum=HK9800218#load_text_ none_>, [20.01.2016], (in Russian).

[62] *Borisov A.B.,* Comments to the Civil Code of Russian Federation, 2nd ed., M., 2003, 339 (in Russian).

[63] Civil Code of the Republic of Tajikistan, <http://www.mehnat.tj/pdf_doc/3_1gr_kodeks.pdf>, [20.01.2016], (In Russian).

[64] Comments to the Civil Code of Kyrgyz Republic, Part I, Vol. 2, editors: *Gallyamova N.S., Kucheryavaya G.A., Tsarnaaeva A.Z.* Bishkek, 2005, 251 (in Russian).

[65] *Baykov A.M.* Obligations Law. Part. I, Riga, 2005, 202 (in Russian).

[66] Hereinafter referred to as LD.

[67] *Wheeler S., Shaw J.,* Contract Law, Cases, Materials and Commentary, Oxford, 1994, 814.

[68] Chitty on Contracts, Vol. 1, 28th edition, London, 1999, 1274.

[69] Ibid.

[70] *Smith S.A.,* Contract Theory, 2004, 425-246.

[71] *Smith J.,* Smith and Thomas, A Casebook on Contract, 11th ed., London, 2000, 646-649.

Contract participants may freely set the LD quantity. Accurate identification of the circumstances where the liquidated damages / provision shall be applicable is within the interests of both parties.[72] Amount payable on the basis of agreement between the parties shall provide assessment of actual damages expected in case of non-fulfillment of the obligations. Such provision shall be deemed legally valid even where it is clearly and significantly excessive of the loss suffered by the damaged party.[73]

Amount agreed upon as LD shall be payable irrespective of the actually caused damages.[74] The claimant is exempted from the burden of evidencing that the damage was caused even if it was much less than the agreed amount. If actually suffered losses exceed the agreed amount, the claim shall be limited to the agreed amount[75].

Common law is interested not in proportionality of the amount agreed with the outcomes of non-fulfillment but rather the intentions of the parties at a time of making contract[76].

At a time of contracting, the creditor's goal should be forecasting of the expected losses in case of non-fulfillment rather than punishing of the debtor. The amount payable shall be regarded as the compensation and not as the hinder or a fine.[77] If the party's intention is punishing of the other party from the outset, the court regards such provision as the punishment and leaves it without any legal force. Actual losses caused to the damaged party shall be compensated in accordance with general regulations,[78] in particular, through submitting claim for compensation of damages to the court.

In interpretation of the amount specified by the contract, the court shall not limit itself with the terms used by the partiers and attention shall be paid not to the form used by the parties but to the contents.[79] Agreed amount specified in the contract between the parties as the liquidate damages or as the penalty, requires recognition as such by the court.

Rules for distinguishing between the LD and the penalty (fine) in English law were formulated in the decision by the House of Lords on case *Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Co Ltd* [1915] AC79. The contract provision on payment of the agreed amount is a panlty: if it is disproportional and unreasonable, with respect to the highest damages caused by non-fulfillment that could be proven; that is set for non-payment of the amount of money and exceeds the undertaken monetary obligations; fixed compensation is set for single, certain or all possible cases, some of which may cause serious damages while the others can be insignificant; amount of money cannot be regarded as the penalty, if its calculation is complicated.[80]

English legislation regards cash compensation as one of the types of trade guarantees. According to Subsection (b), Section (1), Article 5 of the Unfair Contracts Act, the guarantee is the provi-

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[72] *Whincup M.H.,* Contract Law and Practice, The English System and Continental Comperisons, 4th ed., The Hague, London, Boston, 2001, 332.
[73] *Treitel G.H.,* The Law of Contract, 10th ed., London, 1999, 929.
[74] *Mckendrick E.,* Contract Law, Text, Cases and Materials, 4th ed., Oxford University Press, 2010, 919.
[75] *Beatson J.,* Anson's Law of Contract, 27th ed., 1998, 591.
[76] *Duxbury R.,* Contract in a Nutshell, 7th ed., London, 2006, 130.
[77] *Atiyah P.S.,* An Introduction to the Law of Contract, 5th ed., Oxford, 1995, 434.
[78] *Dexbury R.,* Contract in a Nutshell, 7th ed., London, 2006, 129.
[79] *Beatson J.,* Anson's Law of Contract, 27th ed., 1998, 587.
[80] *Smith J.,* Smith and Thomas, A Casebook on Contract, 10th ed., London, 1996, 622-624.

sion agreed upon in written, containing or intended as the promise (whether express or implied) that the defects will be eliminated through full or partial replacement of the article, repair thereof, money compensation or otherwise.[81]

According to Section (e), Article 1 of the Unfair Contract Terms Act, the term requiring from any customer payment of disproportionally high penalty in case of non-compliance shall be deemed unfair.[82]

US courts, historically, have been adding great significance to the principle of contractual freedom, provisions agreed upon by the parties were subject to unconditional fulfillment and the court interpreted them verbally. In case *United States v. Bethlehem Steel Corp. 205 U.S. 105* [1907] the company has undertaken to supply the gun carriages to the state, in the US-Spanish war. Delivery time was of great national importance and LD was agreed upon for each day of delay, for each undelivered item. Though the war ended before the date of fulfillment of the contractual obligations, the government regarded that the company has not complied with the term of delivery and therefore, irrespective of absence of the actual damages, the court has regarded LD provision as the legally binding and mandatory one.[83] Currently, there are some cases where the court relies on the equality rule, together with the principle of contracting freedom, if the damages caused by non-fulfillment are low or even absent at all.[84]

According to Section 1, §2-718 of US Uniform Commercial Code, damages resulting from non-compliance with the contract by any of the parties may be determined by the agreement, though only in amount that is reasonable, regarding expected or actual damages caused by non-fulfillment of the obligations, with difficulty of evidencing of damages, unfavorable conditions or other means for inadequate protection of rights. Provision setting unreasonably high pre-calculated damages shall be deemed invalid as a fine.[85]

The Restatement (Second) of Contracts shares this statement: damages resulting from non-fulfillment of obligations by any of the parties may be set by the contract, though to the extent reasonable, regarding potential or actual damages and complexity of proving. Unreasonable LD, as a fine, is unenforceable, based on the public order (§356(1)).[86]

To distinguish the LD and penalties (fines) from one another, the US law applies three-section test: the amount is a penalty, if it is intended for punishment of the party in breach; value, for securing of which the amount is intended, is hard to evaluate;[87] LD agreed upon by the parties is reasonably predictable[88] as the reasonability is significant factor for exercising of the LD. [89]

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[81] Unfair Contract Terms Act 1977, <http://www.legislation.gov.uk/ukpga/1977/50>, [20.01.2016].

[82] Unfair Terms in Consumer Contracts Regulations 1999, <http://www.legislation.gov.uk/uksi/1999/2083/made/data.pdf>, [20.01.2016].

[83] *Ferris, S.V.,* Liquidated Damages Recovery Under the Restatement (Second) of Contracts, Cornell Law Review, Vol. 67, Issue 4, 1982, 864-865.

[84] Ib, 866.

[85] *Burton S.J.,* Contract Law: Selected Source Materials, St.Paul, 1995, 177.

[86] Ibid, 246-247.

[87] *Ferris, S.V.*, Liquidated Damages Recovery Under the Restatement (Second) of Contracts, Cornell Law Review, Vol. 67, Issue 4, 1982, 874-875.

[88] *Boyak A.J.* Comparative Analysis of the Contractual Damages and Penalty on the Example of Georgia and US "Overview of Georgian business Law", 3rd ed., 2014, 9.

5. Conclusion

In Georgian civil law, non-fulfillment of the contractual obligations or improper fulfillment thereof causes obligation of payment of the penalty that cannot be disproportionally high, with respect of the circumstances of the case. This approach is recognized in the Continental Law countries where, in some cases, the basis for change of the penalty is precisely formulated. In common law, LD set for non-fulfillment of contractual obligations shall be deemed invalid, if it is intended for punishment of the debtor rather than compensation of the expected damages. The penalty amount shall not be subject to change and shall be regarded as invalid contractual term.

[89] *Thomas H.R., Smith G.R., Cummings D.J.,* Enforcement of Liquidated Damages, Journal of Construction Engineering and Management, 1995, 463.

Guliko Kazhashvili *

Role of the Perpetuation of Evidences and Claim Security in Litigation

Perpetuation of evidences and securing of claim comprise two different institutes of procedural law. According to Civil Procedure Code, the court of the first instance shall directly examine the evidences. In USA the approach to the issue of perpetuation of evidences is different.
Work provides practical approach to securing of claim – in which cases the court accepts the request of claim securing and in which cases it provides counter securing so that the adversarial and disposition principles were complied with.

Key words: *perpetuation of evidence, request of perpetuation of evidences, court decision additional perpetuation, perpetuation of evidence in the USA, claim security.*

1. Introduction

Effectiveness of the system of justice is the fundamental prerequisite for strengthening of legal order and ensuring legal security. Effectiveness of the system of justice implies independent, unbiased, fair and timely legal procedures.[1]

In accordance with the Procedure Code, the court of the first instance shall directly examine the evidences. At the court session, the judge shall hear the explanations of the case participants, statements of the eyewitnesses, experts' reports, the judge shall get familiarized with the written evidences, examine material evidences. Therefore, non-compliance with the principles of directness, deviation from it is qualified in the judicial practice as the judicial error with all relevant legal outcomes.

Law assumes two exclusions from this obligation of the court. In case of such exclusion the court's familiarization with the case circumstances is mediated. We mean perpetuation of evidences and letters rogatory[2]. Within the scopes of this study attention will be focused on the institute of perpetuation of evidences in Georgia. We shall also discuss the issue of perpetuation of evidences in the USA where, according to the established practices, the obligation of perpetuation of the material evidences may arise from specific regulatory, legislative and judicial orders providing for perserving security of the documents and information significant for the case.[3] The court pays particular attention to keeping of the case materials by a person, whether the case is pending or not.

Work provides discussion of two independent institutes of procedural legislation. In particular, perpetuation of evidences and security guarantee being the components of the procedural security. Work describes perpetuation of the evidences unknown in Georgian civil procedural law and provided in the US civil procedural legislation.

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* Doctoral Student, TSU Faculty of Law.

1 *Schmit Sch., Richter H.,* Process of Decision Making by the Judge in Civil Law, GIZ, 2013, 3.

2 *Kurdadze Sh., Khunashvili N.,* Georgian Civil Procedure Law, Tbilisi, 2012, 237 (in Georgian).

3 *Spencer A.B.,* The Preservation Obligation: Regulating and Sanctioning Pre-Litigation Spoliation in Federal Court, 79 Fordham L. Rev., 2005 (2011), <http://ir.lawnet.fordham.edu/flr/vol79/iss5/7>.

The work also describes practical approach to the security guarantee, Research is oriented towards demonstration of the role of security guarantee in judicial procedures and to what extent this institute ensures balancing of the parties' interests. In which cases the court accepts the party's request dealing with preservation guarantee and in which ones it provides counter preservation so that the adversarial and optionality principle was not violated.

Study is of comparative legal nature. It is of theoretical and practical significance. With respect of the theory, the interested audience can find information about this issue. In practical context the work is of significance as it contains examples of procedural legislation of Georgia, United States and Eastern Europe.

2. Perpetuation of Evidences

No one of the lawyers can question importance of evidences in civil, administrative, arbitration or criminal procedural law. The evidences have their contents, i.e. they contain information about the facts related to the claim; procedural form called legal form of proof and finally, they are characterized with certain procedural order of obtaining and examination of evidencing information and instruments of proving. These three properties determine the legal nature of the judicial evidences. Absence of any of the listed components results in rejection of entire evidence. Evidences deprived of their cognition contents and procedural form cannot be evidences any more.[4]

Necessity of perpetuation of evidences may be caused by various reasons, e.g. illness of the eyewitness, business trip or departure to the other country for employment, perishable evidences etc.[5] Naturally, necessity shall be assessed individually in each specific case.

On one hand, perpetuation of evidences qualitatively differs from securing of a claim and on the other – from the rogatory letters. Perpetuation of evidences is provided for the purpose of establishment of the facts important for the case while securing of a claim serves to ensuring exercising of the court decision. Thus, evidences perpetuation and securing of a claim are quite different concepts and hence, they require different procedural actions. Referring to these security measures in the law should be understood directly and their interpretation based on similarity of the qualitative sights is unacceptable.[6] As for differentiating of the rogatory letters from the evidence perpetuation, the rogatory letters are intended for collection of evidences and their examination where their presentation and examination at the court session is difficult or impossible.[7]

Some foreign scientists see the difference in the evidence law and the procedure. In particular, the US and not only US lawyers regard that the procedure includes the rules of case consideration at the trial with the overall goal of making decision while proving is persuading of the judge, subordinating to the laws of logic.[8]

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4 *Gagua I.,* Burden of Proof in Georgian Civil Procedure Law, Tbilisi, 2013, 22 (in Georgian).
5 *Liluashvili T.,* Civil Procedure Law, 2nd ed., Tbilisi, 2005, 266 (in Georgian).
6 Decision of the Supreme Court of Georgia of 29 May 2007 on case №AS-827-1190-06.
7 *Liluashvili T., Khrustal V.,* Comments to Civil Procedure Code, Second adjusted and re-worked edition, Tbilisi, 2007, 215.
8 *Gagua I.,* Burden of Proof in Georgian Civil Procedure Law, Tbilisi, 2013, 220 (in Georgian).

Perpetuation of the evidences is a procedural action performed by the court or by the judge solely, to establish the evidences according to the rules under the civil law for their further use in substantial consideration of civil case[9] with the purpose of ensuring establishing of the facts important for making adequate decision on case. Hence, it should be exercised before completion of the procedures and when the dispute is substantially resolved, there exists no9 legal basis for application of the measures for perpetuation of evidences important for given disputed legal relations.[10]

Unlike Georgian Civil Procedure Code, the federal rules of civil procedure in the USA allow the judges to impose the sanctions against persons that have failed to adequately preserve the documents or other evidences significant for establishing of the circumstances of case.[11] In accordance with Article 37(b) of Federal Regulations of Civil Procedure the court shall be entitled to impose the sanctions on a person that has failed to comply with the court order on submission or examination of evidences.[12] Though, not all county courts use similar approach to application of this provision[13]. Their position is unambiguous: undoubtedly, the sanction should be applied against the person that has intentionally destroyed the documentation significant for the case but some judges rely on Article 37(b) of Civil Procedure Regulations and some of the – with the special authorities serving to making lawful and fair decision. Though none of the evidences shall have any predetermined weight but the judges' attitude to the evidences is rather delicate as these are the evidences providing basis for establishing the circumstances specified in the claims and counterclaims,

2.1. Role of the Evidences in Formation of the Court's Moral Certainty

The judge should consider the circumstances significant for the case from the position of both parties. Only such approach allows seeing of actual circumstances and relations between the parties. Naturally, the judge is subject to powerful influence of emotional background but existence of the emotion is not a main thing, the main thing is whether such emotion is controlled or not and overall, form into the moral certainty free of any emotions.[14]

In accordance with Article 105 of Georgian Civil Procedure Code: no evidence shall have a predetermined weight for the court. The court assesses evidences with its mental certainty that should rely upon their thorough, careful and unbiased consideration to make decision on presence or absence of the circumstances significant for the case. The judge's task is much greater than subject-

[9] *Liluashvili T.,* Civil Procedure Law, 2nd ed., Tbilisi, 2005, 266 (in Georgian).

[10] Decision of the Supreme Court of Georgia of 10 April 2008 on case №AS-258-516-08.

[11] *Koppel J.M.,* Federal Common Law and the Courts' Regulation of Pre-Litigation Preservation, 5, 1 Stan. J. Complex Litig., (2012, Forthcoming), <http://ssrn.com/abstract=2154484>.

[12] Rule 37, Failure to Make Disclosures or to Coorporate in Discovery, Sanctions, <http://www.law.cornell.edu/rules/frcp/rule_37>.

[13] In the opinion of most judges, sanctions against a person that have failed to properly preserve the evidences cannot be justified by Article 37(b) of Federal Common Law and Court's Regulation. In case *Capelluto v. FMC Corp*, judge of Minnesota has imposed quite strict sanctions against a person who has intentionally destroyed the evidences while he was notified about the potential dispute. The judge has stated the following: "Relying on the special authority in dispute regulation, with respect of protection of the procedure before litigation, I impose the sanction against the party." See *Koppel J.M.,* Federal Common Law and the Courts' Regulation of Pre-Litigation Preservation, 7, 1 Stan. J. Complex Litig. (2012, Forthcoming), <http://ssrn.com/abstract=2154484>.

[14] *Gagua I.,* Burden of Proof in Georgian Civil Procedure Law, Tbilisi, 2013, 31 (in Georgian).

tive assessment of the provided legal facts (evidences). These are the objective facts that guide formation of the judge's belief.

Identification and collection of the evidences and their submission to the court is the main part of the onus of proof that finally impacts formation of the mental certainty of the court considering the case. "Onus of proof" should be defined as such procedural actions of the disputing parties, performing or, on the contrary, non-performing of which determines whether the court decision will be in favor of one of the disputing parties.[15]

2.2. Application on Perpetuation of Evidences

In the theory of evidences the proof is understood as the activities of evidencing performed by the court and other persons including the following stages: identification of the subject of proving, collection of evidences (identification of evidences, their collection and submitting to the court), examination of the evidences at trial, evaluation of evidences.[16]

According to Georgian Procedure Code, if a person reasonably considers that it would be impossible or difficult for him/her to provide required evidence in the future, may request that the court perpetuate that evidence

Evidence may be perpetuated before the claim is filed.[17] At a time of case consideration at the main court session the court shall examine all evidences, those, presented by any party and collected by the court though it is not excluded that the issue of evidences perpetuation was not arose at the main session.[18]

Civil Procedure Code does not provide for evidences perpetuation after completion of the case consideration[19] as the perpetuation purpose ceases to exist.

Petition on evidence perpetuation of whatever form, whether written or oral, shall be motivated so that the court was able to make decision whether the evidences are acceptable and attributable. Motion for evidence perpetuation by oral statement shall be included into the court record.[20]

Request of evidences in general and especially, perpetuation of evidences is acceptable only provided that such evidence can verify some circumstances essential for the case, i.e. circumstance justifying the plaintiff's claim or the defendant's counter claim.

The fact that the evidence is essential for the case is not sufficient for taking of the evidences' perpetuation measures. It is required that there was an actual danger that submission or use of such evidence later will be difficult or impossible. If no such danger exists the court shall reject the perpetuation request[21] as it is notable that perpetuation of evidences is the form of their registration. This implies that in taking measures for perpetuation of evidence no actions are performed to decide whether

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[15] *Gagua I.,* Burden of Proof in Georgian Civil Procedure Law, Tbilisi, 2013, 31 (in Georgian).
[16] Ibid, 25.
[17] Decision of the Supreme Court of Georgia of 10 April 2008 on case №AS-258-516-08.
[18] *Liluashvili T., Khrustal V.,* Comments to Civil Procedure Code, Second adjusted and re-worked edition, Tbilisi, 2007, 218.
[19] Decision of the Supreme Court of Georgia of 10 April 2008 on case №AS-258-516-08.
[20] *Kurdadze Sh., Khunashvili N.,* Georgian Civil Procedure Law, Tbilisi, 2012, 238 (in Georgian).
[21] *Liluashvili T., Khrustal V.,* Comments to Civil Procedure Code, Second adjusted and re-worked edition, Tbilisi, 2007, 219 (in Georgian).

these evidences are valid and sufficient or not. But the decision on their adequacy and acceptability shall be made before the judge performs the relevant actions for perpetuation of evidences.[22]

Civil procedural legislation of the United States provides for such type of evidences as the testimony under the oath. This type of evidence is of subjective nature, i.e. the fact is evidenced by a natural person. Article 27 of Federal Regulations of Civil Procedures regulates the issue of recording of testimonials under the oath.[23] Adoption of the mentioned Article was preceded by the whole set of processes. Hall v. Stout is the only case where the court provides theoretical discussion that the perpetuation of evidence (recording o testimony under the oath) is required not because there is a danger of evidence destruction but because one should take into consideration the future situation of the witness. It is possible that new circumstances prevented the witness from testifying. Hence, need for perpetuation depends not on the person's physical condition but rather on whether he/she will be able to confirm the facts significant for the case in the future or not.[24]

The situation is different in case *Arizona v. California*, with only decision of the supreme court where the court has regarded sufficient the party's statement that the witness could die before commencement of hearing to issue the order on perpetuation of evidence. Unlike *Hall* case, in case of *Arizona* the court regarded that the witness\s physical condition was of significance but no court has requested from the applicant that the evidence would be lost.[25] In case of *Angel v. Angel* the party has reasoned necessity of perpetuation measure by the fact that the witness to be interrogated was elderly. Here again, the preference was given to the subjective argument. In our opinion, the subjective and objective circumstances should be of alternative nature and in case of even one of them the evidence perpetuation should be provided.

2.3. Application on Perpetuaiton of Evidences before Filing of the Claim

Collection and submission of the evidences is obligation of the parties rather than of the court by the simple reason that a party is better aware in what can confirm its claim and similarly, the other party knows better how to resist the evidences submitted by the opponent and persuade the court in lawfulness of its claims.[26]

In practice, actions intended for collection of evidences should commence before the claim is submitted. This implies that before the procedures begin, the plaintiff or his/her representative shall

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[22] *Kurdadze Sh., Khunashvili N.,* Georgian Civil Procedure Law, Tbilisi, 2012, 238 (in Georgian).

[23] A person desiting to record the testimony under the oath in the US territory, shall apply to the court of the district where the person ti be interrogated resides. In application submitted for issuance of the order, he/she shall specify the name of a person to be interrogated. In addition, he/she will be a party to a case subject to jurisdiction of the US court but at current stage he/she is unable to file the claim; demonstrate his/her interest and specify the facts that have caused such desire. 21 days before the hearing the applicant ensures delivery of the order to the person subject to interrogation. If delivery is impossible for good reasons, the court can undertake the obligation of publication. See Federal Rules of Civil Procedure, Rule 27, Depositions to Perpetuate Testimony, <http://www.law.cornell. edu/rules/frcp/rule_27>.

[24] *Hall v. Miller Stout,* 2:2004cv00184, January 24, 2004.

[25] *Kronfeld N.A.,* The Preservation and Discovery of Evidence Under Federal Rule of Civil Procedure 27, The Georgetown Law Journal, Vol. 78:593, 599.

[26] *Allen R.A., Stei A.,* Evidence, Probability, and the Burden of Proof, Arizona Law Review, Vol. 54, 2013, 557-602, <http://ssrn.com/abstract=2245304>.

make sure that the evidences of reasonability of claim and the facts specified therein.[27] In the USA, the court regards a person liable, with respect of perpetuation of evidences[28], if, before commencement of dispute, he/she receives notification on termination or warning from the other party.[29] From such moment the obligation of safekeeping of significant documents emerges. English legislation allows collection and publication of evidences even before commencement of the litigation. The burden of evidences providing is in clarification of the substance of dispute, in other words, identification of the key issues of dispute. At the preparatory stage the subject of dispute shall be established and pleadings exchanged to provide the parties' awareness and avoid effect of unexpectedness ay the hearing.[30]

According to Section 2, Article 3 of Georgian Procedure Code, evidence may be perpetuated before a claim is filed with a court. After filing of claim, the materials collected for the purpose of evidences' perpetuation shall be sent to the relevant court[31] either by the parties' request or by the court's incentive.

Only court has the authority of perpetuation of evidences. In practice there are some cases where a party submits to the court the notarized so called testimonials and explanations. Such documents are not regarded as evidences and no decision can be made relying on them.[32] Though, there are some countries where before commencement of hearing the perpetuation of evidences is provided by a notary or consulate (Article 68.2 of Civil Code of the Republic of Kyrgyzstan, Article 67.2 of Civil Code of the Republic of Kazakhstan, Article 76.2 of Civil Code of the Republic of Tajikistan, and Chapter XX of the Fundamental Principles of Notary Law of Russian Federation). According to Paragraph 2, Article 127 of Civil Procedure Code of the Republic of Moldova the notary's office and diplomatic representation office are the authorities providing pre-litigation perpetuation of evidences.[33] In Belarus and Uzbekistan, the notary provides perpetuation of evidences only if the request is from the foreign country.[34]

Application to the court shall be formulated clearly and unambiguously. In one of the disputes a party submitted application for court's request of the evidences. This substantially differs from perpetuation of evidences. Unlike the regulations on perpetuation of evidences, request of evidences

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[27] Decision of the Supreme Court of Georgia of 15 January 2002 on case №3K/884-01.

[28] In USA the approach to perpetuation of evidences is more sensitive. Irrespective of existence of judgment, a party shall properly preserve the documents substantially related to the case, for establishing of the facts significant for the case. obligation of preserving of the documents arises when the party receives notification specifying that commencement of litigation though it is not necessary to rely on preservation of evidences. See: *Spencer A.B.,* The Preservation Obligation: Regulating and Sanctioning Pre-Litigation Spoliation in Federal Court, 79 Fordham L. Rev. 2005 (2011), 2009, <http://ir.lawnet.fordham.edu/flr/vol79/iss5/7>.

[29] *Spencer A.B.,* The Preservation Obligation: Regulating and Sanctioning Pre-Litigation Spoliation in Federal Court, 79 Fordham L. Rev., 2005 (2011), 2008, 2009, <http://ir.lawnet.fordham.edu/flr/vol79/iss5/7>.

[30] *Gagua I.,* Characteristics of the Burden of Proof in Common Law – Based on the UK and US Law, Magazine "Justice and Law", (4 (27)), 24 (in Georgian).

[31] *Liluashvili T., Khrustal V.,* Comments to Civil Procedure Code, Second adjusted and re-worked edition, Tbilisi, 2007, 217 (in Georgian).

[32] *Kurdadze Sh., Khunashvili N.,* Georgian Civil Procedure Law, Tbilisi, 2012, 2012, 238 (in Georgian).

[33] Civil Procedure in Cross-Cultural Dialogue: Eurasia Context, Conference Book, Edited by *D. Maleshin*, Moscow, 2012, 352, <http://ssrn.com/abstract=2280682>.

[34] Article 2342 of Civil procedure Code of the Republic of Belarus, Article 612 of Civil Procedure Code of the Republic of Uzbekistan.

is allowed only after filing of claim, i.e., in given case, request of evidences through the court would be allowed if the applicant has filed the counter claim according to the established rules.[35] Hence, the party's application on request of evidences was rejected.

3. Judgment on Perpetuation of Evidences, Appealing if Judgment and Terms of Appeal

Consideration of the issue of perpetuation of evidences is accompanied with the following actions: the court will inform the parties about time and place of evidences' perpetuation though their absence cannot prevent performing of the procedural actions intended for perpetuation. In extraordinary cases perpetuation of evidences is allowed without notification of the parties.[36]

The court shall issue the judgment on perpetuation of evidence specifying the procedural action to be performed, e.g. interrogation of the witness, visual examination.

Unlike compliant against the judgment on securing of the claim, judgment rejecting perpetuation of evidence shall be subject to private complaint to be considered in accordance with articles 414-420 of Civil Procedure Code.

Procedure of complaining against refusal to perpetuate evidences before filing of the claim is of interest. A party shall file the complaint to the court delivering the judgment and together with the case materials sends to the higher court in accordance with the general rules. But the situation is different if the court refuses to perpetuate the evidences at the hearing stating that he/she has not applied for perpetuation of evidences before filing of the claim or at the preparatory stage for no good reasons, though against the refusal private complaint shall be filed this does not provide basis for deferring of the fearing and it shall be considered upon final decision, together with the decision. There is a reasonable question that this would be like a common claim to be submitted against the judgment to be appealed against together with the final decision. In our opinion, this cannot be reasoned by simple prevention of litigation delay and time saving.

Though in accordance with Section 2, Article 404 of Civil Procedure Code the subject of consideration by the court may be the judgments preceding the final decision, but only if these are specified in the cassation appeal and there is a request on cancellation of such judgment as in accordance with the first sentence of Section 2, Article 404 of Civil Procedure Code, the court of cassation shall review a decision within the scope of the cassation appeal.[37]

4. Additional/Repeated Perpetuation of Evidences

Parties and their representatives are entitled to get familiarized with the materials collected for the purpose of perpetuation of evidences and express their opinion about these materials and generally, about procedural actions performed for the purpose of perpetuation of evidences at any stage of

[35] Decision of the Supreme Court of Georgia of 15 January 2002 on case №3K/884-01.
[36] *Kurdadze Sh., Khunashvili N.,* Georgian Civil Procedure Law, Tbilisi, 2012, 239 (in Georgian).
[37] Decision of the Supreme Court of Georgia of 15 January 2002 on case №3K/884-01.

litigation.[38] The parties, whether or not participating in perpetuation of evidences, may express their opinion and specify the gaps that, in their opinion, took place in perpetuation.[39] If the parties have reasonable notes, with respect of inadequacy of the perpetuation of evidences, the relevant court may decide to perform repeated or additional perpetuation of evidence.

At what stage of litigation additional/repeated perpetuation of evidences is allowed. In this respect, the Supreme Court, in one of its decisions explains that in accordance with Article 117 of Civil Procedure Code, the court may make decision on additional and repeated perpetuation of evidence at a time of hearing and not after closing of the case.[40]

5. Claim Security

Together with the adversarial principle, the court has the authority of material guidance of the procedure. Though here comes about the question of proportion of these two principles, adversarial principle and principle of the court activity. To what extent these principles should be combined and applied in case consideration so that the fundamental principles of civil procedure legislation were complied with.

Adversarial principle should not be understood as extreme passive court as according to the procedural legislation the court is entitled to collect the evidences at its incentive if required by the case circumstances or requested by the parties.[41] In one of the cases, the cassation court does not share the opinion of the author of complaint and explains that through Article 199 of Civil Procedure Code provides for applying of security of claim by the court based on the defendant's application but regarding the contents of the same provision, application of claim security is allowed only of the applicant proves the fact of damage expected from security measures.[42] In addition, according to Section 1 of Article 199 of Civil Procedure Code, if the court assumes that the enforcement of measures for securing the claim will cause damage to the defendant, the court may enforce the measures for securing the claim and at the same time, request the person who applied to the court to secure the claim to provide security to compensate possible damages that the other party may incur. The court may also order the provision of security based on the application of the opposite party. Court may apply the security on the basis of the application of the opposite party. Based on the verbatim explanation of the mentioned provision it may be applied only in case of securing of the claim though regarding the negative outcomes of the damage (loss), its application shall be allowable in considering of the issue of securing execution of the decision.

In addition, the chamber of cassation regards the following explanations reasonable waiver of indemnity as such does not deprive the defendant the right to exercise his/her violated rights in case of damages in accordance with the general regulations.[43]

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[38] *Liluashvili T., Khrustal V.,* Comments to Civil Procedure Code, Second adjusted and re-worked edition, Tbilisi, 2007, 224 (in Georgian).

[39] *Kurdadze Sh., Khunashvili N.,* Georgian Civil Procedure Law, Tbilisi, 2012, 239 (in Georgian).

[40] Decision of the Supreme Court of Georgia of 10 April 2008 on case №AS-258-516-08.

[41] *Gagua I.,* Analysis of Innovative Distribution of the Burden of Proof provided for by Georgian Civil Procedure Code, Magazine "Justice and Law", (1(24)10)), 75 (in Georgian).

[42] Decision of the Supreme Court of Georgia of 26 December 2011 on case №AS-1561-1561-2011.

[43] Decision of the Supreme Court of Georgia of 15 October 2012 on case №AS-1338-1263-2012.

Very interesting and significant explanation is provided in the decision of the Supreme Court. The Court regards that the purpose of application of the claim security measures is to actually secure enforcing of the court decision in case of upholding of the claim and hence, avoiding of the possible obstacles to enforcement. Given the above purpose of the procedural institute of claim security, in each specific case of application of the security measures by the court, here should exist the assumption of the claim upholding and the Chamber explained that the assumption of upholding of the claim is the assumption that there is the probability that the claim will be upheld rather than the outcome of examination of reasonability of the filed claim.

The Chamber has not shared the considerations of the claimant about non-consideration of the of the main purpose of the procedural institute of claim security as the guarantee of decision enforcement and explained that inn applying the claim security the court shall take into consideration the interests of both parties and thus, security measures shall be applied without unreasonable prejudice of the defendant's interests. For the purpose of equal protection of the interests of disputing parties where there is the need of application of the claim security measures but at the same time, there is assumed that application of such measures can cause damages to the defendant, je procedural legislation provides for application of the indemnity measures (Article 199 of Civil Procedure Code). Regarding the above, the Chamber has not shared the claimant's opinion that application of security is based on the assumption that the claim will not be upheld.[44] Application of the security is conditioned by equal consideration of the interests of the opposing parties at a time of one or another procedural action in litigation.

Regarding the principles of Civil Procedure Code, a person exercising any right shall evidence the factual circumstances giving rise to such right while a person preventing exercising of such right, i.e. opposing to exercising of such right shall evidence the factual circumstances preventing emergence of such right[45] as the court is not authorized to believe in statements of the parties. It cannot uphold the claim only because it regards that the claimant is an honest person unable to file (unlawful) claim and at the same time, it cannot reject the claim because the defendant's refusal regarding his/her high moral qualities is absolutely trustworthy. The court shall take into consideration the parties statements and evidences to the extent their truth can be proved (73#473).[46]

6. Conclusion

Administration of justice is a set of complex procedures and it requires awareness in the approaches and mechanisms established in the developed society and oriented towards prompt and effective outcomes.

In the United States the obligation of pre-litigation perpetuation of evidences is not regulated at the level of federal legislation and nevertheless, the mentioned institute is of great significance in civil procedural legislation and it results from the magisterial law.

[44] Decision of the Supreme Court of Georgia of 1 July 2013 on case №AS-499-475-2013.
[45] *Schmit Sch., Richter H.,* Process of Decision Making by the Judge in Civil Law, GIZ, 2013, 25.
[46] *Treushnikov M.K.,* Anthology of Civil Code*,* Moscow, 1996, 94 (in Russian).

In Georgia, the issue of perpetuation of evidences shall be studied properly. In this respect, getting familiarized with the foreign practices, their analysis and adaptation in Georgian legislation should be provided to develop effective mechanism for perpetuation of evidences.

According to the Civil Procedure Code, a judgment on the refusal to perpetuate evidence may be appealed with a complaint subject to a time limit. Time limit of such complaint shall be twelve days and the term shall commence on the date of delivery of the judgment to a party. The higher court shall consider the complaint and make decision within two months term. There is also a decision by Supreme Court stating that through the judgment shall be appealed with the complaint subject to time limit, this shall not cause delay of the litigation and complaint shall be filed together with the final judgment. In our opinion, such approach differentiates the evidences and creates impression that the court has already made its opinion about certain evidences in advance. As the evidences are most important in making decisions, the terms of filing of complaint and consideration thereof should be shorter.

Civil procedure legislation does not provide for the terms of perpetuation of evidences. Where the claim security is provided, a party knows that it shall file the claim within ten days, otherwise, the security measure will be revoked and it even may be ordered to compensate damages caused to the other party (if any). For more effective administration of justice, it would be good to solve the issue of regulation of the terms of evidences perpetuation at the legislation level. In such cases a party will know the term of perpetuation of the required evidence. The time and human resources are spent for providing perpetuation measures. Hence, these resources should be effectively used. Otherwise many documents will remain on the shelves.

Tamar Lakerbaia[*]

European Model of Protection of the Consumers' Rights in Distance Contracts – on the Example of Withdrawal Right

Article provides discussion of the characteristics of contracts made with participation of consumers via distance communication. It describes European standards of the consumers rights ' protection in distance contracts that is the right of withdrawal. Article analyses the characteristics of formation of consumers will in the contractual relations and protective effect of the right of withdrawal.

***Key words**: consumer, right of withdrawal, distance contracts.*

1. Introduction

Protection of the consumers' rights is the central pillar of the European contract law. Regarding characteristics of the contract formulation and participation of the consumers in this process, whole set of the protection mechanisms was adopted in the European contractual law to secure the interests of the party recognized as the "weak" one. The characteristic feature of protection of the consumers' rights is that special protection mechanisms are oriented towards prevention of the specific dangers and are associated with the relevant contractual relations. Therefore, the right of the withdrawal is applicable to certain contractual relations, one type of which is the distance contracts.

Currently, neither Georgian Civil Code and nor any other legislative act contains any provisions dealing with distance contracts. For development of the mentioned sphere of contractual relations, it is significant to study practices adopted in the European Union and taking it into consideration. It is notable that according to the Association Agreement of 27 June 2014, between Georgia and the European Union,[1] one of the preconditions for Georgia's entry to the European market is ensuring protection of the consumers' rights in the e-commerce and improvement of their confidence.

2. Consumer in the Distance Contracts

In the contracts where one of the parties is a consumer, the contractual freedom is focused on the consumers' private interest.[2] The reason for this is that consumer has been considered as a weak party of the contract[3]. "Weakness" is presented in both, objective and subjective factors. The former implies the power, awareness marketing policies of the entrepreneurs – attract the consumers by any

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[*] Doctor of Law, TSU Faculty of Law, Visiting Lecturer.

[1] Association Agreement of 27 June 2014, between Georgia on one side and European Union and European Atomic Energy Union and member states on the other side, <www.gov.ge>, Section 2, Article 127, Subsection "d", Section 1, Article 128.

[2] *Kropholler J.*, Civil Code of Germany, Comment for Learning, GYLA Legal Education Support Fund, with GIZ assignment, Tbilisi, 2014, 316.

[3] *Antoniolli L.,* Consumer Law as an Instance of the Law of Diversity, Vermont Law Review, Vol. 30:855, 2006, 856, <http://Lawreview.vermontLaw.edu/files/2012/02/antoniolli.pdf> [3.12.2013].

means and methods and persuade them to make the contract;[4] briefly, the entrepreneurs' inherent aspiration to gain advantages against the buyer[5]. In this respect, the consumer's position is less safe, in the relations with the skilled entrepreneur. He/she has no sufficient knowledge and experience to deal with the information imbalance or imposed contracts. On the other hand, the consumerconsumer is not required to have the trade skills. His/her only purpose is to satisfy his/her needs. ConsumerConsumer's participation in the contract formation is of formal nature. He/she only accepts the offered terms and conditions, without understanding of the relevant obligations, resulting in his/her objective "weakness" in the contractual relations[6].

Subjective "weakness" implies personal qualities of the consumer consumers[7]. Hesitation in making decisions is the inherent quality of the consumerconsumers[8]. In addition, not all are equally firm against the trade methods imposed by the entrepreneurs. In many cases the consumers are under the entrepreneurs psychological influenced – they feel satisfied by the individual approach, are charmed by the offered terms and conditions or goods' description, frequently exacerbated while the actual value and the quality of goods are overlooked resulting in disappointment of the consumers[9].

Therefore, in the contracts made with the consumers' participation, particular attention is paid to their self-determination freedom. And the scopes of the contractual freedom are measured by the expectations of the average consumer,[10] implying, primarily, freedom of choice and opportunity of making reasonable decision[11].

Thus, protection of the consumers' rights relies on the idea of protection of the contracting tights. Here we should note that the law of protection of the consumers' rights is characterized with categorization of the protection measures[12] – protection of the consumers from the danger related to the specific relations, regarded by the law as a substantial one. Hence, the scopes of the consumers' contractual freedom are measured by the nature of relations comprising the object to protection in the specific case.

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4 *Kessler F.,* Contract of Adhesion – Some Thoughts About Freedom of Contract, Faculty Scholarship Series, Paper 2731, 11, <http://digitalcommons.Law.yale.edu/fss_papers/2731 630> [28.02.2014].

5 *Howells G., Ramsay I., Wilhelmsson Th.,* Consumer Law in its International Dimension, Handbook of Research on International Consumer Law, Published by Edward Elgar Publishing Limited, Cheltenham, UK, 2011, 7.

6 *Kessler F.,* Contract of Adhesion – Some Thoughts About Freedom of Contract, Faculty Scholarship Series, Paper 2731, 3 <http://digitalcommons.Law.yale.edu/fss_papers/2731 630>, [28.02.2014].

7 *Dani M.,* Assembling the Fractured European Consumer, A New Concept of European Federalism, LEQS Paper, № 29/2011, <http://www.lse.ac.uk/europeanInstitute/LEQS/LEQSPaper29.pdf>, [22.07 2013] 19.

8 *Solomon M., Bamossy G., Askegaard S., Hogg M. K*., Consumer Behavior, A European Perspective, third edition, Pearson Education Limits, Harlow, England, 2006, 22.

9 *Luzak J.A.,* To Withdrawor not to Withdraw? Evaluations of the Mandatory Right of Withdrawal in Consumer Distance Selling Contracts Taking into Account its Behavioral Effects on Consumer, Amsterdam Law School Legal Research Paper № 2013-21, Centre for the study of European Contract Law working Paper № 2013-04, 6, <http://papers.ssrn.com/sol3/papers.cfm?abstract _id=2243645>, [20.01.2015].

10 *Kropholler J.*, Civil Code of Germany, Comment for Learning, GYLA Legal Education Support Fund, with GIZ assignment, Tbilisi, 2014, 43.

11 *Twigg-Flesner Ch., Schulze R.,* Protection Rational Choice: Information and the Right of Withdrawal, Handbook of Research on International Consumer Law, Published by Edward Elgar Publishing Limited, Cheltenham, UK, 2011, 130.

12 *Dzlierishvili Z., Tsertsvadze G., Robakidze I., Svanadze G., Tsertsvadze L., Janashia L.,* Contracts Law, Publisher: Meridian, Tbilisi, 2014, 29 (in Georgian).

3. Consumer in the Remote Communication World

Innovative means for making contracts, development of the distant and e-commerce, unprecedented progress of electronic media and internet have necessitated adjustment of the economic and legal institutes to the new technologies and commerce rules.[13] Technological progress has impacted the contracts made with the consumers' participation as well. Relations between the consumer and online service provider are not identical to those between the shop consultant and his/her client. One could say that virtual communication has changed not only the format of contractual relations but also the level of the consumers' trust and expectations[14].

In this respect, European contractual law has focused initially on the distance contracts distanceand later – on e-commerce. Promotion of distance contracts on delivery of the goods and services is intended, primarily, for development of the trans-border trade and common European market[15]. The stated goal could not be achieved without consumers active involvement, just like without protection of the consumers' rights in such trade relations. Therefore, the European legislator has paid particular attention to the consumers' rights in the distance transactions.

In its wide sense, contracts made through any form of distance communication are the integral part of private law. This form of trade allows the entrepreneurs performing of any activities not prohibited by the law. In the narrow sense, there are two key directions of e-commerce: contracts between the entrepreneur subjects and those made between the entrepreneurs and consumers[16]. E-contracts' differentiation by the subjects results in their different regulation. E-contracts made between the entrepreneur subjects are regulated by the international and domestic contractual regimes. While the contracts made with participation of the consumers are subject to relatively narrow regulations. These are included into the internal state and regional acts (e.g. EU directives), as the legal mechanisms for regulation of the protection of consumers' rights. In both cases the approach to the validity of contracts and their fulfillment are uniform and rely on the general principles of private law. Only the parties' rights and obligations are different. In the contracts made with consumers' participation the entrepreneurs obligation of acting in good faith and with due care is ensured by the additional imperative norms[17].

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[13] *Katz A.W.,* Is Electronic Contracting Different? Contract Law in the Information Age, <http://www.columbia.edu/~ak472/papers/Electronic%20Contracting.pdf>, [12.03.2014]; *Kaufmann Winn J., Haubold J.,* Electronic Promises: Contract Law Reform and E-Contracts in Comparative Perspective, European Law Review, 27, 2002, 568-569, <http://www.Law.washington.edu/Directory/ docs/Winn/Electronic_Promises_Revised.pdf >, [11.05.2014].

[14] *Nimmer R.T.,* The Legal Landscape of E-commerce: Redefining Contract Law in an Information Era, Journal of Contract Law Conference, Contract and the Commercialization of Intellectual Property, Singapore Academy of Law and Singapore Management University, 2006, 5.

[15] *Macsim A.R.,* The New Consumer Rights Directive, A Comparative Law and economics Analysis of the Maximum Harmonization Effects on Consumers and Businesses, The Case of the Cooling-off Period from Online contracts, <http://pure.au.dk/portal/files/44659752/Thesis.pdf>, [27.11.2013].

[16] *Schmidt W-A., Priess M.,* Germany*, Spindler G., Borner F.,* E-Commerce Law in Europe and the USA, Springer, Verlag Berlin Heidelberg, 2002, *Schmidt W-A., Priess M.,* Germany, 181.

[17] *Daunel-Lieb B.,* A Special Private Law for B2C? Silver Bullet or Blind Alley? New Features in Contract Law, R. Schulze sd. pub. Mucchen, Sellier, European Law Publishers, 2007, 107-117; *Wang F.F.,* Law of Electronic Commercial Transactions, Contemporary Issues in EU, US and China, Routledge Research in IT and E-Commerce Law, Taylor & Francis Group, New York 2010, 14.

While the e-commerce provides innovative means for making effective contracts, it causes new problems related to the contract validity. The way of avoiding possible negative outcomes of the contracts made through distance communication methods comprises one of the key issues in the legal doctrine[18]. Therefore, together with the common principles of protection of rights, in unequal contractual relations (and the distance made contracts with the consumer's participation are regarded as such) the consumers are additionally protected by the right of withdrawal, as the adequate and effective means inn case of neglecting of the principles of trust and honesty towards him/her.[19] Though, in the e-commerce, beyond providing the withdrawal rights, there is apparently seen the goal of the consumers' involvement into the electronic commerce and their stimulation.

4. Distance Contracts

Distance form of communication implies any form of relations not associated with the face to face between the parties. It includes contracts made through phone, mail, electronic mail, catalogues or via internet. Contracts made through advertising through press, radio and television belong to the same group, if they contain the special phone number or e-mail address of the person offering goods and services.[20]

Transactions are regarded as distance contracts when they are made between the consumer and entrepreneur subjected to one and the same or different jurisdictions through any communication means (including internet).[21]

One can say that in the contemporary world these forms of relations are regarded as simplified forms of offering of the goods and services in time and space. They create unique opportunities of making legal relations for both contracting parties. This is particularly convenient for the consumers allowing them to satisfy their interests without leaving their homes. Regarding this factor, distance and e-commerce became the integral part of contracts law for the last decade and protection of the rights of one of the parties of such relation – the consumers was recognized as the priority of the modern civilized law[22].

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[18] *Wang F.F.,* Law of Electronic Commercial Transactions, Contemporary Issues in EU, US and China, Rutledge Research in IT and E-Commerce Law, Taylor & Francis Group, New York 2010, 13.

[19] *Twigg-Flesner C.,* A Cross-Border-Only Regulations for Consumer Transactions in the EU, A Fresh Approach to EU Consumer Law, Springer Briefs in Business, 2012, 5, <http://www.springer.com/cn/book/9781461420460>, [10.11.2013]; *Micklitz H-W.,* The Target Full Harmonization Approach Looking Behind Curtain, Modernizing and Harmonizing Consumer Contract Law, Sellier, ELP, Munich, 2009, 48-51; *Ben-Shahar O., Posner E.,* A., The Right to Withdraw in Contract Law, Journal of legal studies, Vol. 40, January 2011, 116, <http://www.jstor.org/stable/10.1086/658403>.

[20] *Stone R.,* The Modern Law of Contract, 5th edition, Cavendish Publishing limited, Portland, Oregon, USA, 2002, 64.

[21] *Twigg-Flesner C.,* A Cross-Border-Only Regulations for Consumer Transactions in the EU, A Fresh Approach to EU Consumer Law, Springer Briefs in Business, 2012, 5.

[22] *Loos M., Helberger N., Guibaut L., Pessers L.,* Digital Content Contracts for Consumers, Amsterdam Law School Legal Studies Research Paper № 2012-66, Centre for the Study of European Contract Law, Working Paper Series №2012-05, University of Amsterdam, The Netherlands, 2-5; *Twigg-Flesner C.,* A Cross-Border-Only Regulations for Consumer Transactions in the EU, 7.

The right of withdrawal is admitted as one of the guarantees for protection of the consumers' interests in the distance concluded contracts.[23] For effective exercising of such right, defining of what could be regarded as the distance made contract is decisive. Directive of 2011/83 on the Consumers' Rights define the distance contracts as "any contract concluded between the trader and the consumer under an organised distance sales or service-provision scheme without the simultaneous physical presence of the trader and the consumer, with the exclusive use of one or more means of distance communication up to and including the time at which the contract is concluded".[24] Given definition off the distance contracts includes number of significant elements.

4.1. Transaction Validity

Primarily, all contracts made in such manner shall comply with the conditions of transaction validity regulated independently from EU directives by the national legislations of the member states.[25]

4.2. Absence of Communication

To regard the contract as the distance made one and hence, for justification of the protective function implying withdrawal right it is significant to demonstrate special nature of the contracts of such type. "Special nature" primarily means agreement on the contract terms and conditions without face to face communication between the parties, as well as the fact of contract execution. Distance trade has the special characteristic feature – the seller makes contractual relations with the buyer so that the parties not only do not meet face to face but, in many cases, acceptance of the offer is limited to pressing the relevant button only and this is sufficient for recognition of the contract conclusion and self-binding.[26]

Notably, if at any stage of contracting, the consumer can meet the trader face to face or physically examine the desired product and further agree upon the terms and conditions, such contract could not be regarded as the distance concluded one and the consumer cannot enjoy the right of withdrawal.[27]

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[23] *Loos M.,* Right of Withdrawal, Modernizing and Harmonizing Consumer Contract Law, Sellier, European Law Publishers, Munich, 2009, 244-250.

[24] Directive 2011/83/EU of The European Parliament and of The Council of 25 October 2011, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32011L0083>, [26.04.2014].

[25] *Fina S.,* The Consumer's Right of Withdrawal and Distance Selling in Europe: A Consumer Stronghold in European Distance Selling and E-Commerce, in Festschrift Franz Zehetner, Markus Haslinger, Arthur Kanonier and Sylvia Zehetner eds. 2009, 31; *Spindler G., Borner F.,* E-Commerce Law in Europe and the USA, Springer, Verlag Berlin Heidelberg, 2002, *Schmidt W-A., Priess M.,* Germany, 164-176, *Renard I., A., Barberis M. A.,* France, 97-101.

[26] *Fina S.,* The Consumer's Right of Withdrawal and Distance Selling in Europe: A Consumer Stronghold in European Distance Selling and E-Commerce, in Festschrift Franz Zehetner, Markus Haslinger, Arthur Kanonier and Sylvia Zehetner eds., 2009, 31.

[27] Ibid.

4.3. Contracting Method

To regard the contract as the distance made one and hence, for justification of the protective function implying withdrawal right it is significant to demonstrate special nature of the contracts of such type. "Special nature" primarily means agreement on the contract terms and conditions without face to face communication between the parties, as well as the fact of contract execution. Remote trade has the special characteristic feature – the seller makes contractual relations with the buyer so that the parties not only do not meet face to face but, in many cases, acceptance of the offer is limited to pressing the relevant button only and this is sufficient for recognition of the contract conclusion and self-binding.[28]

Notably, if at any stage of contracting, the consumer can meet the entrepreneur face to face or physically examine the desired product and further agree upon the terms and conditions, such contract could not be regarded as the distance concluded one and the consumer cannot enjoy the right of withdrawal.[29]

The consumer shall enjoy withdrawal right if the contract is made using remote communication regulations. Distance communication implies making offer to conclude the contract, as well as accepting of such offer and agreeing upon the substantial terms and conditions by phone, fax, internet, e-mail or any other remote communication methods.[30]

Here we should note that expansion of the mobile phone functions have arisen the issue of making contracts by their means. There were some different opinions in this respect but recent technological achievements in the field of mobile communication showed that in current conditions the mobile phone could be freely used as the instrument for contracting. Moreover, internet access or being source of electronic communication is not a necessary condition. In current reality, even SMS is sufficient for expression of the contractors' will and hence, for emergence of the binding power of the contract.[31]

As for the contracting electronically, it is notable that International Chamber of Commerce defines electronically executed contracts as the automated process of contracting by the parties with their computers, through the network or electronic mails.[32] There are three forms of electronic contracting. The most widespread one is contracting via electronic mail. E-mail can be used for sending of both, the offer and acceptance. The other form of electronic contracting is contracting via global

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[28] *Fina S.,* The Consumer's Right of Withdrawal and Distance Selling in Europe: A Consumer Stronghold in European Distance Selling and E-Commerce, in Festschrift Franz Zehetner, Markus Haslinger, Arthur Kanonier and Sylvia Zehetner eds. 2009, 31.

[29] Ibid.

[30] *Fina S.,* The Consumer's Right of Withdrawal and Distance Selling in Europe: A Consumer Stronghold in European Distance Selling and E-Commerce, in Festschrift Franz Zehetner, Markus Haslinger, Arthur Kanonier and Sylvia Zehetner eds., 2009, 31.

[31] *Henderson K., Poulter A.,* The Distance Selling Directive, 238, <http://www.cis.strath.ac.uk/cis/research/publications/papers/strath_cis_publication_238.pdf>, [09.05.2014].

[32] International Chamber of Commerce (ICC), General Usage for International Digitally Ensured Commerce (GUIDEC), Version II, <www.iccwbo.org>.

network. In such cases, the trader provides the catalogue of his/her products, together with the information about their characteristics and prices on his web site. The consumer views the web site and selects the desired goods and by giving consent to the contract terms and conditions, buys such goods. Third form of the e-commerce includes the contracts terms and conditions of which are provided on the trades's web site through link, so called redirected contracts. Their characteristic feature is that the consumer has to give his/her consent to several complex or independent contracts for the purpose of buying the desired product.[33]

4.4. Products with Digital Contents and Withdrawal Right

Scales of e-commerce and technological progress have impacted the services and goods demand and supply format as well. In addition to the traditional classification of the movable and immovable properties, there appeared the "goods" not belonging to either class with their nature. Here we mean the assets with digital contents being the subject of various contracts every day. These are so called online transactions that are not only concluded electronically but performed electronically as well. For example, ordering of the software via internet where delivery is provided through downloading of the software from the web site or electronic information supply etc.[34]

Directive on the Consumer's Rights of 2011/83 specifies digital contents, asdata which are produced and supplied in digital form, like computer software, application forms, games, music, video or text, irrespective of whether they are available through downloading or used directly, from the material (physical) carriers or any other sources. And where the digital content is delivered from the physical carriers like CD/DVD or USB, they are regarded as common movable property.[35]

Discussing of this issue is of particular significance, in relation with the right of withdrawal as in the contracts where the subject is digital content the consumer's withrawal right is limited. In particular, in such contracts the consumer is entitled to enjoy opportunity of withdrawal of his/her consent until the download process commences and/or completes. Once the process of downloading starts of ends, the consumer loses the right of withdrawal. In such cases, delivery shall be preceded by the consumer's informed consent on commencement of downloading and the trader shall provide

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[33] *Wang F.F.,* Law of Electronic Commercial Transactions, Contemporary Issues in EU, US and China, Rutledge Research in IT and E-Commerce Law, Taylor & Francis Group, New York 2010, 34; *Nimmer R. T.,* The Legal Landscape of E-commerce: Redefining Contract Law in an Information Era, Journal of Contract Law Conference, "Contract and the Commercialization of Intellectual Property", Singapore Academy of Law and Singapore Management University, 2006, 15.

[34] *Loos M., Helberger N., Guibaut L., Pessers L.,* Digital Content Contracts for Consumers, Amsterdam Law School Legal Studies Research Paper № 2012-66, Centre for the Study of European Contract Law, Working Paper Series № 2012-05, University van Amsterdam, The Netherlands, 3; *Loos M.,* The Regulation of Digital Content B2C Contracts in CESL, Amsterdam Law School Legal Studies Research Paper № 2013-60, Centre for the Study of European Contract Law, Working Paper Series № 2013-10, University van Amsterdam, The Netherlands, 1-2; *Erkvania T.,* European Standards of Consumers' Rights Protection in the Sphere of E-Commerce and Georgian Legislation, magazine "Law and Justice" (Martlmsajuleba da Kanoni"), № 3 (30), 2011, 49.

[35] Directive 2011/83/EU of The European Parliament and of The Council of 25 October 2011, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32011L0083>.

warning that the consumer shall lose the right to withdraw from the contract as soon as product download starts.[36]

It is notable that such provision protects the trader from unfair buyers. In particular, it is not excluded that the consumer abused the withdrawal right, download the desired software or information, get familiarized with it, make the copy and then desire to return it with the demand of repayment of the paid about.[37] Taking such situations into consideration the legislator limits application of the withdrawal right for the products with digital contents. Naturally, such approach should be regarded as reasonable as the products with the digital contents are mostly protected with the copyrights (e.g. e-books). If the consumers had unrestricted rights to use such products with relatively low costs, primarily, this would cause violation of the others' rights (those holding the copyrights) and this is unacceptable for the fundamental principles of private law.[38]

4.5. Auction as the Form of Distance Trade and The Right of Withdrawal

Auction is a form of trade, tradition of which has emerged as early as in 500s, BC, in Babylon, where the women were sold in lieu of the most generous proposal. Since then, the auctions have not lost their significance, though unlike Babylonian traditions, currently he auction means offering of the goods and services through competition, where the highest bid has the contractual binding force. For the centuries, this type of trade has been developed in various forms. Some of them are organized by the public institutions, some – by the courts and some – by the professionals while sometimes these are arranged directly by the merchants.[39]

Many years ago the auctions were held in the premises specially arranged for this purpose. Development of the modern technologies has impacted this form of trade as well. Currently the auction can be arranged via internet resulting availability of such form of trade for wide audience. Consequently, the virtual auction could be regarded as one of the forms of distance contracting.[40]

Simplified access to the auctions has resulted in the whole set of inconveniences for the consumers. In some cases this is absence of direct communication and hence impossibility of adjustment of the terms and conditions. In other cases this is discrepancy between the description provided in the offer and the products, problems with delivery, delivery of damaged or broken products or deliv-

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[36] *Roinn Post A., Nualaichta F.,* Consultations on the Implementation of Directive 2001/83/EU On Consumer Rights,<http://www.djei.ie/publications/commerce/2013/CRD.pdf>, [10.02.2014].

[37] *Riefa Ch.,* The Reform of Electronic Consumer Contracts in Europe: Towards an Effective Legal Framework?, 39, <http://www.lex-electronica.org/docs/articles_244.pdf>, [08.05.2014].

[38] *Loos M., Helberger N., Guibaut L., Pessers L.,* Digital Content Contracts for Consumers, Amsterdam Law School Legal Studies Research Paper №2012-66, Centre for the Study of European Contract Law, Working Paper Series №2012-05, University van Amsterdam, The Netherlands, 12-14.

[39] *Riefa Ch.,* A Dangerous Erosion of Consumer Rights: The Absence of a Right to Withdraw from Online Auctions, Modernizing and Harmonizing Consumer Contract Law*, Howells G., Schultze R.* (eds.), Sellier European Law Publishers, 177-188, 2009, 1, <http://papers.ssrn.com/sol3/papers.cfm? abstract_id=1374063>, [15.01.2015].

[40] *Riefa Ch.,* A Dangerous Erosion of Consumer Rights: The Absence of a Right to Withdraw from Online Auctions, Modernizing and Harmonizing consumer Contract Law, Geraint Howells and Reiner Schultze, eds., Sellier European Law Publishers, 177-188, 2009, 1, <http://papers.ssrn.com/sol3/papers.cfm? abstract_id= 1374063.>, [15.01.2015].

ery of the other goods. Therefore, the internet auctions were included into the area of applicability of the legislation regulating protection of the consumers' rights. Though there is no uniform approach to this issue in the legislations of EU member states.[41]

This was particularly apparent in relation with the withdrawal right. For example, in France and Luxemburg, the consumers were protected by the rules applicable to the distance concluded contracts and hence, they had the opportunity to enjoy the right of withdrawal. In these countries the protection regulations for the distance made contracts were not applicable to the public auctions only. In Belgium and Greece E-bay auctions were included into the remote trade regime, as national legislations of these states did not take into consideration the restrictions provided by the directive dealing with the distance made contracts. In Germany, for example, the participants enjoyed the adequate protection in case of participation in internet auctions, as provided by the decision of German federal court, allowing exercising of withdrawal right to the contracts made as a result of internet auctions.[42]

For the purpose of ensuring uniform approach to the withdrawal rights in internet auctions, Directive on Consumers' Rights of 2011/83 directly states that the Directive and hence, the right of withdrawal shall not be applicable to the public auctions only. In addition, the content of public auction was defined. In particular, the 'public auction' means a method of sale where goods or services are offered by the trader to consumers, who attend or are given the possibility to attend the auction in person, through a transparent, competitive bidding procedure run by an auctioneer and where the successful bidder is bound to purchase the goods or services;. Use of the internet platforms for the auctions at disposal of the consumers and trades shall not be deemed as the public auction, for the purposes of the Directive.[43]

Hence, if the auction is held through internet, so that the parties have no opportunity to directly attend it, this should be regarded as the distance concluded contract and the consumer shall be entitled to the right of withdrawal, if he/she desires so.However, the consumer shall be informed about such rights after auction completion, announcing of the results and identification of the winner. Such regulation takes into account the characteristic features of internet auctions. In particular, in the course of auction, before making contract with the specific person, it is actually impossible to provide individual explanation of the rights to unknown person, potential contractor. The consumer is given the additional opportunity to unilaterally terminate the contract only in case of contractual binding. In addition, as the consumer shall be informed about the rules and conditions of withdrawal immediately, upon contract execution, the entrepreneur shall provide written explanations about the

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[41] *Twigg-Flesner Ch., Metcalfe D.,* The Proposed Consumer Rights Directive – Less Haste, More Thought? European Review of Contract Law, 2009, 9, <http://ssrn.com/abstract=1345783>, [20.01.2015].

[42] *Riefa Ch.,* A Dangerous Erosion of Consumer Rights: The Absence of a Right to Withdraw from Online Auctions, Modernizing and Harmonizing Consumer Contract Law, Geraint Howells and Reiner Schultze, eds., Sellier European Law Publishers, 2009, 177-188, 3, <http://papers.ssrn.com/sol3/papers.cfm? abstract_id=1374063>, [15.01.2015].

[43] Directive 2011/83/EU of The European Parliament and of the Council of 25 October 2011, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32011L0083>, [26.04.2014].

withdrawal rights at the earliest possible opportunity. Non-compliance with this obligation results in extension of the term of contract revising.[44]

5. Conclusion

Thus, withdrawal right serves to protect consumers in distance concluded contracts. Protection, as such, implies support to consumer's self-determination and making right choice. One could say that withdrawal right protects the consumer from inadequate choice and comprises effective mechanism for its overcoming. At the same time, possibility of further revising of the contract cannot protect the consumer from disappointment but it adds to the distance concluded contracts the reversal effect. Withdrawal right can protect the consumer from the sense of regretting about concluded contract and stimulate him/her to make further remote contracts. Therefore, this exclusive regulation is regarded as effective tool for protection of the consumers' rights, serving, on one hand, to improvement of the consumers' confidence and trust and on the other hand – promotes distance concluded contracts and their further development.

[44] *Kropholler J.*, Civil Code of Germany, Comment for Learning, GYLA Legal Education Support Fund, with GIZ Assignment, Tbilisi, 2014, 251-252.

Solomon Menabdishvili*

The Types of Vertical Agreements and the Restraints Therein in Terms of Competition Law

In this article we discuss vertical agreements and vertical restraints. In general, vertical restraints are not as harmful as horizontal ones. They can lead to some economic efficiency in production and distribution of goods and services. However, in some cases they may result in restriction of competition on the market. Assessment of legal context of an agreement as well as economic analysis is necessary for the vertical restraints.

Key words: *vertical agreements, vertical restraints, efficiency, restriction.*

1. Introduction

Vertical agreements are agreements between the undertakings which are active on different level of production and distribution chains.[1] Parties to the vertical agreements as a rule are not direct competitors, since they mainly produce complementary products and service and not competing products and service.[2]

Vertical agreements can be concluded on intermediate as well as on final product and service. For example, producer sells product to other undertaking and the latter uses the product as an input for manufacturing different product; in another case, producer sells to wholesaler or retailer final products for reselling to final consumer. It should be noted that the producer can be active on both, production as well as distribution level.

In general, vertical restraints are more competitive benign than horizontal restraints, because they can substantially increase efficiencies. According to the Commission view, certain types of vertical agreements can improve economic efficiency within a chain of production or distribution by facilitating better coordination between the participating undertakings. Namely, they can lead to a reduction in the transaction and distribution costs of the parties and to an optimisation of their sales and investment levels.[3]

Producer has a few options for selling products:

First, set up its own distribution chain and through it sell goods;

Second, acquire the firm already active in distribution business and through it sell goods;

Third, entrust other companies to sell its products.

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* Doctoral Student, TSU Faculty of Law, Invited Lecturer.

1 *Jones A., Sufrin B.*, EU Competition Law Text, Cases, and Materials, 4th ed., Oxford University Press, 2011, 629.

2 *Bishop S.,Walker M*., The Economics of EC Competition Law: Concepts, Application and Measurement, 3rd ed., Sweet & Maxwell, 2010, 188.

3 Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices §6, <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32010R0330>, [21.03.2015].

In the first two cases, the producer makes vertical integration and whole chain of production and distribution is carried out only by one company. In the third case, one company produces goods and the other distributes these goods to final consumers. The latter company is an independent undertaking. It can be wholesaler and/or retailer. Therefore, distribution of goods to the final consumers can be carried out by a distributor, dealer and commercial agent.

2. Commercial Agent

Commercial agent might be a legal or natural person. In general, its functions are limited, because it may negotiate agreements and conclude them on behalf of the principal. An agent gets commission based on its sales or fixed amount of salary.[4]

Commercial agent can be subsidiary body, which is integrated part of the principal. It also can be an independent economic operator, which undertakes minor financial and/or commercial risks connected to the sales or fulfillment of the agreement concluded with the third party.[5]

If the agent does not undertake financial and/or commercial risks, or it undertakes insignificant part of the risks, than the agreement concluded between the agent and principal can be qualified as a genuine agency agreement according to Article 101 and the article is applicable to these types of agreements. There are different types of financial and commercial risks. They can be divided into following categories:

First, the risks resulting from the agreements that have been concluded by the agent on behalf of the principal or from the agreement that was negotiated by the agent, such as for example, purchasing of stocks;

Second, the risks stemming from the specific market investments. For example, the agent can be required to make certain investments. Such investments can be in a form of sunk costs, because if the agent stops certain activity, undertaken investment cannot be used for a different activity and sold within important losses.

Third, risks related to different activities on the same market, but the principal requires from the agent to be undertaken. It should be noted that such an activities are not carried out on behalf of the principal, the agent carries them out on its behalf and on its own risk.[6]

In general, in order for Article 101 to be applicable to agency agreement, following circumstances should be taken into account:

- the agent should not acquire ownership of the selling products;
- the agent does not undertakes the expenses of delivery of the goods to the buyer;
- the agent does not stock selling goods on its own expanses and risk;
- the agent does not have liability towards third parties on the loss resulting from sold goods;
- the agent is not responsible for non-performance of the agreement;

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4 *Whish R., Bailey D.*, Competition Law, 7th ed., Oxford University Press, 2012, 621.

5 *Jones A., Sufrin B.*, EU Competition Law Text, Cases, and Materials, 4th ed., Oxford University Press, 2011, 631.

6 Commission Notes, Guidelines on Vertical Restraints, <http://ec.europa.eu/competition/antitrust/legislation/guidelines vertical_en.pdf>, §14, [21.03.2015].

- the agent is not obliged indirectly or directly to carry out investments in stimulating sales;
- the agent does not carry out market specific investments in equipments, premises or training of the staff;
- the agent does not carry out other activities, which are required by the principal on the relevant market, except the case, if the expanses is reimbursed by the principal.[7]

The list is not exhausted. If the agent incurs one or more risks and/or costs, the agreement between agent and principle will not be qualified as an agency agreement. In the opinion of the EU Commission, each case should be assessed according to circumstances presented in it and account should be taken the economic reality of the situation rather than the legal context of the agreement.[8]

The Commission ascertains that exclusive agency agreement in general does not have anti-competitive effect. However, if single branding agreement and post-term non-compete clause are integrated in exclusive agreement, it may breach Article 101 if it will have foreclosure effect.[9]

The agency agreement can be subject to Article 101 regulation, if it stimulates tacit collusion, even if the principal bears appropriate financial and commercial risks. For example, if several principals use the same agents while collectively excluding others from using these agents or if they use the agents to collude tacitly on market strategy or to share sensitive market information among principals.[10]

3. Main Types of Vertical Agreements

In practice, there are following vertical agreements:

a. single branding agreement, in which case distributor is obliged to obtain certain or whole amount of products from only one producer, which may cause certain efficiency in distribution. However, according to the Commission's opinion, these agreements or network of the similar agreements may unite outlets and foreclose market for rivals.

Foreclosure has a greater effect, the more are market shares of the participating undertakings and the more is duration of non-compete clause.

The Commission thinks that single branding agreements in general have anticompetitive nature, though after studying the details of the case they might be exempted on the basis of Article 101.3.[11]

b. exclusive distribution agreement gives immunity to distributors on a certain territory. They are not allowed to carry out active as well as passive sales in other distributors' territories. The Commission has a skeptical view on exclusive distribution agreement, especially in case if it also includes absolute territorial protection.

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[7] Commission Notes, Guidelines on Vertical Restraints, <http://ec.europa.eu/competition/antitrust/legislation/guidelines vertical_en.pdf>, §16.
[8] Ibid, §17.
[9] Ibid, §19.
[10] Ibid, §20.
[11] *Jones A., Sufrin B.*, EU Competition Law Text, Cases, and Materials, 4th ed., Oxford University Press, 2011, 665.

In the Court's view, exclusive distribution agreement does not restrict competition if the producer enters on a new market and, thereby, substantial investments are necessary to incur.[12]

In general, the Commission ascertains that exclusive distribution agreements limit sales on the different exclusive territories, decrease intra-brand competition and results in market partitioning, which may lead to price discrimination. If all distributors or most of them use exclusive agreements, then competition is decreased and tacit collusion can be easily reached on both, distribution and production levels. It can also lead to foreclosure of the market. The larger the producer's market share, the bigger is limitation of intra-brand competition.[13]

In the Commission's view, in general, foreclosure problem does not arise if the exclusive distribution agreement is not combined with single branding provision.[14]

c. selective distribution system. If the supplier wants to create the image of its products and/or to ensure that the sales are accompanied by specific service terms, it can choose this system. In this case, the supplier selects retailers on the basis of quantity or quality (level of service, level of storage, etc.) and/or location.

In order to be in conformity with competition rules, selective distribution should meet following criteria:

- characteristics and/or features of the product/service should necessitate selective distribution system;
- distributors should be selected on basis of objective qualitative criteria (for instance, size of building, appropriate qualification of the staff), provided they are publicly announced and not used in an discriminative manner against some of the distributors;
- the criteria should not require more than it is necessary for the service/goods.[15]

In the Commission's view, if there is the network of such agreements on the market, than there is high possibility that the competition on the market could be limited.

D. Agreement on Allocation of Space within the Trade Area. The supplier, in view of entry to the trade area, shall in advance pay the distributor for allocation of the space within the trade area of the latter. The fee, as a rule, is fixed and single. In certain events, based on the hereby Agreement, the anti-competitive foreclosure of the market for other distributors may take place, requiring involvement of the competition agencies.[16]

E. Agreement on Management of Products of Certain Category. Based on the Agreement, the distributor shall entitle the supplier on marketing of the products of a certain category, including of the similar category provided by other suppliers. On the hereby basis, the supplier is empowered to influence the disposition of the products and the marketing of products in general in a particular store. In certain cases, similar agreements may entail anti-competitive foreclosure of the market for

[12] The Guidelines on Vertical Restraints, §61.
[13] *Jones A., Sufrin B.*, EU Competition Law Text, Cases, and Materials, 4th ed., Oxford University Press, 2011, 666.
[14] The Guidelines on Vertical Restraints, §155.
[15] The General Court's Judgment: T-19/91, §5, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:61991TJ0019>, [27.05.2015].
[16] Guideline of the EU Commission on Vertical Agreements, §203-205.

competing suppliers and result in restriction of competition. Particularly, the result can be achieved when the supplier is entitled to influence the marketing decisions of the distributor, restrict the distribution of the products by the competing supplier or put them under unfavorable disadvantage.[17]

F. According to the Franchise Agreement, the franchiser shall delegate the intellectual property rights under the license to the franchisee. The Franchise Agreement covers usages of sundry trade-marks and know-how or usage and distribution of goods or services. As a rule, the franchiser renders commercial and technical services to the franchisee within validity of the Agreement. The franchising system allows the franchisee making his/her independent business by means of the brand name and know-how of the franchiser.

According to the Franchise Agreement, the franchisee shall pay the franchiser for usage of the intellectual property rights of the latter. Proper functioning of the franchising system requires each franchisee to meet the uniform commercial standards established by the franchiser as in terms of consumers, all trade units of the franchise shall meet the same standard. Correspondingly, the franchiser shall be authorized to require the franchisee to meet the uniform standards. Besides, the franchiser shall ensure protection of own intellectual property rights by means of the Agreement. Hence, the EU Competition authorities have declared that establishment of restraints of the categories, envisaged in view of establishment of uniform standards and protection of intellectual property rights does not breach the Article 101. However, in opinion of the Commission, if the Franchise Agreements contain the restraints envisaging division of the markets or maintenance of the resale prices, they shall be subject to application of the Article 101. The hereof restraints, in exceptional cases, may meet the criteria provided by the Article 101.3.[18] At that, it is as well noteworthy that provision of the guideline principles on the price does not imply restraint of competition.

The Franchise Agreements often contain various restraints – the provisions on selected distribution, non-compete and exclusive distribution – which shall not be considered as violation of Article 101.

According to the EU Competition Authorities, the restraints limiting the franchisee to open the store of similar nature within validity of the Agreement or within the reasonable term upon expiry thereof without the consent of the franchiser shall not restrict competition if they appear necessary to protect know-how under the Agreement.

Besides, the franchiser is entitled to lodge the demands as follows to the franchisee to:

1. Use the methods and know-how of the franchiser;
2. According to the directives by the franchiser, open and arrange sale areas;
3. Obtain consent of the franchiser prior to delegation of the franchising;
4. Sell the products solely supplied by the franchiser;
5. Obtain consent of the franchiser on all commercials.[19]

[17] Guideline of the EU Commission on Vertical Agreements, §209-210.
[18] *Whish R., Bailey D.*, Competition Law, 7th ed., Oxford University Press, 2012, 646.
[19] *Jones A., Sufrin B.*, EU Competition Law Text, Cases, and Materials, 4th ed., Oxford University Press, 2011, 675.

4. Regulation 330/2010[20]

In 2010, the European Commission developed the Regulation #330/2010 on n the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices. Same year, the Commission has also developed the guideline on application of the hereof Regulation.[21]

According to the Regulation, the vertical agreement means the agreement or the concerted practice between two or more economic agents, who deriving from the objective of the agreement or the concerted practice, hold activity on the different stages of manufacture and distribution. The vertical agreements contain the terms allowing the parties purchasing, selling or reselling the certain goods or services. Deriving from the context of Article 101, the Agreement signed with the final consumer shall not be considered as the vertical agreement as the Article shall be applies to the agreement or concerted practice between two or more economic agents and the decisions of the associations of the economic agents.[22]

The Regulation developed by the Commission declares the vertical agreements between the economic agents as legal on the basis of Article 101.3 if the Agreements meet the requirements provided by the Regulation.

The Regulation shall not be applied to the vertical agreements signed between the competing economic agents. However, exemption shall be applied to the bilateral vertical agreements between the competing economic agents.

As the Commission presumes, mainly vertical restraints in terms of competition entail problems only upon insufficient competition on one or morestages of the trade, that is, in case of certain market power on the levels of supplier or a seller, or both.[23] The primary goal of the Competition Law is to create and maintain the competitive conditions between the economic agents. According to the Commission, the competition is necessary between the brands (inter brand). If the brands encounter effective competition, reduction of competition within the brand (intra brand)(that is, sales between the distributors of the same brand) will not entail negative impact on the consumer.[24] At that, the Commission underlines that in this case, it does not imply the market power of the economic agents required under the Article 102, i.e. the market power in the vertical agreements may be less than required in case of a dominant economic agent on the basis of Article 102.[25]

Vertical restraints envisage restriction of certain rights of one or both parties of the agreement. Mainly, the vertical agreements provide the restraints of the following nature:

1. Restriction of prices and other trade conditions in which the agent/distributor is entitled to sell goods or services;

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[20] The Regulation №330/2010 on Application of the Part Three of the Article 101 of the Treaty on the Functioning of the European Union to the Vertical Agreements and Agreed Practice, <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32010R0330>, [21.03.2015].

[21] See Guidelines of the EU Commission on Vertical Restraints, <http://ec.europa.eu/competition/antitrust/legislation/guidelines_vertical_en.pdf>, [21.03.2015].

[22] Ibid, §25.

[23] Ibid, §6.

[24] Ibid, §102.

[25] Ibid, §97.

2. Restriction of the territory beyond which the agent/distributor is prohibited from sale of goods or services;
3. Restriction of the customers, to whom the agent/distributor is entitled to sell goods or services.

The vertical agreements enjoy the exemptions prescribed under the Regulation solely in the event if the market shares of the parties of the agreements do not exceed the amount stipulated under the Regulation. In line with the Article 3 of the Regulation, the vertical agreements shall be exempted from restraints in the event if the market shares of the supplier and the buyer in the respective markets do not separately exceed 30%. However, the vertical agreements shall not be exempted in the event if containing any of the hardcore restraints provided under the Article 4 of the Regulation. It is noteworthy that the Resolution of the Government of September 1, 2014 N526, envisaging exceptions from the restraints of the agreements restricting competition, also contains the 30%-upper limit for exemption of the vertical agreements from the restraints stipulated under Article 7 of the Law[26].

According to the Commission, in case of existence of the parallel networks to the similar restraints on the market, exceeding 50% of the relevant market, the risk of significant reduction of competition is evident. The Regulation #330/2010 shall not be applied to the hereof vertical agreements.[27]

Article 4 of the Regulation describes following types of hardcore restrictions:

The first restraint concerns the selling price of goods and services.Namely the supplier is not entitled to set the minimal selling price for goods and services to the distributor or fix the resale price. However, the supplier is entitled to establish the maximal price or give price guidelinesprovided that it shall not be equal to the fixed or the minimal price by means of pressure or various impetuses.

The second restraint concerns the territory purposed to serve the area for sale of goods or services or the customers to whom the distributor/dealer is to sell the goods or services. The hereof restraint may neglect one of the most important objectives of EU – single market inasmuch as the supplier may allocate the single European market amongst various distributors. The latters shall be entitled to independently decide the sale area and the buyers of their goods and services.The hereof restraint envisages few exceptions, namely, the supplier is empowered to:

- Restrict active sales for the distributor on the exclusive territory or to the exclusive customer reserved for the supplier or allocated by the supplier to a different distributor/dealer;
- Restrict sale of the goods by the buyers to the end users operating onwhole level;
- Restrict sales by the members of the selective distribution system on the allocated area to unauthorized distributors;
- Restrict sale of the components by the distributor/dealer provided for production of another type of goods to the customers inclined to use them for manufacture of the competitive products.

[26] See the Resolution of the Government №526 on "Exception from Prohibitions of the Agreement on Restriction of Competition", 8, <http://competition.ge/ge/page2.php?p=4&m=199>, [31.05.2015].

[27] See the Regulation №330/2010 "On Application of the Part Three of the Article 101 of the Treaty on the Functioning of the European Union to the Vertical Agreements and Agreed Practice, 6, <http://eur-lex.europa.eu/legal-, content/EN/ALL/?uri=CELEX:32010R0330>, [21.03.2015].

In line with the third restraint, the suppliers shall not restrict the members of the selective distribution system at the same time being the retail traders from active or passive sale of goods or services to the end users. However, they shall be prohibited from sale of goods or services to unauthorized distributors.

The fourth restraintcalls on the suppliers not to restrict the distributors on various levels of trade from inter-trade.

The fifth restraint covers supply of the spare parts. The manufacturer and the buyer of the spare parts, using the hereof parts for manufacture of own products, shall not be restricted or prohibited from sale of the spare parts to the end users, independent repairers or service providers.[28]

Other than the hereof hardcore restraints, the Regulation provides the list of so-called grey restraints (excluded restrictions), inclusion of which into the vertical agreements will not automatically entail non-application of exemption stipulated under the Regulation. The hereof restraints shall be detailed examined and if they are detected to excessively restrict competition, then the agreements will be prohibited. The part one of the Article 5 of the Regulation provides the following excluded restraints:

1. Non-competearticle, which shall not last for indefinite period or the term of which shall not exceed five years. At that, as the Commission considers, the obligation of non-competition, subject to be automatically extended for more than five years, is envisaged to last for indefinite period.
2. The condition directly or indirectly binding the buyer not to produce, buy, sell or resell the certain goods or services upon termination of the agreement;
3. The condition directly or indirectly binding the member of the selective distribution system not to sell the brands of any of the competing supplier.

The time limitation of five years shall not apply where the contract goods or services are sold by the buyer from premises and land owned by the supplier or leased by the supplier from third parties not connected with the buyer, provided that the duration of the non-compete obligation does not exceed the period of occupancy of the premises and land by the buyer.[29]

Exemption stipulated under the Regulation towards the obligations envisaged in the second paragraph shall apply in the event of consideration of the terms as follows:

- The obligation is related to the goods and services competing with the contractual goods and services;
- The obligation is limited within the premises purposed for the activity of the buyer within validity of the agreement;
- The obligation is necessary for protection of know-how delegated by the supplier to the buyer;
- The period of the hereof obligations is restricted with the period of one year upon expiration of the agreement.[30]

[28] Ibid, 4.
[29] Ibid, 5.2.
[30] Ibid, 5.3.

5. The Guideline of the Commission on Vertical Restraints[31]

As the Commission declares, Article 101 aims to ensure that economic agents do not conclude agreements, including the vertical agreements, restricting competition on the market in prejudice of the consumer. Estimation of vertical restraints is as well important in the context of achievement of the integrated market. As the Commission supposes, market integration enhances competition within EU and gives benefits to the consumers. Correspondingly, the companies shall not be able to create private barriers amongst the Member States when the state barriers are successfully eliminated.[32]

Other than group exemption envisaged under this Regulation, the vertical agreements enjoy so-called de minimis rule. According to the hereof rule, the paragraph one of the Article 101 shall not apply to the vertical agreements which are concluded between non-competing economic agents and the individual market share thereof exceed 15% taking the fact into account that the agreement does not envisage any of the hardcore restraints. It is noteworthy that if the individual market share of the parties of the vertical agreement exceeds 15%, it does not automatically breach the paragraph one of the Article 101. The hereof agreements still may not have significant effect on trade between the member states or may not significantly restrict competition. Hence, the Commission presumes that it is necessary to conduct analysis of the vertical agreements in legal and economic context.[33]

In view to ensure agreement between the economic agents deriving from the context of the Article 101, the parties shall express joint intention to act on the market in certain directions. The form of expression of an intention does not matter as it is a reliable expression of intentions of the parties. And in the event when no clear agreement exists on meeting of wills, as the European Court of Justice declares, the Commission shall prove that unilateral policy of one party has obtained tacit acquiescence of another party. In the event of vertical agreements, there are two ways to express tacit acquiescence towards unilateral policy. The first may derive from the rightsgranted under the preliminarily concluded general agreement. For instance, the provisions of the preliminarily concluded general agreement authorize the party to subsequently adopt the certain unilateral policy binding for another party. Correspondingly, tacit acquiescence to the hereof policy may derive on the basis of the hereof provisions. The second way is that in the event of absence of the hereof clear consent, the Commission is entitled to endorse the fact of tacit consent. First of all, the Commission shall demonstrate that one party needs anexpressed or tacit cooperation from another party for implementation of the unilateral policy thereof. Besides, the Commission shall prove that another party has been implementing the hereof requirements by means of establishment of unilateral policy in practice. For instance, if after declaration of unilateral reduction of supply by the supplier aimed at evasion of parallel trade, the distributors have immediately reduced orders and ceased to participate in the parallel trade. In this event, it implies that the distributor expressed tacit consent to the unilateral policy of a supplier. However, if the distributor continues parallel trade or finds new solutions for the parallel trade, it means that the distributor rejects the unilateral policy of a supplier. Often, the

[31] See EU Commission Guideline on Vertical Restraints, <http://ec.europa.eu/competition/antitrust/legislation/guidelines_vertical_en.pdf>, [21.03.2015].
[32] Ibid, §7.
[33] Ibid, §9.

supplier uses the monitoring and fining system to enforce the implementation of own unilateral policy. In this event, according to the level of coercion, the fact of tacit consent can be established.[34]

As the Commission declares, when considering the vertical agreements to define possible significant restriction of competition deriving from the context of the Article 101 as a result thereof, we need to analyze following factors:

- The nature of the agreement;
- The market shares of the parties of the vertical agreements;
- The market shares of the competitors;
- The market power of the buyers of the goods stipulated under the agreement;
- Entry barriers;
- Maturity of the market;
- Trade level;
- Nature of the product;
- Other factors.

6. Basic Restraints Provided in the Vertical Agreements

a. Restriction on determination of the resale price

As we have already mentioned above, Article 4 of the Regulation prohibits determination of the resale price by the supplier and allows the distributor independently defining the resale price. Namely, the hereof Article prohibits conclusion of the vertical agreement envisaging direct or indirect fixation of the price or setting the minimal sale price. The resale price may be maintained by indirect means. For instance: if the supplier determines the distribution margin or the maximal amountof discount.[35]

It is noteworthy that according to the Commission, determination of a maximal price by the supplier or indication to the recommendation prices is not to be considered as breach of the Article 101 as a rule.

As the Competition Agency states, maintenance of the resale price may entail negative outcomes as follows:

The first – by enhancing transparency of the price, the suppliers may conclude the secret agreement on the market;

The second – eliminateintra-brand competition and facilitation to the secret agreement between the distributors/dealers;

The third – reduction of competition between the supplier and/or retail traders, especially when the suppliers use the same distributors for their products and maintenance of the resale price concerns them all or majority of them;

The fourth – impediments to all or certain distributors in reduction of the resale price, that is, it entails indirect increase of the price;

[34] Ibid, §25.

[35] See the EU Commission Guidelines on Vertical Restraints, <http://ec.europa.eu/competition/antitrust/legislation/guidelines_vertical_en.pdf>, §48, [21.03.2015].

The fifth – the resale price may be maintained by the supplier equipped with the market power in order to prevent the competitors to enter the market. The suppliers with the market power may offer the increased margin to the distributors for possible win of the distributors over to serve to any of the certain brands.

The sixth – possible reduction of dynamics and innovation on the distribution level. Restricting the price between various distributors, maintenance of the resale price may hinder more effective retail traders to enter the market and/or obtain sufficient amount of goods at lower price. Besides, it may impede or hinder creation or enlargement of the format of distribution, based on lower prices.[36]

b. Restraints on the Territory and the Customers

The second prohibition of the Article 4 of the Regulation envisages restriction of the right of the seller to himself/herself define the territory for sale and/or the buyer of the goods and services. The hereof restraint contradicts as with the prohibitions of the Article 101 of the Competition Law so with one of the most important objectives of EU – creation of single market stipulated under Article 26 of the Treaty on the Functioning of the European Union.[37]

The EU Commission is particularly skeptical to the exclusive distribution agreements granting absolute territorial protection to the distributors. For instance, the supplier peculiarly obliges the distributors not to sell the goods to the certain customers or not to sell beyond the defined territory and thus, to submit the orders to the respective distributors.

Absolute territorial protection implies prohibition of export of goods by the distributors. The EU Case Law provides various examples of absolute territorial protection, including various models of the following territorial restrictions, namely:

- Export is permitted if the consent is obtained from the supplier or the supplier has been notified;
- When the goods are supplied to the distributor and the invoice provides "export prohibited";
- Insufficient goods are supplied to the distributor to prevent export of goods;
- Bonuses shall not be counted from the exported goods;
- The supplier has returned the exported goods;
- Supplied goods have the mark allowing identification of parallel import;
- The warranty is restricted with the territory of the member state where the goods have been acquired;
- Double price has been used for export prohibition;
- The distributor is required to deliver to the supplier the documents of the customer from other territory;
- The supplier menaces to terminate the agreement or actually terminates the agreement with the dealer or the distributor selling the goods beyond the allocated territory;
- The foreign customers are required to pay the deposit to the supplier unlike the local customers.[38]

[36] Ibid, §224.

[37] See *Mota M.*, et al, Hardcore Restrictions Under the Block Exemption Regulation on Vertical Agreements: An Economic View, <http://ec.europa.eu/dgs/competition/economist/hardcore_restrictions_under_BER.pdf>, 5, [05.04.2015].

[38] *Jones A., Sufrin B.*, EU Competition Law Text, Cases, and Materials, 4th ed., Oxford University Press, 2011, 655-656.

It is noteworthy that the hereof prohibition contains sundry exclusions, including prohibition of active sales on the exclusive territory or to the exclusive customers. As the Commission considers, the distributors and the dealers may be prohibited from active sales on other territory or to other customers, however they shall not be prohibited from passive sales as a rule.

Active sales imply active approach to the customers, for instance sending of the direct letters, including undesirable, without the demand by the customer e-mails; active approach to the customers of a certain group or to the customers on the defined territory via internet or by other means.[39]

Passive sales imply sales implemented in response to the demands by the individual customers, including provision of the hereof customers with goods and services. General commercials aired on TV or uploaded at the internet, reaching other distributors exclusive territories or the group of customers shall be considered as passive sales.[40]

Nowadays, internet allows the traders to establish relations with various and more customers. Generally, having the web-site is considered to be the passive sales form. It is a reasonable mechanism as the customers are capable to establish relations with the distributors via the internet. If the customer visits the web-site of the distributor, contacts the distributor and orders the goods, including delivery, it is also considered as passive sales.[41]

The Commission is skeptical to the restrictions established for the distributors, envisaging prohibitions of passive sales. The following types of restrictions of passive sales can be found in practice:

The first – the distributor is prohibited from allowing the customers from the exclusive territory of another distributor visiting his/her web-site, or the web-site will automatically redirect the hereof customers to the web-site of the respective distributors;

The second – the exclusive distributor shall be imposed with the obligation to terminate internet transactions with the customers after detection of discrepancy of the credit card address with the exclusive territory of the distributor;

The third – the parties of the vertical agreement agree that internet sales shall not exceed the certain amount of total sales;

The fourth – the distributor shall be assigned to set higher price to the internet transactions.[42]

7. Negative Outcomes of Vertical Restraints

According to the Commission, the hereof restrictions provided in the vertical agreements may entail the negative outcomes as follows:

The first – increase market entry barriers for other suppliers or buyers and subsequently foreclose for them market;

The second – reduce competition between the supplier and the competitors thereof and/or allow them concluding the secret agreements as a result of reduction of inter-brand competition between the brands;

[39] See EU Commission Guidelines on Vertical Restraints, <http://ec.europa.eu/competition/antitrust/legislation/guidelines_vertical_en.pdf>, §51, [21.03.2015].
[40] Ibid.
[41] Ibid, §52.
[42] Ibid.

The third – reduce competition between the distributors/dealers and their competitors and/or allow the distributors/dealers of same brand conclude the secret agreement;

The fourth – threat to one of the most important objectives of EU – integration of European market.

8. Objective Necessity of Hardcore Restraints

The hardcore restraints shall not be particularly prohibited under the Article 101 if they are objectively necessary for implementation of the agreements of certain nature, namely:

The first -it is objectively necessary to ensure that a public ban on selling dangerous substances to certain customers for reasons of safety or health is respected.[43]

The second – the distributor represents new type of goods to the market or introduces existing brand to the new market and he/she has committed substantial investment for entry and development of the market. In this event, naturally the distributor shall not conclude the agreement with the supplier failing to protect his/her interests. According to the Commission, in such cases, other distributors may be prohibited from active and passive sales on the respective territory to the existing customers or to the group of the customers allocated for the distributor during the first two years;[44]

The third – In the case of genuine testing of a new product in a limited territory or with a limited customer group and gradual introduction thereof to the market, the distributors may be prohibited from active sales beyond the hereof territory or the group of customers on the first stage;[45]

The fourth – if the supplier has been incurredsubstantially higher costs ononline transactions, he/she may set higher prices for the hereof agreements.[46]

9. Efficiencies Stemming from Vertical Restraints

According to *Steven Mahinka,* the vertical restraints may be necessary in view of achievement of the objectives of legal commercial activity.[47] According to the EU Commission, the restraints provided in the vertical agreements may facilitate to solution of the problems as follows:

The first – establishing the vertical restraints, the supplier may eliminate the problem of so-called "free riding" amongst the distributors. For instance, one distributor may have the pre-sale service envisaging usage of the vehicle for sale by the potential buyer in view of testing. The buyer may enjoy the hereof service from one distributor to test the vehicle but subsequently buy the same model and brand vehicle from another distributor at lower price due to absence of the pre-sale service. In this event, the second distributor is considered to be a "free rider" as he/she enjoys free of charge the pre-sale service offered by the first distributor. For solution of the hereof problem, the supplier may bind all the distributors under the agreement to render effective service to the potential buyers prior to conclusion of the agreement.

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[43] See EU Commission Guidelines on Vertical Restraints, <http://ec.europa.eu/competition/antitrust/legislation/guidelines_vertical_en.pdf>, §60.

[44] Ibid, §61.

[45] Ibid, §62.

[46] Ibid, §64.

[47] *Mahinka S.*, Vertical Restraints as Exclusionary Practices: Current Issues in Regulated and Deregulated Industries, Antitrust Law Journal, Issue 58, 1989-1990, 58.

The second – in view of introduction of goods or services by the distributor to the new territory, he/she may need to invest on the hereof territory, refund of which might be related to certain risks. Deriving from the hereof circumstances, the distributor needs territorial protection for a certain period of time to manage temporarily set higher price to levy from the investments.

The third – in some sectors, the retail traders sell only "high-quality" products. Sale of goods via the hereof traders may be beneficial when introducing new products to the market. In the event, if initially the supplier fails to restrict sales of own goods via the brand shops, introduction of newly manufactured product may be put under risk. In this event, establishment of the restraints for a short period may be justified, such are exclusive or selective distribution. The limited period shall allow introduction of new product to the market but not so long as to hinder large-scale dissemination.

The fourth – sometimes, the suppliers or distributors/dealers may be required to ensure customer-oriented investment. For instance, the manufacturer of the components may be required to create new device to meet particular requirements of his/her customers. In this event, the manufacturer shall not invest unless particular supply conditions are stipulated under the agreement.

The fifth – the vertical restraints may facilitate to the scale economy in distribution. If the supplier wants to enjoy scale economy and sale own production on a lower the retail price, he/she may entrust sales to a limited number of the distributors. In this view, he/she may use exclusive distribution and require from the retail traders to buy the particular amount of goods or use selective distribution with the similar requirements.

The sixth – the vertical restraints may develop uniformity and standardization of quality. Namely, the vertical agreements may create the brand image in the event if the particular measures of uniformity and quality standardization will be established for the distributors, which will increase the level of trust of the end consemers to the brand and increase sales. It can be achieved by means of selective distribution and franchising.[48]

10. Conclusion

Deriving from the above-mentioned, the restraints provided in the vertical agreements contain certain risks in terms of competition. Despite that the agreements of the hereof type compared to the horizontal restraints bear less harmful effects for the competition, they still need particular attention of the Competition Agencies. Competition Law mainly attaches attention to the vertical agreements if the competition between the brands (inter-brand competition) – or between the suppliers is restricted on the market. The EU Commission is particularly skeptical for the vertical agreements concerning fixation of the resale prices or allocation of markets/customers. At that, it is noteworthy that in case of certain objective reasons, the vertical restraints may be exempted from the prohibitions. According to the European Competition authorities, the vertical agreements shall be subject to the thorough economic and legal analysis to define whether they restrict competition on the market. Studying the vertical agreements, we shall take various factors into account, including the circumstances such are the market shares of the parties of the vertical agreements, the market shares of the competitors thereof, existence of barriers to entry, maturity of the market etc.

[48] Ibid, §107.

Ana Ramishvili*

The Place of Shareholder Activism by Institutional Investors in Georgian System of Corporate Governance and Its Influence on International Merger Transactions

Institutional investors, in the course of the international mergers and acquisitions deals, play the particular role and the function. Increase of the role of institutional investors has been entailed with establishment of shareholder activism as the efficient mechanism for improvement of the corporate governance. The activist, by means of consideration of the nature and the forms of the types of the shareholders and the activism thereof, strives to define the feasibility of establishment of shareholder activism practice in Georgian companies and to demonstrate the interdependence between the institutional shareholder activism and the effective protection of the rights of minority shareholders. The article outlines the basics forming due pre-conditions for development of shareholder activism, which serves as a real opportunity for institutional shareholder activism to become the integral part of Georgian system of corporate governance.

The role of the institutional investors, especially of the foreign institutional investors is manifested in exercise of the facilitative function, which in its turn makes the convergence of the corporate governance achievable. Alternative investment funds, through arbitrage transactions and activism related with appraisal of the stock shares, which have already become the integral parts of their investment strategy, facilitate to increase of the transaction price and fair valuation of the shares appurtenant to the minority shareholders. The institutional shareholder activism, based on the surveys, facilitates to extension of the rights of the minority shareholders and effective realization thereof.

Key words: *shareholder activism, convergence of corporate governance, foreign institutional investors, international mergers and acquisitions, hedge funds, merger arbitrage, appraisal activism.*

1. Introduction

International merger is considered as one of the deals characterized for the corporate world, used for obtainment and enhancement of the leading position on the global market. Multinational corporations resort to international merger deals as the instrument for growth, enlargement and introduction to the new markets. The institutional investors play significant role in the process of international merger having capacity to incur significant influence on the deals of such type. Increase of the role of the institutional investors was facilitated with emergence of the shareholder activism. Shareholder activism is the fastest growing American trend of modern corporate governance assuming the responsibility to improve corporate governance and widely spread it worldwide, including in the countries of the Continental Europe.

* Doctoral Student, TSU Faculty of Law.

The hereby article aims to outline the role of the shareholder activism of the institutional investors within the uniform system of corporate governance and to define impact thereof on international merger deals. Studying the issues related to the shareholder activism, the article strives to define possibility of establishment of the shareholder activism in Georgian companies. Hence, the surveys revealed the basis creating the fertile ground for development of shareholder activism.

Consideration of the shareholder activism of the institutional investors aims at demonstration of inter-relation between protection of rights of the minority shareholders and activism to identify the degree of facilitation of the institutional shareholder activism to extension of the rights of the minority shareholders and even effective application thereof and hence, better protection of interests of the shareholders in minority. Hereof approach to the issue derives from the fact that the institutional investor at most extent takes advantage of the status of the minority shareholder.

Consideration of the issue of the institutional shareholder activism resulted in identification of the role of the international institutional investor upon international merger. The article ends with consideration of convergence of corporate governance approachable by means of implementation of the international merger deals and active participation of institutional investors therein.

The survey provided in the conclusion establishes the recommendations to facilitate to development of shareholder activism of institutional investors in Georgian companies on the one hand and on the other hand to ensure conversion of the institutional shareholder activism into the integral part of Georgian system of corporate governance.

2. Institutional Shareholder Activism as the Tool for Improvement of Corporate Governance

2.1. The Essence and the Objective of Shareholder Activism

The shareholder activism is the highest manifestation of shareholder engagement, the universally recognized definition of which with the opinion reconciled amongst the scientists and practitioner lawyers is currently unavailable. The term is often applied to express any activities implemented by the shareholder. The European Corporate Governance Institute gives the definition to this term as the way to be passed by the company owner shareholders where the shareholders are capable to enhance own powers by impacting the social behavior.[1] Shareholder activism, in the strict perspective, can be delivered prior to involvement of the shareholders in the company management and in wider perspective implies engagement of the institutional investors.[2] Shareholder activism falls within the area of the market for corporate influence[3] where unlike the market for corporate control, the parties struggle to obtain influence by means of application of various strategies and tactics to change the strategy or decision.[4] Fights on the corporate control market start for further fundamental changes.[5]

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1 See <http//www.ecgi.org/activism/index.php>, [28.04.2015].

2 *Chiu I.,* The Foundations and Anatomy of Shareholder Activism, Oxford, 2010, 3.

3 *Cheffins B.R., Armour J.*, The Past, Present, and Future of Shareholder Activism by Hedge Funds, J. Corp. L., Vol. 37, Issue 1, 2011, 58.

4 For more information see *Rose P.*, Shareholder Proposals in the Market for Corporate Influence, Florida L. Rev., Vol. 66, 2014, 2179-2228.

The essence of the shareholder activism is often expressed in active realization and enforcement of the rights prescribed under the law by the minority shareholders entailing consideration of the institutional shareholder activism as the method of prevention of deprivation of interests of the minority shareholders.[6] The starting point of such definition of the shareholder activism is the rights of the shareholders and protection thereof, which often serves as the argument resulting in justification of active involvement of the shareholders in corporate governance-administration.[7]

The primary objective of the shareholder activism is enhancement of the role, influence and power of the shareholder without introduction of changes to the control.[8] To be more specified, the objective of the shareholder activism is to increase the shareholder value in long-term perspective achievable by means of influence on the behavior of the heads of the company. Shareholder activism often is the long-term and complex discussion process initiated by one or over shareholders aspiring to better distribute shareholder values in the target company. Shareholder activism can be driven with ecologic and social interests along with economic interests. Some researchers presume that the benefits gained as a result of shareholder activism are one of the varieties of public goods.[9] Despite, economic interest still remains the greatest motivator of the shareholder activism.

2.2. Types of Activist Shareholders and the Nature of their Activism

2.2.1. Retail Investors

Retail investors compose the smallest group of the activist shareholders. Most of the retail investors, as a rule, invest by means of mutual and pension funds which allows professional management of invested funds.[10] Another part of the retail investors implement activism independently.

The essence of the shareholder activism of the retail investors is manifested in achievement of the retail shareholder to not only put the issue into the agenda but to trigger further solution thereof.[11] Critics of the shareholder activism note that activism shall not be the end in itself for the retail shareholder.[12] Individual activism often fails to give tangible outcomes, which is the basis for criticism to consider that the shareholder shall not resort to activism for the purpose of noise only, which results in no positive outcome.[13] Actions of the activist shareholder shall express the sense of

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5 *Kahan M., Rock E.B.,* Hedge Funds in Corporate Governance and Corporate Control, U. Pa. L. Rev., Vol. 155, Issue 5, 2007, 1040.

6 *Low Ch.K.,* A Road Map for Corporate Governance in East Asia, Nw. J. Int'l L. & Bus., Vol. 25, Issue 1, 2004, 185-186.

7 *Armour J., Cheffins B.R.*, The Rise and Fall (?) of Shareholder Activism by Hedge Funds, ECGI Working Paper № 136, 2009, 2009, 2.

8 *Gillan S.L., Starks L.T.,* The Evolution of Shareholder Activism in the United States, Journal of Applied Corporate Finance, Vol. 19, Issue 1, 2007, 58.

9 *Nili Y.*, Missing the Forest for the Trees A New Approach to Shareholder Activism, Harvard Bus L. Rev., Vol. 4, 2014, 167.

10 *Cahn A., Donald D.,* Comparative Company Law, Cambridge UP., Cambridge, 2010, 799.

11 In details see *Gulinello Ch.,* The Retail Investor Vote Mobilizing Rationally Apathetic Shareholders to Preserve or Challenge the Board's Presumption of Authority, *Utah L. Rev.,* Vol. 2010, Issue 3, 2010, 547-604.

12 For more information, see *Langevoort D.,* The SEC, Retail Investors, and the Institutionalization of the Securities Markets, Va. L. Rev., Vol. 95, Issue 4, 2009, 1025-1083.

13 *Harris L.,* Missing in Activism Retail Investor Absence in Corporate Elections, Colum. Bus. L. Rev., Vol. 104, Issue 1, 2010, 104-204.

rationality dictating to implement activism in the event solely when expected profit exceeds the costs.[14] Activist shareholder[15] always has to choose between impact on or provision of high liquidity of the share. Retail investors mostly choose the second option.

2.2.2. Traditional Institutional Investors

The institutional investors constitute the greatest part of the activist shareholders the level of activism of which drastically exceeds the index of the retail investors which derives from holding of the larger shares of stocks. Increase of the role of the institutional investor is facilitated with establishment of the stewardship theory, which is one of the most applied theories amongst the theories of corporate governance, considering the institutional investor in the role of the steward.[16]

Institutional shareholder activism is of a defensive nature as a rule and is characterized with the responsive properties.[17] The shareholder activism of the mutual investment and public pension funds is accidental and is implemented *ex post,* namely when the top management of the funds notice that corporate governance and activity are being developed in undesired directions in which they have invested.

The institutional investor is not usually involved in routine activity, though some of them still attempt to and thus, are being exposed to criticism. In general, it is considered that the institutional investors shall abstain from involvement in routine activity. The institutional investor interferes in governance-management issues when the long-term interests of the society fall under danger.[18] Disclosure of information often fails to give a whole scene which entails necessity to apply other supplementary mechanisms to influence the society. The professor *S. Brainbridge* considers that influence of activism of the institutional investors on corporate governance of the society is minimal.[19] Some of the scientists presume that the institutional shareholder activism means excessive control over the behavior of management, which is the costly procedure subject to be applied in the event of necessity solely.[20]

2.2.3. Alternative Institutional Investors

The alternative institutional investors compose the group of activist shareholders of a brand new type, the structure of which is completed with the alternative investment funds.[21] The hedge

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[14] *Black B*., Protecting the Retail Investor in an Age of Financial Uncertainty, Dayton L.U. Rev., Vol. 35, 2009, 64.

[15] Retail as Well as Institutional Investor.

[16] In details see *Chiu I.,* Institutional Shareholders as Stewards Toward a New Conception of Corporate Governance, Brook. J. Corp. Fin. & Com. L. Vol. 6, 2012, 387-432.

[17] *Cheffins B.R., Armour J.,* The Past, Present, and Future of Shareholder Activism by Hedge Funds, Corp J. L., Vol. 37, Issue 1, 2011, 58.

[18] For more information, see *Sharfman B.,* A Theory of Shareholder Activism and its Place in Corporate Law, Tenn L. Rev., Vol. 82, Issue 4, 2015, 101-134.

[19] *Bainbridge S.,* The New Corporate Governance in Theory and Practice, Oxford UP., Oxford, 2008, 22.

[20] For more information, see *Romano R.,* Less is More Making Institutional Investor Activism A Valuable Mechanism of Corporate Governance, Yale Journal on Regulation, Vol. 18, Issue 2, 2001, 174-252.

[21] Along with the hedge-funds, Private equity funds, exchange traded funds and sovereign weatth fund also are included into the alternative investment funds *Çelik S*., *Isaksson M.,* Institutional Investors as Owners Who Are They and What

fund can be outlined from the alternative investment funds, which is the most dynamic activist shareholder[22] capable to act like real owner.[23] The activist hedge funds along with private equity funds have occupied the area remaining vacant by the credit rating agencies, market for corporate control, rational application of voting rights and accountability of the directors.[24]

The first hedge funds appeared in USA. The historical predecessor of the modern hedge fund was the fund founded by Alfred Winslow Jones in 1949, which was not subordinated to the requirements of *the Investment Company Act of 1940.* The term itself is related to Carol Loomis who used it for the first time in 1966 to characterize the fund. The investment fund of the sophisticated (experienced) investors is the Georgian analogue of the hedge fund.[25] The circle of investors of the hedge fund is composed of the accredited and qualified investors solely. Similar to the hedge fund, only sophisticated (experienced) investor can become the participant of the investment fund of the sophisticated (experienced) investors.[26] Unlike the traditional institutional investors, hedge funds hold more concentrated portfolio and mostly finance the deals by means of the credits.

Activism of hedge funds differs from the activism of the traditional institutional investors with the qualitative and quantitative indices.[27] The main concern around the activity of the hedge funds implied reckon on the short-term objectives and interest during the years.[28] The activity of the hedge funds increases likelihood of systemic risks[29] which played a significant role upon financial crisis and further is explained with application of credit derivatives.[30] Necessity of intensive regulation of the hedge fund can often be explained with reduction of the credit risk,[31] generated upon application of the credit derivatives by the hedge funds.[32] Activism of hedge funds fall under criticism due to the empty voting as well which is no rare event accompanying the merger deals.[33] Empty voting, as manipulative sale and purchase of the suffrage, derives from the strategy of realization of suffrage and separation of economic interests and describes the situation when the interest of a shareholder to

Do They Do? OECD Corporate Governance Working Papers, №11, OECD Publishing, 2013, 8. Available on, <http//dx.doi.org/10.1787/5k3v1dvmfk42-en>, [16.09.2015].

[22] *Kahan M*., *Rock E.B.,* Hedge Funds in Corporate Governance and Corporate Control, U. Pa. L. Rev., Vol. 155, Issue 5, 2007, 1028.

[23] Ibid, 1047.

[24] *Macey J.,* Corporate Governance Promises Kept, Promises Broken, Princeton UP, Princeton, 2008, 272.

[25] See the sub – § "b" of the paragraph 3 of the Article 3 of the Law of Georgia on Investment Funds.

[26] See the §59 and 57 of the Article 2 of the Law of Georgia on Securities Market.

[27] *Kahan M., Rock B.*, Hedge Fund Activism in the Enforcement of Bondholder Rights, NW. L. Rev., Vol. 103, 2009, 282.

[28] *Katelouzou D*., Worldwide Hedge Fund Activism Dimensions and Legal Determinants, J. Bus. L., Vol. 17, Issue 3, 2015, 791.

[29] *Hawley J., Kamath J., Williams A.,* Corporate Governance Failures The Role of Institutional Investors in the Global Financial Crisis, Penn UP, Philadelphia, 2011, 14.

[30] In General see *Stout L. A.,* Derivatives and the Legal Origin of the 2008 Credit Crisis, Harv. Bus. L. Rev., Vol. 1, 2011, 1-38.

[31] *Shadab H.,* The Law and Economics of Hedge Funds Financial Innovation and Investor Protection, Berkeley Bus. L. J., Vol. 6, 2009, 260.

[32] *Wynkoop N*., The Unregulables? The Perilous Confluence of Hedge Funds and Credit Derivatives, Fordham L. Rev., Vol. 76, Issue 6, 2008, 3096.

[33] For more information, see *Zanoni A*., Hedge Funds' Empty Voting in Mergers and Acquisitions A Fiduciary Duties Perspective, Global Jurist, Vol. 9, Issue 4, 2009, 41-79.

vote is much more important than his/her economic interest.[34] Despite, the recent surveys confirm that hedge fund activism does not imply the harmful strategy in long-term perspective.[35]

Activism of hedge funds consists of sundry stages,[36] is of offensive nature and is implemented *ex ante,* namely the manager of the hedge fund starts with estimation of the potential target in terms of profitability to further acquire the share and enact.[37] Activism of the hedge funds is presented somewhere between risky sale and purchase of securities and the fight for the corporate strategy and control.[38]

Hedge fund activism is considered as the corrective mechanism of the corporate governance, capable to facilitate to increase of the shareholder value by means of introduction of changes to the management board and the strategy of the company, as well as to ensure improvement of the corporate governance system in the target company by means of provision of the valuable information for the top management.[39] Hedge fund activism allows real growth of the shareholder value in long-term perspective by means of activities ensuring early warning and notification of the upper link (Board of Directors) of the company concerning expected ineffective decision-making by the lower link (management) by means of provision of information and issue of recommendations.[40]

2.3. Fiduciary Duties of the Activist Shareholder and their Importance

Emergence of the institutional investors and increase of their role, as well as development of the shareholder activism enabled the shareholders to increase own influence in the company. Increased influence converted the shareholders into better informed and active shareholders, making their interests more heterogeneous. Increase of influence of the activist shareholder entailed danger that the increasing influence would serve not for the interests of the society, namely for improvement of corporate governance and provision of accountability of top management but for personal interests solely mostly at the account of the rest of the shareholders.[41]

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[34] In details, see *Hu h., Black B.,* The New Vote Buying Empty Voting and Hidden (Morphable) Ownership, S. Cal. L. Rev., Vol. 79, 2006, 811-908.

[35] In details, see *Bebchuk L., Brav A., Jiang W*., The Long-Term Effects of Hedge Fund Activism, Colum. L. Rev., Vol. 115, Issue 5, 2015, 1085-1156. Also see *Katelouzou D*., Myths and Realities of Hedge Fund Activism Some Empirical Evidence, Va. L. & Bus. Rev., Vol. 7, 2013, 459-504.

[36] Hedge-funds can be sub-categorized into entry, trade, discipline and exit stages. In details, see *Katelouzou D.,* Worldwide Hedge Fund Activism Dimensions and Legal Determinants, J. Bus. L., Vol. 17, Issue 3, 2015, 797.

[37] *Cheffins B.R., Armour J.,* The Past, Present, and Future of Shareholder Activism by Hedge Funds, J. Corp. L., Vol. 37, Issue 1, 2011, 57.

[38] *Kahan M., Rock E.B.,* Hedge Funds in Corporate Governance and Corporate Control, U. Pa. L. Rev., Vol. 155, Issue 5, 2007, 1069.

[39] *Rose P., Sharfman B.,* Shareholder Activism as a Corrective Mechanism in Corporate Governance, BYU L. Rev., Vol. 2014, Issue 2, 2014, 101-135, also available at <http//ssrn.com/abstract=2324151>, [07.12.2014].

[40] For more information, see *Sharfman B*., Activist Hedge Funds in a World of Board Independence Creators or Destroyers of Long-Term Value? Columbia Business Law Review, Forthcoming. Available at, <http//ssrn.com/abstract=2576408>, [24.03.2015]. If we adjust this approach to Georgian reality, we will enable the institutional investors to inform the Supervisory Board concerning the detected shortcomings in the decisions made by the Directors.

[41] *Geczy Ch., Jeffers J., Musto D., Tucker A*., Institutional Investing When Shareholders Are Not Supreme, Harv. Bus. L. Rev., Vol. 5, Issue 1, 2015, 75.

In compliance with the situation modified according to development of the shareholder activism of the institutional investors, the doctrine and the judicial practice have gradually started application of the fiduciary duties to the activist shareholders of traditional concept and underlined the essence and importance of the fiduciary relations with respect to each other.[42] Modern institutional shareholder activism implies responsible behavior of a shareholder equipped with the fiduciary duties as towards the whole corporation so towards the rest of the shareholders and serves as the watchdog for improvement of corporate governance and protection of interests of the company and the shareholders in long-term perspective.

2.4. Forms of the Shareholder Activism

2.4.1. The Initial Stage of Activism: The Wall Street Rule and Relative Investment

Institutional shareholder activism can be exercised in various different forms. The easiest form of the shareholder activism constitutes exit from the company by selling the stocks. The shareholder, instead of becoming activist and attempting to have influence, expresses own experience in this manner.[43] Sale of the shares of the shareholders is one of the forms of the shareholder activism on the basis of the presumption that sale of the shares appurtenant to the institutional investors is an alarming sign negatively impacting on the image and the reputation of the society. Sale of the large package appurtenant to the institutional investor may have negative impact on the price of the stocks.[44]

The Wall Street Rule affects when the costs of discipline of the top management and expected benefit are less than the benefit to be obtained from the sale of the stocks and cannot outweigh the discipline costs. Mostly, it is the retail investor walking the Wall Street who prefers sale of the stocks against the fight. The strategy of exit of this manner is justified when the level of concentration of the shareholder structure reduces as it is considered that when concentration is high, the top management is more disciplined. In other words, discipline of the top management with activism is more rational.[45]

The shareholder, still tending to stay in the company, starts own activism in relatively easy form. The initial form of the shareholder activism is relative investment envisaging establishment of long-term partnership relations and creation of the cooperative environ by means of written correspondence, tête-à-tête relationship, meetings, private discussions, negotiations and other forms of active communication with the top management.

Relative investment is the private form of the shareholder activism unlike wide-scale campaigns and public debates, attributed to more public forms of activism.[46]

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[42] *Anabtawi I., Stout L.,* Fiduciary Duties for Activist Shareholders, Stanf. L. Rev., Vol. 60, Issue 5, 2008, 1260.

[43] *Admati A.R., Pfleiderer P.,* The Wall Street Walk and Shareholder Activism Exit as a Form of Voice, The Review of Financial Studies, Vol. 22, Issue 7, 2009, 2650.

[44] *Rock E.,* Shareholder Eugenics in the Public Corporation, Cornell L. Rev., Vol. 97, 2012, 856.

[45] Ibid.

[46] *Gillan S.L., Starks L.T.,* The Evolution of Shareholder Activism in the United States, Journal of Applied Corporate Finance, Vol. 19, Issue 1, 2007, 51.

2.4.2. Activism Related to the General Meeting

After the initial stage of the shareholder activism is over, it is time to apply the forms related to the general meeting of shareholders, concluding independent inclusion of a separate paragraph into the agenda of the meeting, voting by proxy and application of e-communication forms upon voting. As the negotiations with the top management fails, shareholder proposal and demand to include the shareholder proposal into the agenda replace the main mechanism in the struggle for corporate influence.[47] USA and Europe have long ago started practicing inclusion of a separate paragraph into the agenda of the general meeting of shareholders. The Rule 14a-8 adopted on the basis of the Securities Exchange Act in USA[48] and the article 6 of the Directive on Exercise of Certain Rights of Shareholders in Europe[49] serve as the normative basis of the hereof form of the shareholder activism.[50] The American Rule simplifies communication and coordination between the shareholders and the main advantage thereof lies in evasion of costs for development of the application on proxy and the disadvantage is that it shall be submitted six months prior to convocation of the general meeting and the list of the issues is limited at some extent. Introduction of the proposals on the issues related to the corporate governance shall be implemented in compliance with the Rule 14a-8, entitling the shareholders to include the initiated issue and the supportive statement of at least 500 words into the application on proxy, further submission of which to the shareholders shall be ensured by the corporation.

The most common form of the shareholder activism is realization of suffrage by means of proxy and e-communication, considered as the basic leverage of the shareholder activism.[51] Increase of the role of the institutional investors conditioned replacement of shareholder primacy with the voter primacy paradigm.[52] Voting by proxy and by e-form facilitates to mobilization of votes, which increases raising the issues at the general meeting and likelihood of decision acceptable for the activist. Transformation of the practice of voting by proxy has been entailed with establishment of new type of advisory service, focused on voting by proxy in corporations directly. Proxy advisory services are rendered to all the institutional investors or the proxies thereof, realizing suffrage at the general meeting of the shareholders by proxy.[53] Proxy advisory companies, often in view of inquiry of the proxies, play the role of the intermediaries with the shareholders of the target society.

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47 *Rose P.*, Shareholders Proposals in the Market for Corporate Influence, Florida L. Rev., Vol. 66, 2014, 2180.

48 See 17 CFR 240. 14a-8 – Shareholder Proposals.

49 See Directive 2007,36, EC on the Exercise of Certain Rights of Shareholders in Listed Companies, O.J. L 184, 14,7, 2007, 17-24.

50 The Hereof Article has Triggered Establishment of the Shareholder Activism Movement. *Masouros P.*, Is the EU Taking Shareholder Rights Seriously? An Essay on the Importance of Shareholdership in Corporate Europe, European Company Law, Vol. 7, Issue 5, 2010, 200. Despite, lots of legal impediments remaining, hindering to due development of the institutional shareholder activism in Europe. See *Santella P., Baffi E., Drago C., Lattuca D.*, Legal Obstacles to Institutional Investor Activism in the EU and in the US, Eur. Bus. L. Rev., Vol. 23, Issue 2, 2012, 257-307.

51 *Masourous P.*, Is the EU Taking Shareholder Rights Seriously? An Essay on the Impotence of Shareholdership in Corporate Europe, European Company Law, Vol. 7, 2010, 201.

52 *Haan S.,* Voter Primacy, Fordham L. Rev., Vol. 83, Issue 5, 2015, 2655.

53 *Dent G.,* A Defense of Proxy Advisors, Mich. St. L.Rev., Vol. 2014, Issue 5, 2014, 1290.

2.4.3. Class Action of the Lead Plaintiff

Application of innovative approaches has largely facilitated to diversification of the forms of the shareholder activism, which conditioned interest of the activist shareholder in protection of the rights through litigation. Application to the Court has become an outstanding, however the contradictory form of the shareholder activism.[54] Litigation initiated by the activist shareholder is recognized as the most effective and unique form of the shareholder activism.

Along with the direct and derivative actions of the shareholder, the securities class actions have appeared on the shareholder activism theatre, which serves as the mean of private enforcement of legislation on securities and is the form of the representative action.[55] Engagement of the institutional investor in the litigation initiated in relation with breach of the legislation on securities has become possible due to inculcation of the institution of the lead plaintiff, envisaged under the Private Securities Litigation Reform Act of 1995.[56] Practice of the lead plaintiff allowed the institutional investors applying the class action in capacity of one of the forms of activism.[57] Participation of the institutional investors in the actions filed on securities fraud is attached with utmost importance and they have full support therein.[58] Participation of the institutional investors in the litigation related to the merger deals on behalf of the lead plaintiff along with the actions filed on securities fraud is the judicial form of the shareholder activism, which generates one of the varieties of the traditional judiciary forms of the shareholder activism.[59]

In the litigation initiated on breach of the law on securities, the company itself represents the respondent. The retail investor does not resort to the institute of the lead plaintiff as he/she is considered as a less sophisticated investor.[60] Some of the researchers suppose that the representative action fails to adequately reflect interests of other shareholders due to which it would be expedient if other group of the shareholders as well is engaged in capacity of the respondent.[61]

3. Role of the Institutional Investors upon International Mergers and Acquisitions

3.1. Foreign Institutional Investor as a Facilitator

The foreign institutional investors play one of the central and key roles in the process of international merger transactions, taking active part in every stage of development-planning, conclusion and

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[54] *Perino M.*, Institutional Activism Through Litigation An Empirical Analysis of Public Pension Fund Participation in Securities Class Actions, *Empir J.,* Leg. Stud., Vol. 9, 2012, 368.

[55] *Choi S., Fisch J.,* On Beyond CalPERS Survey Evidence on the Developing Role of Public Pension Funds in Corporate Governance, Vand. L. Rev., Vol. 61, 2008, 316.

[56] *Choi S., Silberman L.*, Transnational Litigation and Global Securities Class Action Lawsuits, Wisc. L. Rev., Vol. 2009, 479.

[57] *Thomas R.,* The Evolving Role of Institutional Investors in Corporate Governance and Corporate Litigation, Vand. L. Rev., Vol. 61, 2008, 300-301.

[58] *Silver Ch., Dinkin S.*, Incentivizing Institutional Investors to Serve as Lead Plaintiffs in Securities Fraud Class Actions, DePaul L. Rev., Vol. 57, Issue 2, 2008, 471.

[59] *Webber D.*, Private Policing of Mergers and Acquisitions An Empirical Assessment of Institutional Lead Plaintiffs in Transactional Class and Derivative Actions, Del. J. Corp. L., Vol. 38, Issue 3, 2014, 907.

[60] *Webber D.*, The Plight of the Individual Investor in Securities Class Actions, Nw. U. L. Rev., Vol. 106, Issue 1, 2012, 180.

[61] *Burch E.,* Optimal Lead Plaintiffs, Vand. L. Rev., Vol. 64, 2011, 1115.

implementation of the deals and thus, simplifying the process.[62] The foreign institutional investor increases the chances of the merger deal to obtain international nature. The institutional investors tend to seek for the potential partners abroad. The foreign institutional investors link the companies of various countries on international level and thus, act in capacity of the facilitators of the international market for the corporate control, facilitated with the international networks of the deals and connections available for the institutional investors, which simplifies exercise of the hereof function by the facilitators.[63]

The initial stage of the process of international takeover is characterized with lobbying of the takeover bid, resorted to by the institutional investors and arbitrageur and thus, attempting to incur pressure on the Board of the Directors of the target corporation in view of approval thereby. Often, institutional investors, in view of obtainment of the proxy, aspire to replace the members of the Board of Directors through the specialized companies by means of accumulation of the votes.[64] Occupation of the positions of the members of the Board of Directors and the Audit committee facilitates the candidates protecting the interests of the foreign institutional investors to implement due oversight of the corporation and hence, exercise the role of the facilitator. The foreign institutional investor often independently resorts to due diligence procedure in view of better implementation of the function of facilitator and studies the target corporation selected for merger.

The role of the institutional investors increases when the preliminary consent of the initiator of merger regarding application of one or another tactics is obtained. The acquired corporation, through communication, provides the institutional investors with the information concerning the expected offers and proposes to apply the warehousing tactics. Upon warehousing the stock shares, the institutional investor acquires the stocks of the target society with the purpose to further resell them to the initiator of acquisition at the price of the future market.[65] Lobbying acquisition and application of the warehousing method simplify acquisition of the package of shares for the offer or.[66]

The institutional investors and other alternative investment funds facilitate to fund-raising for implementation of international merger and acquisition deals. Investment in stocks is one of the sources of financing. Hedge funds and private equity funds often play the role of the financers in the deals,[67] gaining ordinary or preferred shares of the acquirer corporation.[68]

The institutional investors play the key role in reduction of informative asymmetry mostly characterizing the international deals of merger and acquisition. The foreign institutional investors, as being the investors in the developed countries, hold more expert experience and skills, which in its turn, facilitates to better implementation of the function of facilitator. Importance of the insti-

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[62] *Krishnamurti Ch.,* Mergers, Acquisitions and Corporate Restructuring, Response, London, 2008, 187.

[63] *Bragg S.,* Mergers & Acquisitions A Condensed Practitioner's Guide, Wiley, Hoboken, 2009, 53.

[64] *Depamphilis D.,* Mergers and Acquisitions Basics, Elsevier, New York, 2011, 181.

[65] The hereof practice enables circumvention of the requirements of the *William Act* but the Commission on Securities and Exchanges does not always hail application of such tactics. *Brown R*., Mergers, Acquisitions and Divestitures, Palgrave Macmillan, New York, 2007, 71-72.

[66] *Bragg S.,* Mergers & Acquisitions A Condensed Practitioner's Guide, Wiley, Hoboken, 2009, 53.

[67] Alternative Institutional Investors mostly Implement Financing by two Means – Investment and Issue of Loans. *Depamphilis D.,* Mergers, Acquisitions and Other Restructuring Activities, 6th ed., Elsevier, New York, 2012, 29.

[68] Along with the hedge-funds and the private capital investment funds, additional fund-raising can be implemented from the strategic and angel investors. See *Sherman A., Hart M.,* Mergers & Acquisitions from A to Z, 2nd ed., Amacom, N. Y. 2006, 143-146.

tutional investors further increases when the target corporation is located in the countries not characterized with high level of corporate governance and minority shareholder protection. It as well is noteworthy that due to absence of friendly relations of the institutional investors with the local companies, they are capable of better supervision over the corporations.[69]

3.2. Merger Arbitrage

Institutional investors and especially alternative investment funds often pursue strategies of event-driven activism and merger arbitrage which are event-driven investing strategies in the process of accomplishment of international mergers and acquisitions.[70] The structure of deal acquires particular importance in the process of application of the strategy of merger arbitrage on which depends the duration for accomplishment of deal, which in its turn, has an effect on number of deals and acceptable profit.[71]

Merger Arbitrage is concomitant phenomenon for fulfilment of international merger in particular at a stage of deal announcement. Arbitrage transactions are conducted in connection with shares of the target corporation from the moment when merger has been announced which gains are calculated from difference between buying and selling and creates merger arbitrageurs profit.[72] The shares of target corporation are being sold relatively at low price as a rule at the moment of announcement of mergers and acquisitions transactions than has been offered by initial party. Merger arbitrageurs take a long position on stocks in the target corporation to attempt grasping the difference between going market price and asked price what makes theirs gains and will be only obtained in a case of successful completion of merger. Security trading lasts until the merger is completed or that moment when merger is declared to end in failure. Acquiring party encourages hedge funds to acquire more and more shares in the process of hostile takeover with the reason for buy-out from them later and, thereby, increases the chances of successful completion of declared deal.[73] There is a high probability of successful accomplishment of mergers and acquisitions announcement, and not in rare cases, deal announcement is declared to meet with failure. Merger arbitrage is known as risk arbitrage because of the risk that is associated with completion of deal.

Number of arbitrage transactions being conducted in connection with shares of target corporation participating in international mergers and acquisitions deal has appreciably increased during the time that was explained by multiplication of hedge funds and their enhanced impact. The application of merger arbitrage as the strategy of risk arbitrage begins from the moment of merger announcement and causes unexpected, contingent and illogical fluctuation in share prices of the target corporation. Such dynamics concerning shares of the target corporation participating in merger might be completed by important increasing in share value at short run from the moment of announcement.

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[69] *Gaughan P*., Mergers, Acquisitions and Corporate Restructurings, 5th ed., Wiley, New York, 2011, 273.

[70] *Holber Th.,* Full of Hot Air*?* Evaluating the Airgas Court's Reservations about Shareholders′ Short-Term *and* Long-Term Interests in Takeovers*,* Fordham J. Corp. & Fin. L., Vol. 18. Iss. 1, 2012, 134.

[71] *Kirchner Th.,* Merger Arbitrage: How to Profit from Event-Driven Arbitrage, Wiley, Hoboken, 2009, 108-112.

[72] *Stowell D.,* An Introduction to Investment Banks, Hedge Funds, and Private Equity: The New Paradigm, Elsevier, London, 2010, 229.

[73] *Depamphilis D.,* Mergers, Acquisitions and Other Restructuring Activities, 6th ed., Elsevier, New York, 2012, 181.

3.3. Appraisal Activism

Activism being connected with appraisal rights is just one characteristic feature of merger transactions that has recently been arisen in the United States of America and gradually spreads to the Continent.[74] Activism being connected with appraisal rights is absolutely new type by its nature of activism which derivation and evolution were determined by several factors. The major reason for the popularity of appraisal activism was active development of shareholder activism movement itself that promotes to increase in number and what is mostly notable the efficiency of exercising the right to appraisal.

Institutional investors and especially hedge funds begin to acquire the target corporation shares in amount of about 5-10 percent from the moment of the spread of information on announcement or expectation of merger with a single reason to bring an action before the court and demand fair value for their shares. The judicial appraisal of shares as a rule is more high therefore more acceptable for plaintiff than receiving fair value of shares being defined into merger agreement. The difference between them is sometimes so great that covers judicial expenses related to appraisal right and then remains the plaintiff into profitable position.

The profitability of appraisal activism aroused interest among hedge funds for which makes a profit by conducting arbitrage transactions was familiar method. The judicial proceedings related to appraisal right and arbitrage transactions are so widespread and acceptable tactics for hedge funds and other activist shareholders that has become the part of their investing strategy. Appraisal arbitrage is often considered as a special investing strategy[75] being based on appraisal right to be used mainly by hedge funds with a single reason to acquire shares of stock from the moment of announcement to make a profit as a result of exercising the right to appraisal and indeed have no intention of remaining as shareholder into the corporation newly formed or survived from the merger. Appraisal arbitrage is unconventional form of merger arbitrage which might be appeared as means of internal control that provides protection for interests of minority shareholders in merger transactions.[76] The arbitrageurs prepare the prolific ground for effective exercise of appraisal right by way of resolving collective action problems that are so characteristic for shareholder activism. In addition, it has to be noted that appraisal arbitrage promotes increasing the value of minority shares at the expense of reducing the risk of infliction of possible harm on minority shareholders.[77] The divergent view indicates that appraisal arbitrage may create the risk for abuse of the process of exercising appraisal right.[78]

The origin of appraisal arbitrage was conditioned with such growing influence that hedge funds are enjoyed based on financial situation and aggressive character of their activism as well as important part was contributed by common development of law. The multiplication of such

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[74] See in detail *Papadima R.,* Appraisal Activism in M&A Deals: Recent Developments in the United States and the EU, European Company Law, Vol. 12, Iss. 4, 2015, 188-198.

[75] *Korsmo Ch., Myers M.,* Appraisal Arbitrage and the Future of Public Company M&A, Brooklyn Law School, Legal Studies Research Paper № 388, 2014, 1. Available at http://ssrn.com/abstract=2424935 [16.06.2015].

[76] Ibid, 3.

[77] Ibid.

[78] In re Appraisal of Dole Food Company, Inc., № 9079-VCL.

decisions concerning appraisal right in judicial practice that have created great opportunities for development of such strategy promotes growth of appraisal arbitrage.

The main reason for the origin of appraisal arbitrage is considered one particularity of appraisal right that isn't characteristic for other types of proceedings. The circle of investors is unlimited in the process of bringing a suit for exercise of appraisal right which means that having by persons the right to bring a suit not only who are holders of shares of stock at the moment of deal announcement but also who acquires the shares after announcement. The Delaware court of chancery noted in one decision that record day is immediately day of voting and not more earlier date for example the day of registration for such shares be entitled by appraisal right which participate in voting.[79] It gives an opportunity to investor to examine carefully the conditions of merger and acquire shares several hours earlier prior to voting or in last hour in order to bring a suit before court for exercise of appraisal right. There was a case in which was achieved the most high results within the framework of appraisal activism that was connected with *Carl Icahn* campaign against *Dell Corporation* where the threat to bring a suit with claim of exercise of appraisal right was among several factors that has conditioned substantial increase of offer price for buy-out.[80] The interest of development of appraisal activism is just in that the appraisal of value of shares should be made as maximum as possible.[81]

3.4. Shareholder Rights Plan

The role of institutional investors is immeasurably great on triggering of international hostile takeover, during its running and in the process of deciding the issue of application of defense measures. Institutional investor activism can not only promote triggerring of tender offer but also have an influence on it. The indirect influence of institutional investors may be expressed in having an impact on board of directors and management of the target corporation before the start of takeover. Hedge fund who is the most active among institutional investors, who is hedge fund of target corporation of takeover can push target corporation by using own strategy that this later has promoted to come to logic completion of takeover.[82] The direct or even indirect participation of institutional investors in planing of deal can determine price of takeover transaction and entirely success of deal.

The first noisy cases of active participation of institutional investors in the process of takeover and solution of issue on application of defense measures took place yet in the 1980s. The most big takeover among international acquisitions transactions when vodafone made hostile takeover bid to Mannesmann, majority of shareholders of this later was foreign institutional investors therefore offeror as well as management of target corporation mainly were focused on group of investors in time of carring on fight for gaining support of shareholders. The parties to mergers and acquisitions

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[79] In re Appraisal of Transkaryotic Therapies, Inc., C.A. No. 1554-CC (Del. Ch. May 2, 2007). This decision is debatable. The defendant noted that the goals of appraisal right becomes unachievable by such approach and therefore transforms the right aiming to create stability for dissident shareholders into investment tool for arbitrageurs.

[80] *Katelouzou D.,* Worldwide Hedge Fund Activism: Dimensions and Legal Determinants, J. Bus. L., Vol 17, Iss. 3, 2015, 828.

[81] *Papadima R.,* Appraisal Activism in M&A Deals: Recent Developments in the United States and the EU, European Company Law, Vol. 12, Iss. 4, 2015, 188.

[82] *Armour J., Skeel D.,* Who Writes the Rules for Hostile Takeovers, and Why? The Peculiar Divergence of U.S. and U.K. Takeover Regulation, Geo.L.J. Vol. 95, 2007, 1727.

transactions often communicates with institutional investors in order to have an impact on results of voting at general meeting and on shareholders' decisions at the time of tender offer.

Institutional shareholder activism as the shape of shareholder power was formed in parallels with hostile takeover transactions particularly when corporation management (board of directors) was applying any efforts for the purpose of adoption and implementation of defense measures. The shareholder rights plan so called poison pill is being separated out among these defense measures in which institutional investors are the most interested in resolving of issue to adopt or not to adopt and takes the most active part of discussion and resolving of this issue.[83] Institutional investors often promote and being in the role of initiators, or vice-versa put up categorial resistance against adoption of defense measures.[84]

3.5. Convergence of Corporate Governance

The convergence of corporate governance has become usual event in the era of international business on which demand is more and more being increased. The competition passing in global level pushes the countries for convergence of corporate governance.[85] The aim of corporate governance convergence is the spread of the principles and standards of good corporate governance throughout the world. The convergence of corporate governance strives to improve corporate governance there where this necessity exists. The developing countries attempts on the one hand to create proper preconditions for development of local business and on the other hand to arouse desire foreign investors to enter into the country by way of convergence of corporate governance.

international mergers and acquisitions transactions and active participation of institutional investors therein promotes convergence of corporate governance. Institutional shareholder activism has beneficial influence on corporate governance, conditions its improvement and by this creates proper conditions for convergence of corporate governance. Foreign institutional investors are main agents of globalization, and international mergers and acquisitions transactions are primary contractual instruments which promote process of approximation of corporate systems by introduction of foreign element into corporate relationships.[86] The convergence of corporate governance takes place in the process of accomplishment of international mergers and acquisitions transactions as at the level of countries as well corporations participating into deal.

The foreign institutional investors are engaged in export of good corporate governance practice from developed countries to less developed ones. Foreign institutional investor who enters the country and is being appeared in the role of major or minority shareholder of domestic corporation importing such rules and principles of corporate governance which are characteristic for its country

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[83] *Briggs Th.,* Corporate Governance and the New Hedge Fund Activism: An Empirical Analysis, J. Corp. L., Vol. 32, Iss. 4, 2007, 693.

[84] *Magnuson W.,* Takeover Regulation in the United States and Europe: An Institutional Approach, Pace Int'l L. Rev., Vol. 21, 2009, 231.

[85] *Coffee J.,* Future as History: The Prospects for Global Convergence in Corporate Governance and Its Implications, Nw. U. L. Rev., Vol. 93, Iss. 3, 1998-1999, 643.

[86] See in detail *Gevurtz F.,* The Globalization of Corporate Law: The End of History or a Never-Ending Story, Wash. L. Rev., Vol. 86, Iss. 3, 2011, 475-521.

of origin wherewith carries out introduction of good corporate governance practice what in its turn promotes process of convergence of corporate governance systems of different countries.

The convergence of corporate governance does not imply loss of uniqueness and identity for national system of corporate governance what may promote becoming its as a copy of any recognized system. it is to be taken into account that the interest of maintenance of national systems of corporate governance for what the process of approximation should be directed in this way to maintain real essence of convergence. The convergence of corporate governance should be conducted in this way that convergence wouldn't lose essence and not have acquired divergent direction. Today convergence of corporate governance means right perception of idea, aspiration and purpose of modern corporate governance.

4. Conclusion

Institutional shareholder activism is the efficient mechanism for improvement of corporate governance which has considerable impact on the level of minority shareholders protection. Shareholder activism promotes broadening the rights of minority shareholders and protect them more effectively. It is important for evolution of shareholder activism in georgian companies to perfect institutional, legislative and regulative basis promoting institutional investors activities that one of the most important direction ought to be comprised encouraging practice of voting by proxy and means of electronic communication as well as supporting usage of voting that includes element of crossing the border. It is expedient for integrating shareholder activism of institutional investors into the Georgian system of corporate governance also promoting practice of appraisal rights and providing private enforcement mechanism of legislation on securities market. It is also significant for activist shareholders to be given the opportunity to put important question for them as separate item into day order of general meeting independent from convening extraordinary meeting that allows shareholders or group of shareholders holding 5 percent of any class of shares to enjoy such right.

To summarize briefly, it can be noted that institutional investors take active participation in international merger deals and by that support to achieve the goals of corporate governance convergence. Foreign institutional investors are the agents which transfer modern standards of corporate governance from one country to another and thereafter promote their introduction. The convergence of corporate governance are reached by performance of the function of active facilitator by foreign institutional investors in international mergers and acquisitions transactions.

Salome Pruidze[*]

The Right to Freedom of Expression with Regards to the Personality Rights to Honor and Reputation

Personality rights maintain a special position in the wide specter of human rights. Personality rights law being on the edge of the human rights law, civil and criminal law strengthens the status of an individual, assures the presentation of a self to external world and at the same time the protection of a self from external world. Though the exercise of this or that personality right often causes the interference into other individual's personality sphere. With this regards various personal interests often get into conflict. For example, the exercise of the right to freedom of expression may result in the infringement of dignity, the rights to honor, to public image and reputation, the protection of which rights is the most commonly used ground for the limitation of the freedom of expression.

The Article presents a review of freedom of expression in relation to the personality rights to honor and reputation and the mechanisms of the balance practiced by the European Court, as well as the existing situation in Georgian legislation and case law.

Key words: *freedom of expression, personality rights, honor, reputation, reality of facts and value judgments.*

1. Introduction

Personality rights[1] maintain a special position in the wide specter of human rights. Personality rights law being on the edge of the human rights law, civil and criminal law strengthens the status of an individual, assures the presentation of a self to external world and at the same time the protection of a self from external world[2] through the mechanisms of civil law and criminal law.

The exercise of this or that personality right often causes the interference into other individual's personality sphere. With this regards various personal interests are often overlapped and get into conflict. For example, the exercise of the right to freedom of expression may result in the infringement of dignity, the rights to honor, to public image and reputation. The protection of honor and reputation is the most commonly used ground for the limitation of the freedom of expression.[3] The controversy of that kind forms a conflict between the fundamental values of democracy.[4]

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[*] Doctoral Student, Invited Lecturer, TSU Faculty of Law.

[1] About Feasibility of Introduction of term "Personality Rights", and the parallel use of other terms of Civil Code of Georgia see *Kereselidze D.,* The Most General Systematic Notions of Private Law, Tbilisi, 2009, 132-133 (in Georgian).

[2] *Van der Sloot B.,* Privacy as Personality Right: Why the ECtHR's Focus on Ulterior Interests Might Prove Indispensable in the Age of Big Data, 31 (80) Utrecht Journal of International and European Law, 25, 2015, 26.

[3] *Gabekhadze D.,* Reputation as the Basis to Limit Freedom of Expression, European Standards of Human Rights and their Influence on Georgian Legislation and Practices, *Korkelia K.(ed.),* Tbilisi, 2006, 53 (in Georgian).

[4] *Pasca A.,* Les poursuites-Bâillons: frontière entre liberté d'expression et droit à la réputation, lex Electronica, revue du Centre de recherche en droit public, Vol. 14, № 2, 2009, 9.

The freedom of expression is the right of a constitutional level. From one side it creates the opportunity to organize free discussions on the matters of social interest and represents the important matter of public interest by itself[5] for the development of democratic society;[6] and on the other hand the aim of protection of the freedom of expression is to provide a guarantee for individual's full flourishing, for his/her self-realization.[7] Correspondingly, the freedom of expression is an integral and important part of individual right to free development of one's personality in the vast meaning of the word. The interests of providing capacity for the individual to develop his identity, to create his persona fall under the personality rights protection sphere.[8]

It is natural that despite its importance, the freedom of expression is not an absolute right. "Reputation" is emphasized as one of the most valuable rights directly listed in the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred as "European Convention") and the International Covenant on Civil and Political Rights[9], which can define limits to the freedom of expression.

The text of Article 10.2 of the European Convention is actually repeated in Point 4 of Article 24 of the Constitution of Georgia[10] without mentioning the term "reputation". In particular, according to the mentioned norm, the legal limitation of freedom of expression is possible under the conditions which are necessary to protect rights and dignity of others.

In its turn the unconditional protection of honor together with the protection of human dignity is guaranteed by Article 17 of the Constitution of Georgia[11]. In a judgment №2/1/241 of March 11, 2004 on the case – *Akaki Gogichaishvili versus the Parliament of Georgia* – the Constitutional Court of Georgia indicates that the rights to inviolability of honor and dignity form the part of the absolute rights category, hence are not subordinate to any kind of limitations.[12]

Alike the other personality rights, honor and reputation constitute the elements of non-material, moral sphere, the protection of which is ensured.[13] These rights protect social and societal life of an individual, his/her relations with the society and external environment.[14]

As a rule, the legislation of various countries do not cover the definition of notions of reputation and honor.[15] The material scope imparted to these notions is ambiguous. In Georgian legislation

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[5] Civil Chamber at the Supreme Court of Georgia February 20, 2012 Decision №-1278-1298-2011, See <http://www.supremecourt.ge/files/upload-file/pdf/ganmarteba7.pdf>, [09.11.2015] (in Georgian).

[6] Compare Handyside versus the United Kingdom (1976), cited in February 20, 2012 decision №-1278-1298-2011 by Civil Chamber at the Supreme Court of Georgia, see <http://www.supremecourt.ge/files/upload-file/pdf/ganmarteba7.pdf>, [09.11.2015] (in Georgian).

[7] *Brun H.*, Libertés d'expression et de presse; droits à la dignité, l'honneur, la réputation et la vie privée, Revue Générale de Droit, Vol. 23, Issue 3, 1992, 451.

[8] *Van der Sloot B.,* Privacy as Personality Right: Why the ECtHR's Focus on Ulterior Interests Might Prove Indispensable in the Age of Big Data, 31 (80) Utrecht Journal of International and European Law, 25, 2015, 27.

[9] European Convention, Point 2 of Article 10, International Covenant, Point 1 of Article 17.

[10] Constitution of Georgia, Agencies at the Parliament of Georgia, 31-33, Tbilisi, 1995.

[11] Constitution of Georgia, Article 17, 1, "Human honor and dignity are Inviolable".

[12] See judgment, <http://constcourt.ge/ge/legal-acts/judgments/moqalaqe-akaki-gogichaishvili-saqartvelos-parlamentis-winaagmdeg-117>, [09.11.2015] (in Georgian).

[13] *Saint-Pau J.Ch.,* Droits de la personnalité, Paris, 2013, 945.

[14] *Ninidze T.,* Comments on Georgian Civil Code, Vol. I, Tbilisi, 2002, 64 (in Georgian).

the term of "business reputation" is used in line with the notion of "honor", which reflects the level of assessment of a person's professional or other qualities by the society.[16]

A rigorous separation of the terms – honor, reputation and business/professional reputation – has mainly the theoretical sense while from the practical point of view it cannot be important, as opposed to the freedom of expression the mechanisms of protection of these rights are not differentiated by law. It is more important to define the common, unite sphere of action for these rights and the scope of their application.

According to the analysis of various countries legislation the issue of balance between the rights to freedom of expression and honor and reputation is not predetermined in favor of one of them. It particularly refers to the approaches used by European Court of Human Rights (hereinafter referred as European Court), which rules each concrete case separately taking into account the circumstances of the particular case.

The Article presents a review of freedom of expression in relation to the personality rights of honor and reputation and the mechanisms of the balance practiced by the European Court, as well as the existing situation in Georgian legislation and practice in this regard.

2. Case Law of European Court of Human Rights

According to some authors, in the cases involving the conflict between the freedom of expression and the right to reputation European Court's legal reasoning suffers from a lack of clarity, consistency and transparency.[17] The Court has developed just a few interpretable criteria which can be used in general as a balancing means in any case involving the conflict between human rights.

At early 2000 the European Court did not consider reputation as one of the fundamental personality rights protected by the European Convention. It was regarded rather as a private interest which, based on Point 2 of Article 10 of European Convention was a value worthy of protection.[18] The member countries could, but were not obliged to restrict the freedom of expression in the favor of this kind of interest.[19] For the first time the Court mentioned that the reputation is a right guaranteed by Article 8 of the Convention and thus the element of the right to respect for private life with regards to the Radio France vs. France (2004) case;[20] while in the case Chauvy vs. France (2004) the Court for the first time indicated on the conflict between the fundamental right to freedom of expression and the privacy right.[21] The Court in the case of Pfeifer vs. Austria (2007) mentioned that per-

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[15] *Baramidze N.,* Some Peculiarities on Court Cases and Compensation of Moral Damage Related to Honor, Dignity and Business Reputation Protection, Justice and Law (magazine), № 4, Tbilisi, 2011, 112 (in Georgian).

[16] Supreme Court of Georgia decision № 3k, 376-01, dated July 18, 2001 cited: *Kereselidze D.,* The Most General Systematic Notions of Private Law, Tbilisi, 2009, 146-147 (in Georgian).

[17] *Smet S.,* Freedom of Expression and the Gight to Reputation: Human Rights in Conflict, American University International Law Review, Vol. 26, Issue 1, 2010, 187.

[18] Ibid, 187.

[19] *Van der Sloot B.,* Privacy as Personality Right: Why the ECtHR's Focus on Ulterior Interests Might Prove Indispensable in the Age of Big Data, 31 (80) Utrecht Journal of International and European Law, 25, 2015, 31.

[20] *Smet S.,* Freedom of Expression and the Right to Reputation: Human Rights in Conflict, American University International Law Review, Vol. 26, Issue 1, 2010, 193.

[21] See Resolution, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-61861>, [10.11.2015].

son's reputation, even if that person is criticized in the context of a public debate, forms part of his or her personal identity and psychological integrity and therefore also falls within the scope of his or her "private life (i.e. the scope of Article 8)".[22]

Hence in other subsequent cases[23] examined in the abovementioned and recent periods the Court defined reputation and honor as parts of the right to respect for private life and, doing so, these individual rights which were deliberately excepted by the authors of the Convention from its scope, are now positioned under the scope of Article 8. Thus the scope of application of right to privacy was widen.[24] Correspondingly the Article 8 was transformed into personality rights protection Article of the Convention.[25]

European Convention does not specify the measures which a state can use to protect the right to honor and reputation, hence the legislation of various countries considers both civil and criminal regulations with this regards. Though, the Court often mentions, that the sanctioning of freedom of expression must not cause the chilling effect of this right. There are some decisions made by European Court when even light, non-criminal sanctions are considered non-proportional in the cases when the restriction of freedom of expression is not well-grounded.[26]

2.1. Reality of Facts Stated and Value Judgment Which is not a Subject of Verification

Aiming at protecting honor and reputation the freedom of expression can be limited in two directions: spreading the humiliating facts which are not true and using the offensive word expressions.[27] In the first case the European Court separates statement of facts from value judgments and defines different results for each of them.

Fact is an objective event free from subjective attitudes which gives the opportunity of assertion of their rightness or wrongness.[28] Correspondingly, in case of fact statement the author has to bring more justifications to prove the fact in other case the reputation of the addressee will be considered defamed. Accordingly, it will be logical to ensure that the reality of the indicated facts is considered the basis of release from the responsibility for defamation while exercising the freedom of expression.[29]

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[22] *Van der Sloot B.,* Privacy as Personality Right: Why the ECtHR's Focus on Ulterior Interests Might Prove Indispensable in the Age of Big Data, 31 (80) Utrecht Journal of International and European Law, 25, 2015, 32.

[23] For example see *Rothe vs.* Austria (2012); A vs. Norway (2009), cited by *Van der Sloot B.,* Privacy as Personality Right: Why the ECtHR's Focus on Ulterior Interests Might Prove Indispensable in the Age of Big Data, 31 (80) Utrecht Journal of International and European Law, 25, 2015, 32.

[24] Right to Privacy.

[25] *Van der Sloot B.,* Privacy as Personality Right: Why the ECtHR's Focus on Ulterior Interests Might Prove Indispensable in the Age of "Big Data", 31 (80) Utrecht Journal of International and European Law, 25, 2015, 32, 44.

[26] *Smet S.,* Freedom of Expression and the Right to Reputation: Human Rights in Conflict, American University International Law Review, Vol. 26, Issue 1, 2010, 203.

[27] *Kereselidze D*., The Most General Systematic Notions of Private Law, Tbilisi, 2009, 146 (in Georgian).

[28] *Gabekhadze D.,* Reputation as the Basis of Limitation of Freedom of Expression, European Standards of Human Rights and their Influence on Georgian Legislation and Practice, *Korkelia K.(ed.),* Tbilisi, 2006, 58 (in Georgian).

[29] Compare *Kereselidze D.,* The Most General Systematic Notions of Private Law, Tbilisi, 2009, 146-147 (in Georgian).

Furthermore, the European Court states that if the case refers to the dissemination of an information (the areal of media activity) which is the matter of serious public concern, journalists are required to aspire and care for the truth as opposed to the absolute truth, i.e., spread of the real facts.[30] Hence the determining factor is not the wrongness or the rightness of the fact but the attitude of the fact disseminator towards the accuracy of the information.[31] The European Court put the "short validity" of information as the basis of the decisions of that kind and mentioned that if the media representatives are requested to check the maximum of truthness of the facts "it is doubtful that journalists manage to publicise any information at all".[32]

The European Court under the "duties and reponsibilities" (referred to the Point 2 of Article 10 of the European Convention) demanded from the journalists considers the obligation to act honestly, to transfer the reasonably cross-checked and trustworthy information within the norms of journalistic ethics.[33]

The European Court is even more loyal with regards to the value judgments. Value judgment apart from the statement of facts "is the product of subjective foresight of external world by an individual, and is not susceptible of proof".[34] According to the approaches used by the European Court the evaluation of consideration occurs in consistency with the existing circumstances in which the consideration/value judgment was expressed as well as in light of its stylistic admissibility.

After *Handyside* case the Court, when processing the *Hertel versus Switzerland* case[35] (1998), reconfirmed that the freedom of expression works not only for expressing the idea which is favorably received or regarded as inoffensive or as a matter of indifference, but also for the idea which offends, shocks or disturbs.[36] Such expressions, as "fascist", "Nazis", "idiot", "abnormal" and etc. taken separately do not defame the right to reputation; the attention should be paid to the context and the situation these words are used in and, particularly, to the previous actions of another party.[37] Despite the abovementioned facts the Court has strict attitude towards racist expressions which preach for the racial intolerance and discrimination[38] as well as towards the disclaimer of historically proved facts. The Court qualifies this kind of expressions as an abuse of right and based on the

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[30] *Kublashvili K.,* Basic Rights, Tbilisi, 2003, 298 (in Georgian).

[31] *Gabekhadze D.,* Reputation as the Basis of Limitation of Freedom of Expression, European Standards of Human Rights and their Influence on Georgian Legislation and Practices, *Korkelia K.(ed.),* Tbilisi, 2006, 59 (in Georgian).

[32] Ibid, 60.

[33] *Smet S.,* Freedom of Expression and the Right on Reputation: Human Rights in Conflict, American University International Law Review, Vol. 26, Issue 1, 2010, 228.

[34] *Gabekhadze D.,* Reputation as the Basis of Limitation of Freedom of Expression, European Standards of Human Rights and their Influence on Georgian Legislation and Practices, *Korkelia K.(ed.),* Tbilisi, 2006, 63 (in Georgian).

[35] See decision, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-59366>, [09.11.2015] (in Georgian).

[36] *Flauss J.F.,* The European Court of Human Rights and the Freedom of Expression, Indiana Law Journal, 2009, 818.

[37] *Smet S.,* Freedom of Expression and the Right to Reputation: Human Rights in Conflict, American University International Law Review, Vol. 26, Issue 1, 2010, 208.

[38] *Gabekhadze D.,* Reputation as the Basis of Limitation of Freedom of Expression, European Standards of Human Rights and their Influence on Georgian Legislation and Practices, *Korkelia K.(ed.),* Tbilisi, 2006, 64 (in Georgian).

power of Article 17 of the Convention excludes them from the scope of Article 10 of the Convention.[39]

Often a value judgment has some factual basis and it is difficult to separate it from the allegation of fact. Though if there is no sufficient factual basis under the evaluation the Court has stricter attitude towards it. In case of *De Haas and Gijsels versus Belgium*[40] (1997) the Court pointed out that the opinion may be excessive, "in particular in the absence of any factual basis".[41] In case *Petrina versus Romania*[42] (2008) the European Court ruled that statements directly accusing a named individual and completely devoid of a factual basis cannot benefit from the defense of exaggeration or provocation.[43]

Accordingly, when a value judgment has a clear factual basis, less attention is paid to its stylistic acceptability; while the attitude of the Court towards the expressed value judgments which have no factual basis is more strict.

2.2. "The Limits of Acceptable Criticism"

The European Court draws attention to the status of the plaintiff. In particular, the Court seperates several categories of persons: politicians, public servants[44], public figures[45] and private individuals – natural persons. The Court considers that the limits of acceptable criticism vary depending on each category of persons. The politicians' right to reputation is less protected given the fact that they enter on their own will the sphere where the criticism towards them is highly expected. A politician "inevitably and knowingly lays himself open to close scrutiny of his every word and deed".[46]

The next category towards which the range of acceptable criticism is less broadthan towads the previous category are public servants. Though, the intensity of defense of public servants is lower than that with regards to private individuals. Within this category lawyers (judges, prosecutors) are distinguished and more protected by the European Court, taking into account a high interest of the society and the importance of the trust towards them.[47] Exercise of freedom of expression may possibly abuse the reputation of the court, but also the authority and professional reputation of a judge. The European Court considers that the court members must enjoy particular public confidence

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[39] *Gotsiridze E.,* Expression of Consideration not Protected by the Article 10 of European Convention, European Standards of Human Rights and their Influence on Georgian Legislation and Practice, *Korkelia K.(ed.),* Tbilisi, 2006, 115 (in Georgian).

[40] See decision, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58015>, [09.11.2015] (in Georgian).

[41] *Gabekhadze D.,* Reputation as the Basis of Limitation of Freedom of Expression, European Standards of Human Rights and their Influence on Georgian Legislation and Practices, *Korkelia K.,(ed.),* Tbilisi, 2006, 65 (in Georgian).

[42] See decision, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-88963>, [09.11.2015] (in Georgian).

[43] *Smet S.,* Freedom of Expression and the Right to Reputation: Human Rights in Conflict, American University International Law Review, Vol. 26, Issue 1, 2010, 233.

[44] Public Servant.

[45] Public Figure.

[46] Lingens Versus Austria (1986), cited, *Smet S.*, Freedom of Expression and the Right to Reputation: Human Rights in Conflict, American University International Law Review, Vol. 26, Issue 1, 2010, 205.

[47] *Smet S.*, Freedom of Expression and the Right to Reputation: Human Rights in Conflict, American University International Law Review, Vol. 26, Issue 1, 2010, 226.

and correspondingly must be protected from actually unjustified destructive attacks, moreover that the judges cannot publicly respond to criticism[48] as they have taken the obligation to "abstain".[49]

As for the public figures, the Court points out that since this category willingly chooses to lay themselves open to public scrutiny, similarly to political persons they have to demonstrate a greater degree of tolerance to criticism.[50]

The Court does not discuss the importance of the right to reputation for abovementioned distinct categories, it only changes the "limits of accepted criticism"[51] according to the status.

The abovementioned approach is the result of drawing attention to matters of public interest. If we consider that the main goal and essence of freedom of expression is an opportunity to conduct open political discussion, then the sanctioning for defamation will work depending on whether the appealing party is a politician or an ordinary private individual. Yet in case we consider that the main goal of protection of freedom of expression is the protection of personal autonomy, then it makes no difference who the appealing party is.[52]

2.3. Form of Expression

Defamation can have various forms: oral or written, public (by means of magazines, books, TV or radio comments) or private (letter) and can derive from direct statement or be implicit. The European Court believes that the oral expressions require more protection than the written ones as the author has time to think before publishing it.[53]

The form of statement shall not serve the only purpose of causing sensation.[54] The Court also draws attention to the group of people, the audience where the statement or other form of offensive evaluation was articulated. For example, if the article was published in a widely spread newspaper/ magazine the responsibility of the author of statement is much higher than in case when the information was disseminated through specialized publications. Saying this the reputation can be damaged through spread of statement in a wide audience, but in case the audience is limited the defamation of the reputation is not confirmed.

Other forms of statements or expressions are evaluated based on the objective criteria, in particular, only in cases when it can be reasonably considered that the reputation of the third person is defamed.[55]

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[48] *Macovey M.,* Freedom of Expression, Article 10 of the European Convention on Human Rights, Guidelines, 2005, 152 (in Georgian).

[49] *Zoidze B.,* Comments on Constitution of Georgia (Chapter two, Georgian Citizenship. Basic Human Rights and Freedoms), Tbilisi, 2013, 279 (in Georgian).

[50] *Smet S.*, Freedom of Expression and the Right to Reputation: Human Rights in Conflict, American University International Law Review, Vol. 26, Issue 1, 2010, 205.

[51] Ibid, 207.

[52] *Meyerson D.*, The Legitimate Extent of Freedom of Expression, 52 University of Toronto Law Journal, 2002, 332.

[53] *Smet S.,* Freedom of Expression and the Right to Reputation: Human Rights in Conflict, American University International Law Review, Vol. 26, Issue 1, 2010, 212-213.

[54] *Flauss J.F.,* The European Court of Human Rights and the Freedom of Expression, Indiana Law Journal, 2009, 819.

[55] *Pasca A.,* Les poursuites-Bâillons: frontière entre liberté d'expression et droit à la réputation, Lex Electronica, revue du Centre de recherche en droit public, Vol. 14, № 2, 2009, 9.

3. Georgian Legislation and Case Law of the Court

In Georgia the matters related to the freedom of expression are regulated by the law on "Freedom of Speech and Expression"[56] dated June 24, 2004. The mechanism of private law to protect honor and professional reputation of a natural person is defined by Articles 18 and 19[57] of the Civil Code of Georgia. The Court case law is not very numerous; Georgian court often refers to the standards established by the European Court. The overall results indicate on the tendency of prioritization in favor of freedom of expression.

3.1. Conditions of Limitation of Freedom of Expression Defined by Law

The law on freedom of speech and expression guarantees the freedom of expression and permits its restriction in favor of other rights or interests only in very rare cases (actually in the form of exclusion) when the other rights are defamed through the exercise of freedom of expression.

There is a separate chapter in Law devoted to the mechanisms of restriction of freedom of expression in cases of defamation. Defamation is defined as a statement containing a substantially false fact bearing significant harm to a person's reputation and dignity.[58] Hence, during the statement of facts the norms defining and regulating defamation and corresponding responsibilities are used to regulate the right to freedom of expression.

The law separates the defamation of private and public persons. According to Article 13 a person shall bear responsibility under the civil law for defamation of a private person, if the plaintiff proves in court that the statement of the respondent contains a substantially false fact in relation to the plaintiff, and that the plaintiff suffered damage as a result of this statement. In case the plaintiff is a public person besides the abovementioned two requirements he has to meet the third requirement as well: he has to prove that the falseness of the fact was known to the respondent in advance or the respondent acted with apparent and gross negligence, which led to spreading a statement containing a substantially false fact.[59]

Besides defining different results for different status of plaintiff the law contains many norms particularly complicating the practical chance to impose responsibility for defamation. From this point of view it is noteworthy that the burden of proof of all circumstances lies with the plaintiff. Moreover, the law prescribes full or partial release of a respondent from the responsibility (cases of absolute and qualified privilege) in many cases:

Article 5 does not impose any responsibility on a parliament and Sacrebulo member, as well as on the authors of statements made at the request of an authorized body, within the framework of political debates, parliament/Sakrebulo sessions, meetings of commettees, in court and in the presence of the Public Defender. It is absolutely unclear what is meant under the statements made "at the request of an authorized body" and why a person is completely released from the liabilities if he/she makes a

[56] See <https://matsne.gov.ge/ka/document/view/33208>, [10.11.2015] (in Georgian).
[57] See <https://matsne.gov.ge/ka/document/view/31702>, [10.11.2015] (in Georgian).
[58] See Sub-point „e" of Article 1.
[59] See Article 14 of the Law.

statement of false facts at the request of an authorized body. At the same time this norm allows and states that any kind of lie and false facts are acceptable in political debates and, accordingly, creates a chance to mislead the society; hence it turns out that the more crucial is the plausibility and not the truth, i.e. the ability to persuade the public in "the truth" despite the existing reality.

Article 15 lists the qualified privileges for defamation. Some of the points are blur and must not serve the basis of releasing a person from the responsibility. Let us review each of them:

According to Article 15 a person is granted a qualified privilege for defamation in case of a statement containing substantially false fact if:

a) he/she took reasonable measures to verify the accuracy of the fact, but was unable to avoid a mistake, and took effective measures in order to restore the reputation of the person damaged by the defamation;
b) he/she aimed to protect the legitimate interests of society, and the benefits protected exceeded the damage caused;
c) he/she made the statement with the consent of the plaintiff;
d) his/her statement was a proportional response to the plaintiff's statement against him/her;
e) his/her statement was a fair and accurate report in relation to the events attracting public attention.

Sub-points "a", "c", "d" fully correspond to the standards developed by European Court. As for the sub-point "b" – it is not advisable to use it independently as the protection of interests of the society cannot compensate the damage caused by a false fact dissemination. Otherwise it is a case of misleading the society; hence in this case where not only the person suffers but the public interests as well. Here again the standard of care and the act performed by the journalist is of particular importance. Correspondingly, it is suggested to use only the first part of the criterion defined by sub-point "b" in combination with the criterion defined by sub-point "a". The same could be said with regards to criterion defined by sub-point"e": the media coverage based on false facts even excluding any fault of author cannot be considered "just" and "accurate" no matter whether there is an interest in the society and that the society has right to have the information. In this case the respondent may be released from reimbursement for damaged person but not imposing him/her obligation of the negation of the publicized information or announcement of the court decision may cause an unjust result.[60]

As for the restrictions on value judgments, the law defines a notion of "obscenity". In particular, according to the sub-point "f" of Article 1 obscenity is a statement, which does not have any political, cultural, educational or scientific value and which rudely violates the universally recognized ethical norms. According to Article 9 of the same Law, regulation of the content of speech and expression may be established by law in case of obscenity or direct abuse. Though there is no concrete regulation in Law related to such cases. For example, if a person considers that the other person

[60] In case the fact of defamation is proved Article 17 considers the consequent legal results regarding the freedom of speech and expression: 1. In relation to defamation, a respondent may be required by court to publish a notice on the court decision in a form determined by the court. 2. Forcing a respondent to apologize shall be unacceptable. 3. If the respondent makes a correction or denial within the time limit determined by the law, but publishing the correction or denial is not sufficient for proper reimbursement of the damages caused by the defamation to the plaintiff, the respondent may be required to reimburse property and/or non-property (moral) damages to the plaintiff.

is a " Scoundrel", "Shameless", "Immoral" and so on and announces it through TV, the addressee is unable to sue him for defamation since these words express the subjective attitude of a person and are not based on a concrete fact. To protect his dignity, honor and reputation through civil code the plaintiff can refer to Article 18 of civil code.[61] Though Article 18 is more of general character than the Law on "Freedom of Speech and Expression" and does not regulate specifically the preconditions of protection of dignity and honor.

3.2. Case Law

The Supreme Court of Georgia ruled on 65 cases of defamation for the period of 2000 – 2015.[62] Out of this number 21 cassation appeals were considered inadmissible or left without review. The big majority of the rest of the appeals were left without changing the previous instances decisions – giving the priority to the freedom of expression.

The Civil Chamber of the Supreme Court made important clarifications in a decision Nas-1278-1298-2011 on February 20, 2012.[63]

The court evaluated obscenity of the expressions like: "immoral ass", "Cynics", "Pinochet equal man". With this regards the court stated that it is not always possible to intervene with freedom of expression of a person aiming at protection of dignity, business reputation and honor of other person but only when it is necessary in a democratic society. The court took into account the previous decisions of the European Court (Handyside versus UK, 1976; Lingens versus Austria, 1986) and concluded that "people have to bear and listen to defaming, shocking and perturbing ideas and information as in a democratic society the necessity to limit freedom of expression arises in very rare cases".

The Court also indicated on the necessity of guaranteeing freedom of media, as a matter of particular public interest. Taking into account that in the mentioned case the dispute araised during a discussion between parties on the matter of public interest the Court evaluated the published article in its full context as value judgments expressed in a sharp (rough) form but not as obscenity.

As it is obvious from the decision the court is trying to do maximum to avoid the qualification of "obscenity" and states that it is possible to give this qualification only in particular and exceptional cases despite that the phrases used violate "the ethic norms established in the society". Besides this, it seems, that the court is inclined to qualify used phrases as an idea or consideration, value judgment, more than a statement of facts, as it was outlined in the mentioned decision.[64]

Discussing an issue of imposing a burden of proving the falseness of the fact on a plaintiff the Supreme Court sets an exclusion in the sphere of criminal law deriving from the principle of the presumption of innocence. In particular, the court considers that it is impossible to require from a

[61] See <https://matsne.gov.ge/ka/document/view/31702>, [09.11.2015] (in Georgian).
[62] See decision, <http://prg.supremecourt.ge/CaseCivilResult.aspx>, [11.11.2015] (in Georgian).
[63] See <http://www.supremecourt.ge/files/upload-file/pdf/ganmarteba7.pdf>, [09.11.2015] (in Georgian).
[64] The Statement Published in the Article: "A.F. is known as a person who during the hard Civil War threw the fat in the fire and provided the gangs which invaded Samegrelo with the intellectual support " – was defined by the Court as an expression of an idea.

person to prove that he has not committed a crime and hence the announcement containing this information is defamatory. This kind of requirement would be completely contrary to the presumeption of innocence.[65] The fact that there is no final guilty verdict is sufficient to conclude that a plaintiff has carried out the burden of proving that the disseminated information contains essentially false facts.[66]

It is particularly noteworthy that by the decision Nas-1052-1007-2014 of the Supreme Court dated September 30, 2015[67] the Court put even more limits on the scope of application of rights to honor and business reputation by the following important explanations:

First of all the Court mentions that "only identification of the fact of spreading defamative statement is not sufficient to satisfy the defamation claim. The necessity of restriction of freedom of expression is defined by the accepted standards in a democratic society. In other words the restriction should represent an urgent necessity for the society. In the process of decision-making regarding the restrictions of freedom of expression the problem of balance between the public and private interests arises. The balance between the freedom of expression and individual's interest must be maintained through considering the particularities of each separate case, at the same time the limits of acceptable criticism, the freedom of media, public interests should be taken into account".

The court continues with the review of preconditions to use Article 13 of the Law on Freedom of Speech and Expression and points out that to impose a responsibility on a person for defamation, three precondition are necessary to be in place: the disseminated information must refer to the plaintiff, it should contain substantially false facts and should damage the honor and business reputation of the plaintiff.

The court in a concrete case discusses the appropriateness of defense of the plaintiff as a legal entity of private law. In Point 1.12 of motivation part the court refers to the decision made by the Supreme Court in 2001 according to which the Court considered that it is impossible for a legal person to suffer from moral harm because "under the concept of a moral harm an extra patrimonial interest is meant which has no material equivalent (spiritual or physical pain, feeling or other) . Hence the demand from the legal person on reimbursement of moral damage has no legal basis". Taking into account the abovementioned the Court makes a conclusion that since there was no moral harm done to the plaintiff there was no defamation case.[68]

Thus the Court actually rejects the right of legal persons to honor which does not correspond to the approach established by European countries to recognize and defend honor of a legal person.[69]

The Court recognizes the existence of such an extra patrimonial right of legal person as the right on business reputation. The Court defines that "the business reputation of a legal person can be

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[65] See decision №1559-1462-2012 made by the Civil Chamber of the Supreme Court of Georgia on January 9, 2014, Decisions of the Supreme Court of Georgia on Civil Cases №4, Tbilisi, 2015, 13.

[66] The decision №-179-172-2012 made by the Supreme Court of Georgia on January 9, 2014, decisions of the Supreme Court of Georgia on Civil Cases № 4, Tbilisi, 2015, 29.

[67] See <http://prg.supremecourt.ge/DetailViewCivil.aspx>, [09.01.2016] (in Georgian).

[68] See Point 1.13 of the Motivation Part of decision.

[69] About the Defense of Legal Person's Honor by the Court of German Federation, see *Kereselidze D.,* The Most General Systematic Notions of Private Law, Tbilisi, 2009, 132.

considered violated if the disseminated information influences and contradicts the "marketing image" chosen by a person, i.e. Impression, which the legal person wants to establish towards it in the society while the disseminated information causes his failure in the face of the third parties". Even in this case the Chamber of Cassation considers that in case of non-demonstration of proof of a concrete property, material damage the claim cannot be satisfied.

4. Conclusion

As we have seen the action of public interest in favor of freedom of expression is strong which in some cases gives the priority to this freedom thus causing conflict with the other individual personality rights. Taking this into consideration, imposing certain limitations to the freedom of expression can be justified by not only the argument that it causes the damage to other party's interests but also can be reviewed from the point of view of freedom as the freedom including responsibility as well.[70] Existence of concepts of Duties and Responsibilities is inevitable for the development and progress of a society. Development and progress, in its turn, is impossible on a condition of accepting unlimited expression of anything. This is the main motivation for the countries to establish different levels of regulations of the freedom of expression to ensure the civil society progress. For example, in the legislation of Canada the concept and initial meaning of freedom of expression does not encompass the disclosure of very private issues and brute instincts related to the feelings of individuals when as usual such disclosure is pre-determined by only economic speculations.[71] This kind of expression is excluded from the protection under the realm of freedom of expression.

In Georgia the probability of protecting reputation through court is low as the Law on "Freedom of Speech and Expression" restricts this opportunity, which is due to the burden of proof laid completely with a plaintiff. The presumption that all doubts have to be resolved in favor of freedom of expression is also defined.[72] Correspondingly, "Article 17 of the Constitution of Georgia and this law create serious anachronism".[73]

Article 2 of Law on freedom of Speech and Expression provides, that the law must be interpreted in compliance with the European precedential Law, however the European Law and European Court itself with its approaches are "much more moderate".[74]

It is highly recommended that the Georgian legislation becomes closer to European Convention and Court position, which does not impart apparent advantage to freedom of expression taking

[70] Compare *Meyerson D.,* The Legitimate Extent of Freedom of Expression, 52 University of Toronto Law Journal, 2002, 340.

[71] *Gotsiridze E.,* Expression of Idea not protected by Article 10 of European Convention, European Standards of Human Rights Protection and Their Influence on Georgian Legislation and Practice, *Korkelia K.(ed.),* Tbilisi, 2006, 100 (in Georgian).

[72] See Article 7 – Standard and Burden of Proof.

[73] *Gotsiridze E.,* Comments to Georgian Constitution (Chapter Two, Georgian Citizenship. Basic Human Rights and Freedoms), Tbilisi, 2013, 114-115 (in Georgian).

[74] *Gotsiridze E.,* Comments to Georgian Constitution (Chapter Two, Georgian Citizenship. Basic Human Rights and Freedoms), Tbilisi, 2013, 115 (in Georgian).

into account the social responsibility related to this right. It is important not to prevent the realization of rights to honor and professional reputation in real life. The rule of burden of proof defined by law on freedom of speech and expressions needs to be reconsidered; other separate norms of the law also require reconsideration, including the list of privileges indicated in Article 5 and 15; it is also desirable to define by the law the concrete mechanisms of protection against obscenities and abusive expressions.

The Georgian Court must recognize the existence of the right to honor of legal persons, as well as recognize violation of honor and reputation using the definition given to defamation by Law. It is not admissible to require additional precondition – existence of material damage – for satisfying plaintiff's non-property claims for defamation: negation of disseminated statement, dissemination of a respond or taking other extra patrimonial measures. Existence of material damage must be considered as necessary precondition for remuneration of damage, only in cases when the reimbursement of damages suffered is claimed.

Ekaterine Kardava*

Development of Labor Relations Law on the Background of Euro-Integration Processes

In 2014, Georgia signed the Association Agreement with the EU. The Agreement obliges Georgia to fulfill specified obligations in labour law field.

It should be stressed that the topic of labour law is not only current agenda through the course of European Integration. The necessity for the gradual integration and implementation of European labour standards has been permanently discussed since the Partnership and Cooperation Agreement (PCA) between the EU and Georgia entered into force in 1999.

The article reviews and studies the following issues:
1. Obligations Defined by the Association Agreement: research offers the first theoretical approach of explanation and interpretation of AA provisions on labour policy in light of the DCFTA and SOCIAL POLICY. Attitudes of the Association Agenda and Annual Action Plans are discussed as well.
2. Dynamics of approximation of Labor Law on the Background of Normative Environment Supporting Euro-Integration Processes: The study is the first attempt to summarize and systematize all stages of the legal approximation process in the labour field in light of European integration, covering the early periods of PCA implementation, the National Harmonization Strategy and Action Plan for 2004-2006, ENP AP, and the annual progress reports of the European Commission.

***Key words**: labour code, AA (Association Agreement), DCFTA (Deep and Comprehensive Free Trade Agreement), association agenda, legal harmonization, PCA (Partnership and Cooperation Agreement Between), ENP AP.*

1. Introduction

Labor legislation in Georgia has been a subject of multiple changes for years. Foundations of the reforms carried out in this sphere were a response of attitudes developed in accordance with the political and economic situations. The main question was the following: should be labor legislation in the state of new democracy and transition economy maximally oriented on Social Security or mobile – burdened for an employer with less binding legal norms? A regulation and deregulation issue is disputed in a scientific circle, as well as among specialists of this sphere. The World Bank in the report of 1990 expressed its opinion that regulations of labor market, directed to improve the state of employees, were really harming them. In the member states of OECD (Organization for Economic Cooperation and Development) on searching for reasons of different unemployment levels even in its reports of 1994 it was advising the member states to deregulate labor markets[1]. Just such concep-

* Doctoral Student, TSU Faculty of Law.

1 Economical Analysis of Labor Code of Georgia, PMC Research Center (within the program of the Institute of East-West Management (EWMI)), May, 2013, 3, <http://www.icc.ge/www/download/Analysis%20of%20the%20Amendments%20to%20the%20Labor%20Code%20of%20Georgia%20-%20GEO.pdf>.

tual vision had a new labor code accepted in 2006 in Georgia. During years it became a principle of bipolarization of society. In the country there was developed the situation, when politics oriented only on business created the extreme social strain. As a result, in 2012-2013 there was arisen an issue of reforming labor legislation and at this stage the whole attention was directed to improvement of the protection quality of an employee. At present due to the changes carried out in 2013 the current labor code is a subject of critics from business sector.

Today Georgia is a party of the European Union Association Agreement[2]. The country has to integrate and fulfill those standards in legislation, which connected with aspects of labor law are statutory in the agreement, though a labor sphere is not only an object of regulation of the Association Agreement and only an order of the current day. On the way of European integration it was an object of interest and discussion of more than one international document or format of official relations.

Within the European integration politics considering demands for the labor sphere the description of legislation changes and the history of their estimation is one of the most important elements and a useful method of development of science of labor law in Georgia. In the article there are presented stages of development of European integration processes at normative level (acts accepted by the president of Georgia, the government and the Parliament of Georgia for the purpose of supporting integration processes), on their background obligations to labor law, dynamics and estimation of the implemented legislation changes. Such attitude will allow us to analyze a real picture of harmonization of labor law in general political or legal context and besides it will make the following transparent: whether in connection with the European integration processes the legal approaching process in one of the segments was appropriate to the publicly declared will, whether there was inter-compatibility between these two aspects. The article is emphasizing the process in order to comprehend better a mechanism, pace and quality of approaching labor legislation to the European Union legislation that is directly connected with the European Union's estimations and recommendations on labor law. For achieving this objective a method of system and historical research is used.

2. General Review of Obligations Defined by the Association Agreement

According to Article 229 of the Association Agreement the implementation of standards in the sphere of labor relations law is connected on the one hand with the establishment of fruitful employment and deserving labor, as a basic element of globalization management, and on the other hand with trade promotion.[3] In other words politics of labor and employment should equivalently provide rights of an employee, as well as of an employer, who is the most significant subject in trade. It should be noted that Article 229 is part IV of the Association Agreement, which concerns issues connected with trade and is DCFTA (*Deep and Comprehensive Free Trade Area)* integrated in the Association Agreement.

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[2] Association Agreement on the one Hand Between Georgia and on the Other Hand Between European Union and European Atomic Energy Community and their Member States, the Acceptance date 27.06.14, Date of Publishing [11.09.14], <https://matsne.gov.ge/ka/document/view/2496959>.

[3] See ref. 2, Article 229, §1.

The Association Agreement divided the labor sphere regulation thematically into two directions of politics – trade and social. Therefore statutes regulating the issues are placed in different places of the agreement structure:

1. In the context of trade and stable development according to the norms regulating labor standards (Part IV, Chapter 13, Articles 229 and 239) Georgia has to use the basic principles defined for the membership of the International Labor Organization and implement the standards of ILO (International Labor Organization) Conventions in its own legislation and practice[4].
2. In the context of employment, social politics and labor conditions the norms regulating labor standards are given in Articles 348-354 of Chapter 14 of Part VI of the Association Agreement, where is said the following: "The parties will strengthen a dialogue and cooperation to promote worthy labor conditions, employment politics, health and work safety, a social dialogue, social protection, social involvement, gender equality and discrimination banning and thus they will contribute in creating more and better jobs, stable development and improved level of life".[5]

Concrete instruments supporting the above mentioned tasks are presented in Annex XXX of the Associate Agreement as EU directives.

In order to implement the Association Agreement by steps there is worked up Association agenda, which defines priority directions and tasks for 2014-2016.[6] In the mentioned document a labor sphere is discussed in three main directions:

1. In the block of political dialogue and reform[7] there is marked that the law of changes to the labor code accepted in 2013 by the Parliament is to be implemented according to ILO standards. A new law must be strengthened by new institutions and procedures for settling disputes and development of negotiations culture (mediation centre); special attention must be paid to the safety of working environment; effective social dialogue must be organized by means of systematic invitation of tripartite commission.
2. In the block of trade and issues connected with trade[8] it is said that in the process of a dialogue between the parties in the sphere of trade the information about implementation of a labor code and fulfillment of obligations connected with stable development will be exchanged.
3. In the block of employment, politics and equal opportunities[9] it is remarked that the parties will be cooperating in order to prepare for the implementation of European legislation in the spheres such as health and safety at workplace, work conditions, gender equality and anti-discrimination; creating an effective system of labor inspection; development of opportunities of social partners; development of strategic approach to employment the objective of which is creation of more and better jobs with normative working conditions.

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4 See ref. 2, Article 229, §2.
5 See ref. 2, Articles 348-349.
6 <http://eeas.europa.eu/delegations/georgia/documents/eap_aa/associationagenda_2014_ka.pdf>.
7 Ibid, Trade Union Rights and Basic Labor Standards, 8.
8 Ibid, Trade and Stable Development, 21-22.
9 Ibid, 31-32.

In order to provide the implementation of the Association agenda there are accepted separate Annual Action Plans.[10]

Annex XXX of the Association Agreement is divided into three parts: a) labor law; b) discrimination banning and gender equality; c) health and safety at workplace. For the implementation of the part of labor law there are 8 directives of the EU, for carrying out of which 4-6 years are defined; in the part of gender equality – 6 directives on 3-4 years; in the part of safety – 26 directives on 9 years. The directives regulations of the first and the second parts are universal norms and are spreading on all the forms of labor relations. The directives of the third part are regulating relations of a concrete sphere and technical standards usable in this sphere.

3. Dynamics of Harmonization of Labor Law on the Background of Normative Environment Supporting Euro-Integration Processes – General Overview of Obligations to Implement Legal Harmonization

The first foundation of legal cooperation between Georgia and the EU was created by the "Agreement on Partnership and Cooperation (PCA)"[11], which like the Association Agreement is discussing trade-economic and social aspects in the section of joint and dynamic development. It is remarkable, that in PCA in Part IV of the Agreement – "Regulations connected with Business and Investments" labor conditions and in Part VI- "Economic Cooperation" employment and social aspects are talked of too.

Within the scope of PCA Article 43 of Part V was about obligations of legal approachment, on the basis of which there were defined priority spheres, in which an approaching process of laws must have been started,[12] among them was protection of employees at their workplace.

For the fulfillment of PCA, apart from the declared political will it was inevitable to create intrastate legal instruments. For this purpose the country began to accept such normative acts, which were providing development of politics of legal approaching to Euro-integration processes: the most significant and one of the first acts was the Regulation of the Georgian Parliament "on harmonization of the Georgian legislation with the EU legislation", according to which all the laws from the 1st of September of 1998 accepted by the Georgian Parliament and other normative acts must have been in conformity with the standards and norms stated by the European Union.[13] In 2000 was accepted the decree of President of Georgia "on promoting the implementation of the Agreement on Partnership and Cooperation between Georgia and the EU"[14] and the order "on working up the strategy of harmonization of the

[10] Governmental Prescription of Georgia № 1516, 03, 09, 2014, date of Publishing 15, 09, 14, <https://matsne.gov.ge/ka/document/view/2496190>, Governmental prescription of Georgia № 59, 26.01.15, Date of Publishing: 02.02.15, <https://matsne.gov.ge/ka/document/view/2702520>.

[11] Agreement on Partnership and Cooperation, date of acceptance 22 April, 1996, ratified by the Parliament of Georgia, Regulation of the Georgian Parliament № 347-I, Heralds of Parliament 22-23, 04,09,1996, Date of Entering into Effect: July 1, 1999, <https://matsne.gov.ge/ka/document/view/1212956>.

[12] See ref. 18, Article 43, № 2.

[13] Regulation of the Georgian Parliament № 828-I, 02.09.1997, Heralds of Parliament 37-38, 10.09.1997, <https://matsne.gov.ge/ka/document/view/38704>.

[14] Decree of President of Georgia № 317, 24. 07. 2000, <https://matsne.gov.ge/ka/document/view/1252267>.

Georgian legislation with the legislation of the EU",[15] where it is said that "before the 1st of February, 2001 the proper ministries and departments must prepare notes on the document prepared by the Georgian-European Policy and Legal Advice Center (GEPLAC)[16]: "Recommendations for the strategy of harmonization of the Georgian legislation with the legislation of the EU" and statements connected with the mentioned strategy". In 2001 there was accepted an order "on the strategy of harmonization of the Georgian legislation with the legislation of the EU".[17] By this act the harmonization strategy was approved and the committee of supporting EU partnership and cooperation was asked to work up the national program of harmonization of the Georgian legislation with the legislation of the EU. In 2004 there was accepted an order "on working up the unified action plan of implementation of the national program of harmonization of the Georgian legislation with the legislation of the EU and a new agenda of cooperation with the EU".[18] By the mentioned act the national program of harmonization and guidelines for the action plan were approved[19] and it was decided to prepare in cooperation with the GEPLAC a unified action plan for carrying out the national program.

In the national harmonization program an individual chapter was given to the sphere of labor relations law, in which the comparative review of the conformity of the labor code of Georgia with the EU legislation was represented, and also there were given recommendations on legislative measures to be carried out. With this objective in view in the national program of harmonization there were given those directives, the integration of the statutes of which should have been carried out in the Georgian legislation. There should be also mentioned the fact that the part of these directives are in Annex XXX of the Association Agreement.

In 2004 Georgia became a beneficiary of the European Neighborhood Policy and in 2005 there were started negotiations on the active inclusion of Georgia into the European Neighborhood Policy by working up an individual action plan. To this purpose more than one normative act were accepted[20] and the committee negotiating with Europe was created.[21]. The Georgian government decided to define the priorities of the country in the integration processes according to the current situation, for which it worked up and approved the priorities[22], later established the Governmental Commission coordinating the implementation of these priorities[23]. In 2006 the Action Plan of the

[15] Decree of President of Georgia № 1422, 31.12.2000.

[16] Consulting Centre in Georgia created within the program "TASSIS", Instrument Promoting Legal and Economical Reforms. Since 1997 it has been consulting government departments. It has become a consultant of the leading united coordinating organ of the harmonization process of legislation – the Government Committee

[17] Decree of President of Georgia № 613, 13. 06. 2001.

[18] Decree of government of Georgia № 22, 08. 05. 2004.

[19] <http://www.parliament.ge/uploads/other/18/18483.pdf>.

[20] Within the frames of neighborhood policy for the purpose of working up the action plan the application of the Parliament of Georgia on starting negotiations between Georgia and European Union № 1477-I, 20.05.2005.

[21] Government Decree № 112, 11.07.2005, Georgian Legislative Bulletin 82, 13.07, 2005 on creating a commission for negotiation with European party within the frame of neighborhood policy about working up position of Georgia about the Action Plan, <https://matsne.gov.ge/ka/document/view/1287563>.

[22] Government Decree of Georgia "about the approval of priorities of Georgia for the Action Plan of neighborhood policy of Europe", № 291, 11. 07. 2005.

[23] Government Decree of Georgia 195, 03.11.2005, on creating an interdepartmental government committee for realization priorities of Georgia in the integration process of neighborhood policy of Europe and NATO, Georgian Legislative Bulletin 129, 03.11.2005, <https://matsne.gov.ge/ka/document/view/10630>.

European Neighborhood policy (ENP AP)[24] was worked up and the Georgian government made decision on working up a plan for carrying out the ENP AP.[25]

From 2006 Georgia begins carrying out the ENP AP. From 207 the European Commission of the EU annually estimates the state of the country in the context of the implementation of the ENP AP.

From 2010 a political dialogue between Georgia and the EU starts, which is connected with the perspectives of concluding the Association Agreement and integration of the DCFTA in this agreement. For supporting the above mentioned dialogue a group of persons for holding negotiations with the European Union was defined[26], an interdepartmental working group was established for holding negotiations on DCFTA issues.[27]

At Vinius Summit in 2013 initialing of the Association Agreement was carried out; in this period the government also accepted the resolution on creating the commission[28] negotiating with the EU with the purpose of receiving and updating the text of "the agenda of the Association Agreement between Georgia and the European Union". In 2014 the government accepted the order on measures for effective implementation the "Association Agreement" between Georgia and the European Union", which includes the agreement about a deep and comprehensive trade area"[29]. In 2014 the Parliament ratified the Association Agreement.

The history of formation and establishing the above mentioned normative frame reveals the will, as a result of which a process of legislative approachment should have been fulfilled by stages, including a labor law sphere. Systematization of normative acts, which were received for supporting Euro-integration processes, is important in order to make clear by which conformity and interconsistency the publicly recognized policy and substantive changes of labor law were developing, which will be discussed in the following chapter.

4. Dynamics of Requirements Before Labor Legislation and Estimation

The review of labor legislation in Georgia must be divided into three parts: code of labor laws of 1973; code of labor laws of 2006; changes made in "Labor Code" of 2013. The law of 1973 of the Soviet Socialist Republic of Georgia, which in the 90s was renovated in conformity with the existed social relations, was characterized with details of labor relations and aspects regulating the associated results. It can be freely named codification. Later in 2003 the analysis of the Code of labor laws of 1973 was a matter of interest, when the agenda became the inevitability of harmonization of the

[24] <http://www.eeas.europa.eu/delegations/georgia/documents/eu_georgia/booklet_a4_2geo.pdf>.

[25] Government Decree of Georgia № 498, 20. 10. 2006, within the frames of the European neighborhood policy the European Union – Georgia on working up the implementation of Georgian government's Action Plan.

[26] Decree of the President of Georgia on granting the authority for holding negotiations with European Union for the purpose of accepting the text about the Association Agreement between Georgia and the European Union № 489, 12. 07. 2010.

[27] Government Decree of Georgia on creating an interdepartmental working team for the purpose of holding negotiations on the agreement about deep and comprehensive trade between Georgia and the European Union, № 61, 21. 02. 2012, date of publishing 22. 02. 2012, <https://matsne.gov.ge/ka/document/view/1593359>.

[28] Government Decree of Georgia № 112, 27 January, 2014, <https://matsne.gov.ge/ka/document/view/2218037>.

[29] Government Decree of Georgia № 86, 7 February 2014, <https://matsne.gov.ge/ka/document/view/2250269>.

Georgian legislation with the EU legislation and fulfillment of the analysis of the labor legislation conformity with the European legislation, which was reflected by the recommendations in the national program of harmonization. The analysis covered the following issues: labor agreement; working time; protecting of the young; restructuration of enterprises (handing over); gender equity, health and safety protection.[30] In the program it is said that the analysis of the conformity of the Georgain labor legislation with the directives of the EU labor legislation showed that o the whole the Georgian legislation is in the conformity with the EU directives and in some cases it has even higher standards compared with the EU directives.[31]

By the time when GEPLAC experts and the working group had analyzed the current legislation, in parallel mode they also studied a project of the new labor code, which should have replaced the law of 1973. A new act should have considered new reality of labor market and labor relations, at the same time requirements of the EU and European standards. As a result of the analysis there were developed recommendations, which should have been reflected in the new law[32], though by 2005 three versions of the labor code project were submitted to the Georgian Parliament for consideration from: the GEPLAC, the Freedom Institute and the Georgian government. In spite of the protest from the trade unions and the most part of the Georgian society the Parliament of Georgia considered and accepted a draft law prepared on the basis worked up by the Freedom Institute and the Georgian government.[33] In 2006 a new labor code was accepted[34].

In spite of the fact that the law of 2006 covered many principles universally recognized in the labor sphere and implemented new institutes appropriate to the modern labor market, it was far on the one hand from the standards established by the EU legislation and on the other hand from the codification principle. It did not consider the results of the experts' analysis either, left the recommendations without reaction and somehow created a problem of regulating labor relations in a pro-European manner. The code contained statutes, which were in direct contradiction with the requirements of the EU directives and the other international obligations taken by Georgia[35].

The accepting of the new labor code coincides with the period when Georgia became a beneficiary of the European neighborhood policy. Recommendations on regulation of the labor sphere on the basis of PCA were represented in ENP AP, in which it is said, that it is necessary to make effort to implement standards defined by "the European Social Charter": provision of fundamental rights

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[30] National Program of Harmonization of the Georgian Legislation with the Legislation of the EU (guidelines for Action Plan), September, 2003, 148, <http://www.parliament.ge/uploads/other/18/18483.pdf>.

[31] Ibid, 148.

[32] Ibid, 149-157.

[33] *Antadze Ts.,* Labor Standards and Their Conformity with the Requirements of the "European Social Charter" and Conventions of the International Labor Organizations Ratified by Georgia, <http://www.nplg.gov.ge/gsdl/cgi-bin/library.exe?e=d-00000-00---off-0civil2-civil2-01-1--0-10-0--0-0---0prompt-10--..-4----4---0-1l--11-ka-10---10-preferences-50--00-3-1-00-0-00-11-1-0utfZz-8-00-0-11-1-0utfZz-8-10&cl=CL2.6&d=HASH2097cf9988510f51cdfd72.4.5&x=1>.

[34] The law of Georgia Labor Code of Georgia, 25.05.2006, Georgian Legislative Bulletin 23,19.06.2006, <https://matsne.gov.ge/ka/document/view/26350>.

[35] The Current State of Implementation of the National Program of Harmonization the Georgian Legislation with the EU Legislation, report of the GEPLAC (Georgian European Policy and Legal Advice Center), for the state of 13 June, 2006, 20-21, <http://www.parliament.ge/uploads/other/18/18477.pdf>.

of trade unions and main labor standards according to the Conventions of the "International Labor Organization"[36] ratified by Georgia. In the annual report on estimation of the implementation of the ENP AP by Georgia the European Committee describing the existed situation was working up recommendations, which by years looked as the following:

2007: Georgia has opted for total liberalisation of employment and labour relations in which the market is the single regulator. There is a predominance of long-term unemployment. Lack of effective employment and labour market policies and disrupted social safety nets have exacerbated the labour market distortions. The 2006 labour code, which was prepared without prior consultation with trade unions, is not in line with the International Labour Organisation (ILO) standards. Furthermore, the labour code contradicts both EU standards and the European Social Charter that the country ratified in July 2005. No progress can be reported as regards social dialogue.[37]

2008: As to labour legislation, labour rights and social dialog, Georgia declared readiness for launching more intensive cooperation between social partners, but no concrete measure has been conducted. No amendments has been made to Labour Code.[38]

2009: As regards employment, Georgia has no specific employment strategy in place and no employment implementing agency. Further to the October 2008 joint statement by the International Labour Organisation (ILO) and Georgia, a number of consultations were held during the reporting period between representatives of the Government, the trade unions and the Association of Employers, to review the provisions of the Labour Code which were not in line with the ILO Conventions on core labour standards. The social dialogue of October 2009 led to the issuing in November 2009 of a Decree institutionalising the tripartite National social dialogue commission.[39]

2010: Challenges remains with regard to Freedom of Association, labour rights, employment. ILO expresses its concern with regard to implementation of the conventions. Georgia has no employment strategy, there is no employment agency as well. It is essential to amend the Labour Code and Trade Union law.[40]

2011: The issue of labour rights continues to be a serious concern, including the insufficient implementation of core ILO conventions. Whereas in 2011 progress was made in the dialogue of Georgia

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[36] <http://www.parliament.ge/uploads/other/18/18476.pdf>.

[37] Commission Staff Working Document Accompanying the Communication from the Commission to the Council and the European Parliament 'Implementation of the European Neighbourhood Policy in 2007' Progress Report Georgia, Brussels, 3 Aprils 2008, SEC (2008) 393, 11, <http://www.eeas.europa.eu/delegations/ georgia/eu_ georgia/political_relations/political_framework/enp_georgia_news/index_en.htm>.

[38] Commission staff working document, 'Implementation of the European Neighbourhood Policy in 2008, Communication from the Commission to the Council and the European Parliament interim Progress Report Georgia, Brussels, 23 Aprils 2009, 15, <http://eeas.europa.eu/delegations/georgia/documents/eu_georgia/enp_ progessreport2008_ka.pdf >.

[39] Commission staff working document Accompanying the communication from the Commission to the European Parliament and the Council taking stock of the European Neighbourhood Policy (ENP) Implementation of the European Neighbourhood Policy in 2009, Progress Report Georgia Brussels, 12/05/2010 SEC(2010) 518, 10, <http://www.eeas.europa.eu/delegations/georgia/documents/eu_georgia/progress%20report_en.pdf >.

[40] Commission staff working document on Implementation of the European Neighbourhood Policy in 2010, Progress Report Georgia, Commission, High Representative of the EU on common foreign and security policy, Brussels, 265 May, 2011, 3, 12, <http://eeas.europa.eu/delegations/georgia/documents/eu_georgia/enp_ progressreport2010_ka.pdf>.

with the ILO and certain recommendations, Georgia is still expected to address several of them, notably with regard to legislative amendments to the Law on Trade Unions and the Labour Code.[41]

2012: Labour rights have been identified as one of the principal challenges faced by the new Government. Previous reports have noted the absence of substantive social dialogue, and the perception that the authorities were obstructing the activities of trade unions and putting pressure on trade unionists. However, the new Government has made a commitment to bringing labour legislation into line with international and European standards and to working closely with the ILO and other partners to this end. ILO was closely involved in preparing revisions of the labour code, which is a significant positive development. The quality of social dialogue has also been enhanced; in December 2012, the Parliament adopted a law institutionalising the Tripartite Social Commission under the chairmanship of the Prime Minister.[42]

2013: A new Labour Code in line with ILO standards was adopted. This had been a longstanding EU request but implementing it properly is still remains problematic. All International Labour Organization (ILO) standards-related provisions were properly adopted, which means that the Labour Code is now complying with ILO Conventions.[43]

2014: The institutional arrangements to protect labour rights remained unchanged. There is a broad consensus between the government and the social partners about inspections of safety at work, but the creation of broader labour inspections (linked to the AA/DCFTA) remained a contentious issue.[44]

The above given estimations make clear that in a certain period the labor legislation was in stagnation. It means that there were no dynamic and step-by-step legislative harmonization processes in the sphere of labor law and the tasks which were before the country were not fulfilled. A new stage for the labor legislation started on the verge of 2012-2013, when some changes were made to the organic law. Just in this period the recordings of the ENP AP estimation document about the fact that the labor code approached the international standards. It is fact that on the background of dynamics of normative environment of European integration processes we can talk about real and resulting

[41] Joint staff working document implementation of the European Neighbourhood policy in Georgia progress in 2011 and recommendations for action accompanying the document joint communication to the European parliament, the Council, the European economic and social committee and the committee of the regions delivering on a new European Neighbourhood policy, Brussels, 15.5.2012 SWD (2012) 114, 8-9, <http://eeas.europa.eu/ delegations/ georgia/documents/news/enpprogressreport_2011_en.pdf >.

[42] Joint staff working document Implementation of the European Neighbourhood Policy in Georgia Progress in 2012 and recommendations for action Accompanying the document joint communication to the European Parliament, the Council, the European Economic and social committee and the committee of the regions, Brussels, 20.3.2013 SWD (2013) 90, 7, <http://eeas.europa.eu/enp/pdf/docs/2013enp_pack/2013_progress_report_georgiaen.pdf >.

[43] Joint staff working document, implementation of the European Neighbourhood policy in Georgia progress in 2013 and recommendations for action accompanying the document joint communication to the European Parliament, the Council, the European economic and social committee and the committee of the regions, Brussels, 27.3.2014 SWD(2014) 72, 9, 13, <http://eeas.europa.eu/enp/pdf/2014/country-reports/georgia_en.pdf >.

[44] Joint staff working document Implementation of the European Neighbourhood Policy in Georgia Progress in 2014 and recommendations for actions Accompanying the document joint communication to the European Parliament, the Council, the European economic and social committee and the committee of the regions, Brussels, 25.3.2015 SWD(2015) 66, 8, < http://eeas.europa.eu/enp/pdf/2015/georgia-enp-report-2015_en.pdf>.

aspects of approaching the European standards on the basis of the amendments to the labor code of 2013. The changes, which were oriented on balancing rights of an employee and employer and strengthen aspects of the employee's state by legislative intervention, caused bipolarity of opinions:

1. A new code contains many amendments, concerning all the spheres of labor law and there is observed the legislation attempt to strengthen the protection of employees without neglecting the employer's interests; the approachment to the standards of the EU countries;;[45] A legislator was attempting to depict in special norms the progressive judgments presented by constitutional and supreme courts on the right to work, which on the background of deficiencies of pre-reform legislation were resulted from general principles of international and legal law. European striving of the country was giving a stimulus to a legislator to take adequate steps in direction of approaching this sphere of law to the global international values[46]. Since the main purpose of labor relations law is the maintenance of the balance of employee's and employer's interests, which has an influence on social peace, development of economics, establishment of a social and law-governed state, it was inevitable to fulfill the first-rate task of the state – to support protection of individuals' interests and carry out the rights granted to them.[47]
2. The stringent regulation of conclusion and termination of a labor agreement is increasing a businessman's expenditures connected with an employee. The increase of the expenditures will presumably decrease labor demand, which will have a negative influence on creation of new jobs. The burden of the termless agreement strengthens entrepreneurs' stimulus not to create new jobs. The disorder of the mechanism, which enables the businessman to take decisions more freely on creation of new jobs, finally will be negatively reflected on creation of new jobs, and generally on the employment rate. The possibility of the direct involvement of the state and strengthening its role in cases of mass dismissal and collective disputes intensify the state press upon business. Because of decreasing of the labor market flexibility businessmen are not able to react fast on current changes in the process of economy crisis.[48]

5. Conclusion

By using the method of historic and systematic research in the sphere of labor relations law there was clearly seen the dynamics, rate and quality of the performance of obligations of the country and on the background of Euro-integration processes the legal harmonization stages with results.

In spite of the fact that forming of labor legislation pursuant to European standards has been a problem for years, at present it is clear and doubtless that in the sphere of labor there has already

[45] *Oskiuler B.,* New Labor Relations Law, several issues chosen for discussion, Labor Law (Collection of articles), III, cooperation of Germany, GIZ, Law faculty of *Iv. Javakhishvili* Tbilisi State University, Tbilisi, 2014, 174.

[46] *Chachava S., Zaalishvili V.,* Labor Law (Collection of articles), III, cooperation of Germany, GIZ, Law faculty of *Javakhishvili Iv.,* Tbilisi State University, Tbilisi, 2014.

[47] Ibid, *Inasaridze T.,* In Connection with the Essential Terms in Labor Agreement, the Objective of the Reform of 12 July, 2013, 184-185.

[48] See ref. 1, 3-4.

been started a legal harmonization process that in the future will be continued and developed by the method of dynamic approachment. Considering requirements of PCA, at present already of the Association Agreement, labor legislation of Georgia is still in need of changes by steps, which must be always oriented on the one hand on high quality protection of human rights and on the other hand on economic development of the country and the current trends of the labor market. On the background of the integration of European standards in Georgian legislation it is very important a dialogue between social partners and the policy formed and balanced by their involvement, which finally must support the regulation of conflict situations between the employee and the employer. In this process the most important is a legislator's role, which must be based on historical experience and at the same time scientific opinions, and considering the peculiarities of the local situation and practice take adequate decisions.

Aleksandre Tsuladze[*]

Conceptual Vision of Court Mediation

The hereby Article aims to provide the reader with the information about the conditions of development of the court mediation in Georgia and sharing with them the vision how to overcome the challenges. In author's view, in order to develop court mediation in Georgia in proper manner it's absolute necessity to have the strategy, which should be based on the analysis of the past experience, existing practice and the received recommendations. Therefore, article reviews the culture of amicable dispute resolution in Georgia, the results of the last 4 years after creating some legislation on mediation in Georgia and the elaborated recommendations. Herewith, in author's opinion, considerations and viewpoint made by Ilia Chavchavadze in his articles carries not only symbolic, but outstanding practical value too. Therefore, based on the values and the vision of the Ilia, article gives a conclusion about the importance of having successful mediation practice for the Georgian Judiciary and the vision how it should be achieved.

Key words: *court mediation, mediation culture, mediation models, vision of court mediation.*

1. Introducion

During the last 20 years, Georgian judiciary went through significant – major or minor – changes, naturally accompanied with the shortcomings. Establishment of a new legal institution is a challenge for successful accomplishment of which mere "copy" of a model law, strategy or action plan developed by a foreign country or international organization is not enough, especially when there is no universal formula for establishment successful mediation centers. Hence, the objective of consideration of the historical experience of dispute resolution, issued recommendations and the outcomes of practice is to identifying the keystones of the court mediation, the vector of its development and define the vision necessary for having successful court mediation in Georgia.

Despite the fact that peaceful regulation of conflict by the help of the third neutral party is long ago applied in Georgia, modern mediation, as an alternative mean for dispute resolution, is just on the initial stage. On December 20, 2011 the Change was introduced to the Civil Code of Practice of Georgia, initially applying to the legal institution yet unknown for the current Civil Code – court mediation.[1] The hereof change was the first step made in view of establishment of the modern model of mediation, which itself is a historical fact. After the legislative changes, interest to mediation in Georgian legislative space has significantly increased, evidenced with initiation of the pilot project of court mediation in Tbilisi City Court, various scientific events organized on mediation issue, scientific articles published and establishment of the Mediators Association since 2012. Correspondingly, if we agree on importance of court mediation as on efficiency thereof in dispute resolution in

[*] Doctoral Student, TSU Faculty of Law.

[1] See <https://matsne.gov.ge/index.php?option=com_ldmssearch&view=docView&id=29962>, [10.10.2015].

the sphere of private and public law, then we need to develop the approach and the principles in terms of court mediation policy in Georgia.

2. Historical Experience of Dispute Resolution with Settlement in Georgian Law

a) Settlement in Customary Law of Georgia

Inasmuch as Municipalities in Georgian Customary Law used to unify yet non-dissociated legislative, executive and legislative authorities,[2] it is hard to speak on mediation in Georgian Customary Law as of pure forensic institution,[3] especially as of the mechanism of dispute resolution in private law.[4] It is as well noteworthy that Georgian Customary Law did not envisage the strictly dissociated functions of the third neutral party – mediator and the judge as it is in modern jurisdiction currently. The evidence, on the one hand is plentitude of the names of the persons in public service, functions of which along with peaceful dispute resolution, also included: man of law,[5] judge, court secretary, debating mediator,[6] elder, mouravi[7] etc. "According to observations by Mikheil Kekelia, the term "mediator" was not known in Georgian reality till the XIX century. It has been introduced only since 1802", – as stated by the researcher of history of law, G. Davitashvili in his work.[8] On the other hand, the fact that the hereof persons enjoyed the authority of decision-making while relying on "old testaments",[9] e.i. the case law, indicates to their roles as not of only the facilitators to settlement but as of the decision makers. Despite of undoubtedly drastic difference between modern mediators and debating mediators, they also have similarities in lots of aspects, including in the rule of election – that the mediator should be the person acceptable for both parties; organization of the common and individual meetings upon settlement process; organization of sundry meetings for settlement; confidentiality of the information disclosed upon settlement etc.[10]

Along with the mediation institutions in Customary Law, the institution of settler Judge, introduced as a result of the judicial reform in Russian Empire in 1864 was also launched in Georgia.[11] Jurisdiction of the settler judges also applied to the civil cases,[12] the subject of dispute of which never exceeded 500 Rubles and envisaged consideration of the disputes entailed on the basis of personal insults, offense, recover of property rights, commitment of small crimes (crimes to which the

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2 *Kekelia M. (ed.r-in-chief),* Georgian Customary Law, Vol. 4, 1993, 165.

3 *Kekelia M. (ed.r-in-chief),* Georgian Customary Law, Vol. 4, 1993, 165.

4 According to the Customary Law, the Settler Mediators in Georgia were Mostly and Effectively Represented in Criminal Disputes.

5 *Davitashvili G.,* Court Organization and Process in Georgian Customary Law, Tbilisi, 2004, 34.

6 "Debating" – the Judge Elected for Consideration of the Disputable Case – Mediator" – Georgian Explanatory Dictionary.

7 In details, see *Tsulukiani A.,* Debating Mediation Court in Svaneti, magazine "State and Law", 9, 1990, 60.

8 *Davitashvili G.,* Court Organization and Process in Georgian Customary Law, TSU Edition, Tbilisi, 2004, 5.

9 Georgian Customary Law, Vol. 4, Editor-in Chief, Kekelia M., Publishing House "Metsniereba", 1993, 168. With further indication to: *Jibladze D.,* material on Customary Law of Pshavi, 73.

10 *Tsulukiani A.,* Svanetian Debating Mediator Court, Magazine "State and Law", №9, 1990, 67.

11 See <http://www.bibliotekar.ru/teoria-gosudarstva-i-prava-6/187.htm>, [11.09.2015].

12 *Giorgadze I., Gurgenidze N.,* Ilia Chavchavadze: Chronicles of Life and Activity, Bibliographical chronicle 1837-1907, Tbilisi, 1987, 48.

judge was unable to impose the penalty exceeding 300 Rubles). It might be vague for the reader what the settler judge does with mediation, which is quite a grounded question, however if we take high similarity between the settler judge and the mediation institutions into account, (objectives, advantages, tasks and course), we may state that the settler judge is one of mediation forms. In this very view, the terms – mediator and the settler judge are used as synonyms in USA and the Federal Republic of Germany, and the Courts offer services – the alternative means of dispute resolution within the common program, to the court users.[13]

Naturally, inculcation of Russian rules has gradually reduced the functions of the debating mediators on the whole territory of Georgia but their very existence served an effective precondition for establishment of the settler courts and both – in modern Georgia. Peaceful resolution of the court disputes is a well-known institution for the Georgian Court with rich historical experience and no doubt that it was actively used almost in all parts of Georgia and was organically combined with our culture. Correspondingly, when outlining the design, model and form of the modern mechanisms for dispute resolution, we shall attach due attention not to only international experience but to features of our local Customary Law.

As to the settler judges and generally, mechanisms for dispute resolution during Russian annexation, it might not at all become the subject of the hereby Article if not a single significant fact – *Ilia Chavchavadze* was appointed as one of the settler judges.

b. The Concept of Georgian Mediation by Ilia Chavchavadze

Taking the deepth of thinking and analyticalskills, as well as authority of *Ilia Chavchavadze,* the will to re-emphasize the concept by *Ilia Chavchavadze* on peaceful resolution of discord by means of the third neutral party must be clearly understandable in view to underline on the one hand the height of historical development of Georgian legal awareness and culture and on the other hand, importance of the brilliant example of activity of *Ilia Chavchavadze* in capacity of the settler judge in this sphere in successful re-establishment of this institution in modern milieu.

On February 1, 1868[14] *Ilia Chavchavadze* was appointed on the position of the settler judge on the basis of the Order of the Court of the Viceroy of Russia.[15] It is as well noteworthy that the position of the settler judge was not the first position for *Ilia Chavchavdze,* striving to arrange peaceful resolution of disputes, namely prior to this appointment, on November 8, 1964, *I. Chavchavadze* was appointed on the position of the settler mediator of Tbilisi Province, covering Gare-Kakheti and Mtskheta districts.[16] Soon after Tbilisi Province, he was dispatched to Dusheti region on the same position. At that time, the functions of the settler mediator comprised resolution of conflicts and tensions between the nobilities and peasants emerged due to the conducted reforms, dissociation-

[13] Dispute Resolution Programs of California Court, in details see <http://www.cand.uscourts.gov/adr>, [09.11.2015].

[14] *Giorgadze I., Gurgenidze N*., Ilia Chavchavadze: Chronicles of Life and Activity, Bibliographical Chronicles 1837-1907, "Science", Tbilisi, 1987, 48.

[15] It is Noteworthy that the Settler Judges in some Parts of Russian Empire were Directly Elected by People Amongst the Authorized Persons. Unfortunately, this Rule Never Applied in Georgia.

[16] *Giorgadze I., Gurgenidze N*., Ilia Chavchavadze: Chronicles of Life and Activity, Bibliographical Chronicles 1837-1907, Publishing House "Science", Tbilisi, 1987, 44.

specification of the land plots of the peasants and the landowners and composition of the contract awards, due to which, Ilia Chavchavadze, since the very first day on the hereof position, had to walk door-to-door in the villages of Dusheti Province along with the office "writer".[17]

The name of *Ilia Chavchavadze* is associated with establishment of the number of institutions and novelties, including one of the establishments – amicable dispute resolution, which was rarely underlined when speaking about the merit of *Ilia Chavchavadze* in the judicial system. He was not only a practitioner mediator (as a neutral peace-keeper) but his contributions for establishment of culture of mediation in Georgia (amicable dispute resolution) are immense, evidenced with the articles and publications authored by *Ilia Chavchavadze* regarding this issue, particularly including: "Mediation in Georgia", "Settler Judge in Georgia", "Court Quick and Right", "Courts in Georgia", "About Settler Courts".

Attitude of Ilia to mediation is clearly demonstrated in the article published in the newspaper "Iveria" on April 19, 1886 – "About Settler Courts", where he estimates addition of 30 more settlers in Georgian jurisdiction as the fact of utmost importance. Namely, he wrote: "the further life goes on, the harder relations between people are. We encounter brisk trade exchange and hence, importance of the settler court is higher. More and more cases the Court has to deal with and the small number of the Courts is insufficient to meet the requirements of local jurisdiction. And if jurisdiction is as short to fail to deal with local requirements, if due to this shortage not everyone is allowed of easy and quick application to the Court for restoration of justice, then life can no longer be considered as desired due to routine interruptions, affecting first of all the economic life and the moral condition of the population. People need quick and easy, informal Court. Violated rights need to be quickly restored". The hereof issue is still as relevant as in the second half of the XIX century. Even today, we encounter protracted civil litigations and the Courts are overloaded with the pending cases.[18] Addition of the Judges instead of the mediators is still doomed to be the solution of the hereof situation[19], while increase of number of mediators, as *Ilia* presumed, will enable approximation of justice to the people.[20] At that, unfortunately, the incumbent Council of Justice of Georgia is not active enough considering setting up of the Settler – Mediation Centers as a solution of the challenges the Court encounters regardless of heartily support of *Ilia Chavchavadze* to this endeavor. "Workers on daily basis strive to find food, so it is hard for them to walk a long distance, to expect trials, to serve constant visits – all these entail excessive costs and are considered a damage for the people… as we see the greatest troubles people are in as they have to walk to the door of the Court during a whole year, then it means they have to abandon their houses and families and lose their time in the Courts!". "People do not enjoy disputes but strive for quick resolution", and in this single sentence, *Ilia Chavchavadze* manages to form the Court as the concept of service rendered by the body

[17] Tsk. T. IX, 309.
[18] Statistic Data of the Supreme Court of Georgia, see <http://www.supremecourt.ge/statistics/>, [10.11.2015].
[19] The Statement by the Chairman of the Supreme Court of Georgia on Addition of 100 more Judges, see <http://www.ipress.ge/new/7577-raionul-saqalaqo-sasamartloebs-100dan-150mde-mosamartle-daemateba>, [10.11.2015].
[20] *Chavchavadze I.,* On Settler Courts, Newspaper Iveria, 1886, №86.

for jurisdiction, namely necessity to prioritize prompt and effective resolution of dispute. The article by *Ilia Chavchavadze* published in the newspaper "Droeba" (Times) N51 of March 10, 1883 is dedicated to the same issue – "Court Quick and True". As we already see from the title, Ilia Chavchavadze in his article speaks about deficiencies of delayed jurisdiction, indirectly indicating to "imaginable" nature of success of the prevailing party under the conditions of "protracted" jurisdiction: "say, you sued having your claims. What would your opinion be about justice suspending you in one instance for a month, then to another with the same period etc. and as two years pass, states: you won, good luck. And in his publicist letters he provides that "the greater part of people cannot interpret laws, another part cannot tolerate formality, respects a real truth and wants to save time; people rather want their litigations to be quickly accomplished and the judgments to be based on the fact considered by people as the truth".[21]

Unfortunately, deriving from the confidential nature of settlements and due to scarcity of the stationary material kept in the National Historical Archive of Georgia (in informative terms), we failed to obtain most of the material reflecting the mediation process conducted peculiarly by *Ilia Chavchavadze,* though we still discovered two cases where *Ilia Chavchavadze* successfully accomplished mediation between the parties. The first of the cases was in re dispute – the priest Shio Barnabishvili v. Phillippe Arganashvili: "I, as the settler judge, have assured the parties about peaceful resolution of the dispute in the agreement that Arganashvili should indemnify four manats instead of five to the priest and give the lamb back. They agreed on these conditions".[22] Relevantly, Ilia Chavchavadze ceased proceedings and delivered it to the Archive. The second case demonstrates that the habitant of the village Uremi, Tiko Kochorashvili appealed to the Court against her husband – Kutsika Kochorashvili due to his adultery. "I have assured the plaintiff and the defendant on peaceful resolution and on forgiveness of each other's assault and offence, as well as complete restoration of the marital rights and clarity of marital responsibilities between the spouses. The plaintiff and the defendant expressed their consent on my offer and reconciled, asking to terminate proceedings. They could not sign the document due to illiteracy",[23] – as the records provide. The fact that *Ilia Chavchavadze* systematically referred to mediation and was successful therein is clearly manifested in the stationary records of the Historical Archive, though they fail to provide the information about the immediate circumstances and the disputable subject between the parties.[24]

Taking similarity of the institutions of the settler judge on the territory of Georgia in the second half of the XIX century and the modern Court mediation into account, we can unconditionally call *Ilia Chavchavadze* the flagship of Georgian mediation, especially that most of the lawyer mediators in the modern developed countries are former and incumbent judges.[25]

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[21] *Chavchavadze I.,* Settler Judges in Georgia, Letter №6, Publicist Letters, Vol. IV, Publishing House "Sakartvelo" Georgia, Tbilisi, 1987, 359.

[22] See the Protocol of September 23, 1968 in re case №289-1, Kept in the National Historical Archive of Georgia.

[23] See the Protocol of July 23, 1868 in re case C128, Kept in the National Historical Archive of Georgia.

[24] See №f.8-1-2284, № f.31-1-27, № f.31-1-211, № f. 31-1-20268 da № f. 31-1-20650 Folders Kept in the National Historical Archive of Georgia.

[25] Evidenced with the Lists of the Mediators Licensed by the International Mediation Organizations, for Instance: <www.jamsadr.org>, [05.11.2015].

3. Modern Court Mediation Practice after four Years of Adoption of Legislation

On November 21, 2011, the legislative package on "Changes to Sundry Legislative Acts of Georgia"[26] has been initiated to the Parliament, aiming at establishment of the institution of mediation into the judicial system. According to the explanatory note to the draft, "the draft aims at establishment of the alternative mechanism of dispute resolution – institution of mediation to facilitate to elimination of disputes between the parties in compliance with their agreement and increase of public awareness to allow amicable dispute resolution", and the objective of the draft was stated to be provision of quick and effective jurisdiction in the Regional (City) Courts and the Courts of Appeal and facilitation to amicable resolution of disputes between the parties.[27]

The above-mentioned draft was soon adopted – on December 20, 2011 and enacted on January 1, 2012. In view of clarification whether the resources (potential) of improvement of the progress during four years upon enactment lie in the legislative norms or implementation (administration) of the policy undertaken in view of establishment of new institution, we need to severally consider the legislation and the practice.

a. Analysis of the Legislation Regulating the Court Mediation

Achievement of the objective prescribed with adoption of the norms regulating the Court mediation, required the developed legal norms to stimulate application of mediation without prejudice of essence of mediation; to protect the parties of the litigation and the disclosed information but to prevent excessive regulation of the process; in view of effective enforcement of mediation to elaborate the masterly and balanced legal mechanisms. Analysis of the above-mentioned issues requires consideration of the issues as follows:

1. Concept of Mediation

Chapter XXI[1] of the Civil Code of Practice of Georgia – "Court Mediation" fails to provide explanation of mediation, indication to the role of the third neutral party of the process, control of the process outcomes by the parties and the style of the mediator. The hereof issues are neither regulated under any normative acts adopted by the judicial authority. Correspondingly, it still is up to the professionalism and conscientiousness of the practitioner mediators to deal with the number of similar issues, which as a rule, are prescribed with the concept of mediation, for instance: the style of the mediation process conducted by the mediator, whether he/she will offer the mediation conditions to the parties etc.

2. Initiation of the Process

In line with the Article 187[3] of the Civil Code of Practice of Georgia[28], initiation of the Court mediation is possible in the event of consent of the parties on any dispute and with the Court order:

a) On family disputes other than adoption, annulment of adoption, restriction of the parental rights and deprivation of the parental rights;

[26] See <http://parliament.ge/ge/law/7675/15264>, [11.24.2015].
[27] Explanatory Note to the Draft, see <http://parliament.ge/ge/law/7675/15264>, [11.24.2015].
[28] See <https://matsne.gov.ge/ka/document/view/29962?geo=on#>, [03.11.2015].

b) On Legal disputes over inheritance;
c) On Legal disputes over neighborhood.

Correspondingly, the legislators, regarding initiation of the process, have opted for the intermediate approach implying admittance of mandatory mediation on the cases of three categories solely and in other events, reserved it in capacity of the subject of voluntary agreement of the parties. A very interesting factor of the legislation regulating Georgian Court mediation is the reservation in the paragraph two of the Article 187^3 of the Civil Code of Practice of Georgia[29] that in the event of voluntary mediation solely, i.e. in the event of agreement of the parties, the dispute can be referred to mediation at any stage, which implies that the adoption of the judgment on mandatory mediation by the Judge is permitted on the preparatory stage solely instead of any stage. It is as well noteworthy that in line with the Article 187^3 of the Civil Code of Practice of Georgia, the judgment on delegation of the case to the mediators shall not be appealed. Hence, we can state that the legislation of Georgia perceives the institution of mediation, more specifically the mandatory mediation as the integral part of Court proceedings. The fact that the disputes of certain categories shall be referred to the mandatory mediation in the manner depriving the parties the right to appeal, and it is rather the decision made in the course of the Court administration instead of restriction of the right to appeal to the Court as guaranteed under the Constitution. This is the very attitude practiced by the Courts of the number[30] of the countries, though in this event it is to be regulated under the decision of the body developing the policy of jurisdiction for the Common Courts – the High Council of Justice. In compliance with the sub-paragraph "e" of the paragraph one of the Article 49 of the Organic Law of Georgia on "Common Courts", "the High Council of Justice of Georgia shall develop and endorse the rule of organizational practice of the Common Courts"[31] and in accordance with the sub-paragraph "u" of the paragraph "g" of the Article 9 of the Rules of Procedure of the High Council of Justice of Georgia, the High Council of Justice shall endorse the rule of organizational practice of the Common Courts and make the decisions on the issues related to due functioning and administration of the Common Court system.[32] Correspondingly, the High Council of Justice, ratifying the Provisions on the rule of organizational practice and activity of the Court mediation, would ensure integration of Court mediation into the judicial system of Georgia.

3. Privacy Protection Issue

The process of Court mediation is safe for the parties first of all in terms that the mediation, in the event of failure of settlement, is not to entail damage to the parties in regards with disclosure of information. Privacy, as an institution, is beneficial and interesting for the parties not willing to refer the conflict with the family member, coworker or partner to the public area (Court). It is of crucial importance for the integral components of mediation: improvement of communication and due obtainment of information. Moreover, inasmuch as unlike the Court proceedings, the mediator upon

[29] See <https://matsne.gov.ge/ka/document/view/29962?geo=on#>, [03.11.2015].
[30] See US Court Mediation Rules, <http://www.cand.uscourts.gov/overview>, [11.05.2015], or Australian Court Mediation rules, <http://www.ag.gov.au/LegalSystem/AlternateDisputeResolution/Pages/NADRACPublications-A-Z.aspx>, [11.05.2015].
[31] See <https://matsne.gov.ge/ka/document/view/90676>, [12.12.2015].
[32] See <http://hcoj.gov.ge/ge/legal-framework/varios>, [12.12.2015].

mediation strives to achieve mutually beneficial solution by means of "inter-play" of different or common but not contradictory, legal, psycho-social and material interests of the parties, privacy protection issue also has an immense impact on the integral parts of mediation – achievement of creative solution. Deriving, in view of identification of real needs of the parties, the effective Court mediation requires from the mediator to have the capacity to obtain any information, including confidential. Vice versa, if the judicial system fails to ensure due protection from disclosure of confidential information, it can be prejudicial for the parties. Without due guarantees for privacy protection, the parties in the mediation process do not as a rule disclose sensitive information fearing leakage and thus, it appears impossible to obtain the complete picture on the disputable issue. That is why, privacy protection is one of the mainstays of the mediation process and without privacy protection due mediation is doomed to be impossible. The hereof issue has been envisaged by the Georgian legislators, which is clearly evidenced with the Articles 104, 141 and 187^8 of the Civil Code of Practice of Georgia, namely in line with the Article 104 of the Civil Code of Practice of Georgia, the Court rejects the information and the documents, disclosed under the privacy conditions upon Court mediation in capacity of the evidences, save otherwise agreed by the parties.[33] Under the paragraph 1^2 of the hereof Article, this rule shall not apply in the event if the disclosed information or the document is submitted to the Court by the party disclosing them, or if the hereof information or the document was possessed by another party or obtained otherwise under the law and introduced to the Court.[34] As to the Article 187^8 of the Civil Code of Practice of Georgia, it prohibits as parties so the mediators from distribution of the information disclosed under the mediation, and the Article 141 of the Civil Code of Practice of Georgia prohibits interrogation of the mediator in capacity of the witness in regards with the circumstances, about which he/she became aware upon exercise of the functions of the mediator. It is also interesting that unlike regulations in Germany[35] and some of the US States[36], the legislation of Georgia fails to envisage the exceptions from the above-mentioned, which at some extent is in compliance with the European Directive[37] on "Certain Aspects of Mediation in Civil and Commercial Matters", namely despite of the fact that the preamble and the text of the Directive emphasizes importance of confidentiality for the mediation process, the paragraph one of the Article 7 of the Mediation Act envisages exceptions as well – if the confidential information concerns the public order of the country, more specifically the interests of a child or enforcement of the act of settlement. However, the paragraph two of the same Article entitles the signatory countries to undertake stricter rules for privacy protection than it is provided in the Directive itself; inasmuch as

[33] See <https://matsne.gov.ge/ka/document/view/29962?geo=on#>, [03.11.2015].
[34] See <https://matsne.gov.ge/ka/document/view/29962?geo=on#>, [03.11.2015].
[35] You can compare it with the German legislation where according to the Article 4 of the Mediation Act, in exceptional cases the mediator can be exempted from the obligation of privacy protection, namely it is admitted in the event solely if disclosure of information appears necessary for settlement or protection of public order, see <http://www.gesetze-im-internet.de/bundesrecht/mediationsg/gesamt.pdf>, [12.11.2015].
[36] According to the legislation of the State of Wisconsin, the mediators are allowed of disclosing the confidential information in camera in the event if keeping the information disclosed upon mediation confidential is an illegal action, see <http://www.wicourts.gov/services/attorney/mediation.htm>, [10.02.2014].
[37] Directive 2008/52/EC, on Certain Aspects of Mediation in Civil and Commercial Matters, of the European Parliament and of the Council, 21 May 2008, see in details <http://eur-ex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32008L0052:en:NOT>, [03.07.2015].

possibility to secede from the Agreement on Confidentiality, first of all, is conditioned with the public interests prevailing over the private interests of protection. As well in Georgia, exceptions from the privacy protection rule, would likely be better for the mediation institution itself rather than worse. It is true that the rules of the leading Mediation Courts of the developed countries also envisage absolute obligation of privacy protection similar to Georgia (for instance, Court of California[38]), though taking the qualification of mediators in Georgia into account, such settlement can be still related to certain risks.

4. Rights and Obligations of the Parties of the Process

The Civil Code of Practice of Georgia imposes the following rights and obligations to the parties of the Court mediation:[39]

- In line with the sub-paragraph "e" of the Article 31, the Judge shall deter the case if he/she participated in re in capacity of the mediator;
- Authority to deter the mediator shall be granted to the parties on the same basis (Article 187^4 of the Civil Code of Practice of Georgia) as of the basis for deterrence of the Judge;
- In line with the Article 94 of the Civil Code of Practice of Georgia, the person shall not serve in capacity of the representative in the Court, who participated in the status of the mediator in the same case, and in line with the Article 35 of the Civil Code of Practice of Georgia, same restriction shall apply to the expert, translator, specialist and the secretary of the sitting;
- The Article 187^8 of the Civil Code of Practice of Georgia prohibits the mediators and the mediation parties from distribution of the confidential information disclosed upon mediation;
- The Article 141 of the Civil Code of Practice of Georgia on the one hand privileges not to give testimony concerning the information disclosed upon mediation and on the other hand, prohibits serving the witness in the Court concerning the circumstances, disclosed thereto upon exercising the functions of the mediator;
- part one of the Article 187^4 obliges the parties to attend at least two mediation meetings at the appointed time and venue, and in the event of absence without a good reason, the parties shall be imposed with the penalty of 150 GEL;
- In line with the Article 187^5, the mediator, in view of settlement of the parties, is entitled to use the period of 45 days, which can be extended with the same term on the basis of the consent of the parties.

Resuming the hereof regulations, we can state that in line with the legislation of Georgia: 1) the third neutral party shall be deprived of the right to participate in the same case in another status after he/she participated in capacity of the mediator; 2) in terms of confidentiality, the mediators are attributed to the category of the privileged professions, protected from the obligation to disclose the information obtained upon implementation of their professional duties; 3) direct participation of the parties is ensured in the mediation process; 4) the reasonable term is established upon expiry of which the mediator shall resubmit the case to the Court for consideration.

[38] Sanction 1121 (mediator's Reports and Finding) California Evidence Code, see <http://www.leginfo.ca.gov/cgi-bin/displaycode?section=evid&group=01001-02000&file=1115-1128>, [03.01.2015].

[39] See <https://matsne.gov.ge/ka/document/view/29962?geo=on#>, [03.11.2015].

The aim of regulation of the rights and obligations of the parties of the mediation process on the legislative level is to protect the mediation process, the interests of the parties and jurisdiction. Hence, in case of comparison of the hereof obligations of the mediators with the obligations of the mediators of the developed countries (Germany, Austria or (deriving from the liberal approaches) the State of California), we can clearly see that the obligations of the mediators in the process of the Court mediation in Georgia, are not quite perfectly regulated. According to the federal legislation of Germany, namely the Article 5 (1) of the "Mediation Act"[40], the person willing to be appointed as the mediator shall meet the following requirements: pass the mediation training to study the basic principles of mediation, the technique of negotiations and communications, conflict management and the law on mediation, and if the person wills to become the registered mediator, according to the Austrian law on Mediation, he/she needs to: a) be 28 years old and over; b) be of high reliability; c) meet the criterion of professionalism; d) have own responsibility insured with 400 000 EURO. And finally, the persons willing to become the mediators in the State of California[41] shall pass the 25-hour theoretical and practical trainings and sign the Code of Conduct for mediators, envisaging consideration of at least one pro bono case per year.

5. Resolution of the Case with Settlement

There are no any special forms or requirements in Georgia for registration of the settlement achieved in the Court mediation. However, the Article 187^7 of the Civil Code of Practice of Georgia regulates the issue of resolution of the Court mediation. Namely, "if the dispute, within the term established under the law on Court Mediation, is resolved amicably, the Court, on the basis of the mediation, shall adopt the judgment on endorsement of settlement of the parties. The hereof judgment is final and shall not be appealed[42] and shall enter into force without delay". At that, in line with the Article 2 of the Law of Georgia "On Enforcement Proceedings"[43], the judgments entered into legal force on private and administration cases shall be subject to enforcement.

Legislation of Georgia envisages not only the mechanism for simplified enforcement of the settlement achieved upon the Court mediation but in view of resolution of the case through mediation, establishes certain stimulating mechanisms for the Court applicants, including one of the most important factors – economic motive. Namely, in the event of resolution of the dispute through mediation, the amount of the state tax constitutes 1%, however no less than 50 GEL.[44]

In financial terms, the hereof rule for reduction of the Court fees is indeed a good motivator for the parties,[45] however we shall take another issue into account: in line with the Article 208 of the Civil Code of Practice of Georgia, in case of Court settlement (instead of mediation), the Judge shall

[40] See <http://www.gesetze-im-internet.de/mediationsg/__1.html>, [12.12.2014]
[41] See <http://www.courts.ca.gov/rules.htm>, [11.05.2013].
[42] See <https://matsne.gov.ge/ka/document/view/29962?geo=on#>, [03.11.2015].
[43] See <https://matsne.gov.ge/ka/document/view/18442>, [03.11.2015].
[44] Paragraph "a3" of the Article 39 of the Civil Code of Practice of Georgia, see <https://matsne.gov.ge/ka/document/view/29962?geo=on#>, [03.11.2015].
[45] As outlined in practice, often the parties upon filing the claim to the Court of the First Instance, completely cover the Court fees, stipulated under the Law of Georgia on "State Fees" – 3%, due to which the Judge, along with approval of the settlement protocol, refunds excessively paid 2% to the parties.

make his/her judgment on termination of proceedings and endorses the terms of settlement, and in the event of termination of proceedings, the paragraph 3 of the Article 6 of the Law of Georgia "On State Fees" allows complete refund of paid state fee.[46] Correspondingly, the hereof record provides better impetus for settlement in the Court in practice than for settlement through mediation. The hereof issue might not be important, though we shall expect the parties to refuse accomplishment of the case with settlement through mediation due to the fact that settlement in the Court hall after accomplishment of mediation process will be more beneficial for the parties.

It is as well noteworthy that even the regulatory norms of the Court settlement in Georgian legislation have some gaps. Namely, in line with the Article 218 of the Civil Code of Practice of Georgia,[47] the Judge, in view of settlement of the parties, is authorized by own initiative or through mediation of the parties, to announce the break during the trial and hear the parties or the representative of the parties solely without attendance of other persons. Besides, the Judge, in view of settlement of the parties, is entitled to indicate to the possible outcomes of dispute resolution and offer the settlement terms to the parties. Whereas the Judge is in capacity of the mediator in the case under his/her consideration and fails to delegate the case to his/her colleague, as practiced in the Courts of German Federation for instance,[48] the settlement process is being exposed to the following problems:

1. The parties and the Judge himself/herself find it complicated to instantly switch from the trial based on the principle of competitiveness to the settlement process based on the principle of cooperation and hence, to change their attitude to the process. Deriving from the hereof fact, the Court settlement processes ongoing in the Courts of Georgia, with high probability are used to continue in the same opposing mode similar to the mode of the trial;
2. The parties, acknowledging that in the event of failure to achieve settlement, the same Judge is to make the decision on the subject of dispute dictated by his/her personal belief, abstain from disclosure of the confidential information that might have impact on the decision-maker. Correspondingly, the fact that the Judge is entitled to hear the parties solely without presence of other persons, cannot serve the guarantee sufficient for the parties to disclose the sensitive information.
3. There is the threat upon estimation of the settlement terms by the third neural party during the settlement process or upon offers that if the parties consider any of them inadmissible, the neutral party upon disclosure – the Judge or the mediator, loses the role of the neutral party for the signatory party and is converted into the "Lawyer" of the opponent. Hence, indication by the Judge peculiarly considering the case, even in view of settlement of the parties, to one of the parties (or both) on the outcome of dispute resolution inadmissible thereby or on settlement terms, undermines the neutral or unbiased image of the hereof Judge in case of continuation of the process, which is quite a crucial issue for jurisdic-

[46] See <https://matsne.gov.ge/ka/document/view/93718>, [03.11.2015].
[47] See <https://matsne.gov.ge/ka/document/view/29962?geo=on#>, [03.11.2015].
[48] *Hopt K. J., Steffek F.,* Mediation Principles and Regulation in Comparative Perspective, Oxford University Press, Oxford, 2013, 17.

tion.[49] In view of solution of the hereof problems and neutralization of the risks, the dispute upon Court settlement in Germany shall be delegated to the other Judge entitled to meet with the parties in different milieu to introduce own role and through formation of cooperative attitude between the parties, to try accomplish the judicial discord with settlement. At that, he/she shall not disclose the information to the Judge considering the case, that he/she became aware upon the settlement process. Correspondingly, he/she shall keep confidentiality and in the event of failure of the settlement process, re-delegate the case to the initial Judge.[50]

Likely, the conditional factor of the quite unfavorable statistic data of the settlements[51] achieved through the Court settlement in the Common Courts of Georgia, is the gap in the hereof legislation along with the pure skills of settlement technique of the Judges. Correspondingly, improvement of the legislation regulating the Court settlement in Georgia would be preferable taking the best practice of the leading European countries into account.

b. Practice Analysis of the Pilot Project of Mediation in Tbilisi City Court

After enactment of the legislative norms (January 1, 2012), on May 7, 2012,[52] the Memorandum concluded between the High Council of Justice of Georgia, High School of Justice, Tbilisi City Court, the National Center for Alternative Resolution of Disputes at Tbilisi State University, the "German International Cooperation Society" (GIZ) and the "Judicial Independence and Legal Empowerment Project" (JILEP) in view of practical enactment of the Court mediation was the first step forward. The Memorandum on Cooperation facilitated to launch of the pilot project of Court mediation in Tbilisi City Court and selection of the candidates eligible for the training course on mediation organized with support of the "British Center for Effective Dispute Resolution" (CEDR). The pilot project of mediation of Tbilisi City Court has triggered the mediation meetings in December, 2013. During two years, 44 cases[53] altogether have been delegated for mediation (3 cases in 2013, 13 cases in 2014, 28 cases in 2015). 16 of the cases delegated for mediation have been accomplished with settlement, 25 have been accomplished without agreement and 3 disputes are still under mediation. In percentage terms, 39% of 41 cases was accomplished with settlement and 61% failed. It is noteworthy that during the accounting period, the pilot project covered only the voluntary mediation cases, the most of which – 29 cases were the mandatory legal disputes, 11 cases were the domestic and 4 cases were hereditary disputes.[54] If we take lack of culture of dispute resolution with settlement – mediation into account in current Georgian jurisdiction, evidenced with the official statistic data by the Supreme Court (namely, according to the

[49] An interesting elucidation has been made concerning the hereof issue in the Judgment of the Civil Chamber of the Court of Appeals of Tbilisi of August 6, 2015. See <http://library.court.ge/judgements/63762015-09-11.pdf >, [11.11.2015].

[50] *Hopt K.J., Steffek F.,* Mediation Principles and Regulation in Comparative Perspective, Oxford University Press, Oxford, 2013, 18.

[51] See <http://www.supremecourt.ge/statistics/>, [12.12.2015].

[52] See <http://hcoj.gov.ge/ge/sasamartlo-mediatsiis-temastan-dakavshirebit-memorandumi-gaformda/1924>, [28.11.2015].

[53] The hereof statistic data is provided by Tbilisi City Court on December 2, 2015.

[54] The Letter of Tbilisi City Court of November 25, 2015.

information by the Statistic Service of the Supreme Court of Georgia, the following cases have been accomplished with Court settlement on the civil legal disputes in Tbilisi City Court: 8.4% of considered cases in 2012, 7.2% in 2013, 9.6% in 2014 and 9.1% in 2015.[55] The hereof data countrywide is even lower. Namely, the following cases have been accomplished with Court settlement on civil disputes: 8.3% in 2012, 8.4% in 2013, 9.4% in 2014 and 8.5% in 2015.[56]), the data obtained as a result of the pilot project is almost 4 times higher than the percentage index of the Court settlements. Correspondingly, the settlements achieved during the last two years for the mediation pilot project can be considered as quite a successful result.

The administrator of the pilot project of Tbilisi City Court, other than the statistic data of the cases submitted to the Mediation Center, shall initiate the anonymous questionnaire of satisfaction of the parties of the mediation process with the mediation process and the mediator. The leading Mediation Centers[57] consider the results of the questionnaire of satisfaction of the mediation users as the main measurement unit of project success instead of the percentage data of accomplishment of cases with settlement, which is quite logical if we consider the fact that the objective of mediation is not only achievement of settlement but continuation of the dispute in the Court after the parties are assured that dispute resolution by the Judge is the best solution way for the given situation. Relevantly, the lawyer and the client shall leave the mediation process with satisfaction even when the lawyer fails to accomplish the dispute with settlement whereas is aware that it is the event when there was no chance to use settlement, peaceful resolution of the dispute, transformation of relations and other advantages of mediation and not when the parties merely leave the opportunities unrealized or moreover – they lose the opportunities. Deriving from this fact, the questionnaire of satisfaction of the users is one of the best methods to control, maintain and improve the quality of mediation process, which likely will be implemented by the managers of the pilot project peculiarly after some period of time.

The pilot project of Tbilisi City Court, in terms of the number of delegated mediation cases, has nothing to be proud of, though usage of the voluntary mediation at the first phase and enactment of the mandatory mediation only after accumulation of some experience (likely since 2016) shall be considered as the right decision of the managers of the pilot project. As noted, satisfaction of the users is more important than the quantitative index but whereas the questionnaire of satisfaction of the users is confidential, it would be hard to speak about the achievements of the Mediation Center of Tbilisi City Court in this regards, though the fact that the hereof information is accumulated, processed and stored in the base of Tbilisi City Court, is to be undoubtedly hailed.

4. Recommendations of the International Experts

Three reports publicly accessible have been developed concerning the alternative means of dispute resolution, namely the dynamics and prospects of development and state of mediation during the last five years in Georgia. All the reports have been held at various stages of development of me-

[55] The Letter of the Supreme Court of Georgia of November 20, 2015 №118.
[56] The Letter of the Supreme Court of Georgia of November 20, 2015 №118.
[57] See <http://www.jamsadr.com/>, an <http://www.ca9.uscourts.gov/mediation/>, [11.11.2015].

diation with engagement of various experts. Hence, they do represent important documents for study and analysis of the recommendations adopted in view of realization of the trajectory, current and missed opportunities of development of Court mediation in Georgia and that is why they deserve to be individually considered.

In October, 2011 the contracted expert, *Michael Blechman* has developed the evaluation (report) of the alternative means of dispute resolution in Georgia with support under the "Judicial Independence and Legal Empowerment Project".[58] The report covers evaluation of not only the Court mediation but the alternative means of dispute resolution in general. Development of the norms regulating mediation has had not even been triggered during the visit of the expert in Georgia, though this fact makes the hereof evaluation even far more interesting in terms of study of the available opinions and expectations for 2011 of the persons concerned with development of alternative means of dispute resolution in Georgia. In view to accurately foresee the trajectory of development of mediation, we shall outline the records made by the expert as a result of the meeting with the law companies concerning the fact that regardless of recognition of the mediation institution and friendly attitude thereto, the representatives of the law companies were not sure about the extent of efficiency of the hereof institution in Georgia without stimulating mechanisms.[59] Thus, importance of mediation stimulating mechanisms has been initially considered.

Correspondingly, the conclusion developed by the expert on alternative means of dispute resolution in Georgia is as follows: "the prospect of development of mediation in Georgia is quite high, inasmuch necessity thereof is confirmed by the Judges, lawyers and Law Schools and there is the potential to realize the model to facilitate to development of alternative means of dispute resolution".[60]

It is noteworthy that the author of estimation (*M. Blechman*) initially underlined importance of the model. Namely, in view of development of mediation in Georgia, as he presumes, we shall take the experience of development of commercial mediation of the Balkan states by "International Financial Cooperation" (IFC) into account.[61]

In March, 2015, within "Judicial Independence and Legal Empowerment",[62] the "European Center for Dispute Resolution" has developed the report on mediation in Georgia providing interesting observations and recommendations. The hereof recommendation is the most comprehensive report in terms of estimation of development of mediation institution in Georgia. The goal of the expert, Aleš Zalar[63] invited for development of the report was to estimate: the extent of efficiency of

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[58] "Judicial Independence and legal empowerment program" was the 4-year initiative implemented by the "East-West Management Institution" in Georgia with financial support by USAID, See <http://www.ewmi-jilep.org/>, [22.10.2015].

[59] *Blechman M. D.,* Assessment of ADR in Georgia, Assisted by USAID – JILAP Commercial Law team, 2011, 5.

[60] Ibid.

[61] See the report in details, <http://www.ifc.org/wps/wcm/connect/991f510047e98d59a52ebd6f97fe9d91/ PublicationBalkansGivingMediationaChanceADRStory.pdf?MOD=AJPERES>, [11.11.2015].

[62] "Judicial Independence and legal empowerment program" was the 4-year initiative implemented by the "East-West Management Institution" in Georgia with financial support by USAID. See <http://www.ewmi-jilep.org/>, [22.10.2015].

[63] *Zalar A.,* "European Center for Dispute Resolution", the President, the former Minister of Justice of Slovenia, the mediator.

mediation in capacity of dispute resolution mean in Georgia; the course of the pilot project in Tbilisi City Court and impact of the pilot project on development of mediation countrywide.

In view of estimation of the norms regulating mediation, the expert has offered verification thereof by means of the questionnaire developed by the "National Austrian Dispute Resolution Commission"[64] facilitating the persons working on the norms regulating mediation to develop the consistent approaches and respective standards in regards with the hereof issues. The author of the study considers the issues as follows problematic for development of the mediation institution in general in Georgia:

1. Unavailability of the document defining the policy for development of alternative means of dispute resolution, which along with other issues, is entailed with waning support by the donor organizations in the course of development of mediation;
2. Unavailability of the uniform and the standing Advisory Body in view of definition of the policy for alternative means of dispute resolution, to implement the functions of the coordination agency.

Correspondingly, the main challenge for further development of mediation is ineffective system of exchange of information and coordination of processes between the parties engaged in the process of development of media, as well as unavailability of the uniform approach. Hence, despite of the Chapter provided in the Civil Code of Practice envisaging Court mediation, unavailability of the legislative act regulating the mediation institution in general creates incomplete legislative frame in Georgia, failing to comply with the EU respective directives on the one hand and entailing reduction of confidence towards the institution amongst the potential users thereof on the other hand.

In the part of the Court mediation, the expert has noted the positive aspects of the Chapter 21^1 of the Civil Code of Practice[65] of Georgia upon estimating the legislation as follows:

- Opportunity of establishment of mediation in the judicial system with both forms – as the Court mediation, so the Court-related mediation;
- Opportunity of application of mandatory mediation towards the domestic, hereditary and neighborhood disputes;
- Availability of maximal duration – 90-day provision of mediation;
- Imposition of the respective sanctions in the event of failure to appear at the mediation process;
- Other than exceptions stipulated under the law, opportunity of delegation of all civil legal disputes for mediation with the consent of the parties;
- Observance of confidentiality and inadmissibility of the created evidences at the trial in mediation process;
- Enforcement of the settlements achieved by means of the Court.[66]

[64] National Australian ADR Commission, see <http://www.ag.gov.au/LegalSystem/AlternateDisputeResolution/Pages/NADRACPublications-A-Z.aspx>, [22.10.2015].
[65] See <https://matsne.gov.ge/ka/document/view/29962?geo=on#>, [03.11.2015].
[66] The list is incomplete.

- In line with the developed documents, the gaps in the legislation are as follows:
- In the Civil Code of Practice, incomplete compliance of the Chapter on the Court mediation with the EU respective directives and the UNCITRAl Model Law;
- Unavailability of the criterion for selection and accreditation of the mediators;
- Encouragement of the Judicial Authority and the concrete Courts for development of the mediation programs and respective regulatory norms;
- Disorganization of the issue of financing of the Court mediation;
- Unequal conditions of the settlement achieved by means of the Court settlement and mediation in financial terms;
- Obligation of at least two mediation meetings.[67]

Based on the hereof gaps and positive aspects provided in the current legislation of Georgia, the report provides respective conclusions on the pilot program ongoing in Tbilisi City Court. The recommendation on formation the provision of the pilot program taking the interests of the Court and the users into account is particularly noteworthy. Another recommendation offers mediation to the parties of the dispute at the early stage. Other recommendations also envisage the advices on communication with the users and most importantly, the recommendation on transmission of the pilot project on the domestic disputes to the mandatory mediation, and the neighborhood and hereditary disputes – to the quasi mandatory (soft) model.[68]

The part of the report on Court mediation provides the recommendations not only for Tbilisi City Court but for the High Council of Justice of Georgia, namely, the recommendations to add the quantity of the cases delegated for mediation in the "forms of individual statistics" of the Judges and to add the quantity of appeals to mediation amongst the criterion for effective evaluation of the Judges.

It is hard to state that any fundamental changes have taken place six months after adoption of the recommendations provided in the study. All the recommendations or the ideas provided therein are as relevant as in the end of 2015 during the visit of the experts in Georgia and correspondingly, existing problems were supplemented with another problem – failure to consider the most important recommendations developed by the experts. Although, the High Council of Justice of Georgia launched extension of the pilot projects to go beyond Tbilisi area, established the Association of Mediators and the pilot project ongoing in Tbilisi City Council is to be transformed into the mandatory mediation since 2016 but to complete picture remains unchanged – Court mediation has the slow development pace so far.

Despite, Aleš Zalar served the short-term visit to Georgia aiming at development of the report, he succeeded to thoroughly study the impediments for establishment of mediation in Georgia, the circumstance amongst of which is particularly noteworthy that he recognized the main impediment for establishment of mediation in Georgia not in technical or legislative sphere but in exchange of information between the agencies concerned, coordinated cooperation and joint administration of the

[67] The list is incomplete.

[68] Implying the opportunity to waive mediation on the basis of due ground and in writing within the term of 8 days upon submitting the Judgment.

processes, reflected on administration of the process of establishment of the hereof institution in Georgia.

And finally, the founder of the "Rule of Law Foundation", *Victor Schachter* and the expert of the Foundation, *John Koppel* served the visit to Georgia in May, 2015. Within the visit, the experts studied the norms regulating the Court mediation and held the meetings with the parties in the process of establishment of Court mediation. Based on the information obtained, the engaged specialists have developed the recommendations classified thereby according to the high, mid-high and average priorities. The issues as follows in the list of the recommendations have been granted the top priority:

- Enactment of mandatory mediation;
- Set up of the working group, namely with participation of all parties concerned;
- Provision of the trainings on mediation for the Judges;
- Training for the lawyers to develop the representative skills in mediation;
- Public awareness on values and accessibility to mediation;
- Improvement of evaluation system for satisfaction with the mediation process;
- Constant update of knowledge of the mediators and Judges in mediation skills;
- Establishment of couching and mentor systems for the newly appointed mediators.

Unlike other recommendations, the recommendations issued by the experts of the "Rule of Law Initiative" Foundation are dignified with far practical nature compared to the legal analysis of the norms. Besides, whereas the evaluation has been elaborated for development of the Court mediation solely, it is focused on Court mediation totally and fails to cover the pros and cons of the other mediation institutions in Georgia. Correspondingly, it is oriented to concrete and pilot project details than to the general picture.

5. Conclusion

Successful establishment of the mediation institution for Georgian jurisdiction is the issue of utmost important as in practical,[69] so in theoretical terms.[70] Implementation thereof is rather complicated without academic support. The fact that *Ilia Chavchavadze* wrote about the role and importance of the settlement institution in the course of implementation of law, is the greatest advantage and success indeed for re-establishment of mediation in Georgia. The considerations by *Ilia Chavchavadze* are the greatest heritage for establishment of the culture of legal dispute resolution through settlement in Georgia (and beyond), carrying the symbolic and practical purpose. As the change management experts provide, if we want to change the system we shall have the new system based on and appealing to the old, best practice.[71] The fact that the legal discords have been solved

[69] In practical terms, the number of the pending cases for Court consideration, mid-terms of consideration and the statements of the members of the Council of Justice regarding insufficient number of the Judges allow underlining importance of mediation for jurisdiction. See the official statistic data of the Common Courts of Georgia, <http://www.supremecourt.ge/statistics/>, [11.12.2015].

[70] In ideological terms, importance of establishment of mediation for jurisdiction is establishment of the multi-window Court oriented to early and peaceful solution of the problem, allowing jurisdiction achieving the essence of the Court in successful manner – social peace.

[71] *Heath C., Heath D.,* Switch: How to Change Things when Change is Hard, Broadway Books, New York, 2010, 23.

through mediation during centuries in Georgia was not put to dispute so far,[72] though other than describing the institution of the settler Judge, *Ilia Chavchavadze* has created the concept in his publications of how the policy of the judicial authority shall be in terms of administration, jurisdiction and render of juridical service to the Court users. Namely, he indicated to importance of the judicial service oriented to the rapid, simple and informal jurisdiction. Correspondingly, his expressions do have the potential to become the slogan of Georgian Court mediation and serve the basis for the communication strategy of modern Court mediation.

Obviously, appealing to the historical experience of peaceful resolution of disputes in Georgia is not enough to change the paradigm of Georgian jurisdiction. We, in view to deal with the change management process, need to ensure respective regulations and best management, which is the part of the norms regulating Court mediation on the one hand and the effective administration of the process on the other hand.

Surely, the changes adopted to the Civil Code of Practice of Georgia on Court mediation were of utmost importance for establishment of mediation in Georgian jurisdiction, though they were insufficient, which is obvious from the analysis of the hereof legal norms and obtained recommendations. Namely, the problems are outlined in the concept of mediation – in regards with absence of the definition, Court mediation coordinating body, the document identifying authority of the employees of the Mediation Centers, norms controlling the quality of mediation process, the document defining the professional standard and obligations of the mediators and insufficient boosting mechanisms for mediation. The hereof problems go far beyond acute in the event of transmission to the mandatory mediation. Hence, the rapid and effective way to eliminate the legislative gaps is adoption of the changes to the Provisions of the Court Mediation, Code of Conduct of Mediators and the Rule of Proceedings by the High Council of Justice, which along with problem solution, will grant attractiveness and guarantees to Court mediation. Namely, the "Provisions on Court Mediation" allow regulation of the issues as follows:

- Elucidation of the process of Court mediation – definition (with indication to the role and style of mediator in the process);
- Set up of the coordinating agency of Court mediation;
- Development of the functions and competences of the Administrator of the Mediation Center;
- Development of the minimal standard of professional education of the mediator;
- Development of the provisions on the professional duties of the mediator (if expedient).

Increase of attractiveness of mediation requires enactment of the additional stimulators as follows:

- Prioritization of the case in the event of successful accomplishment of mediation upon consideration thereof in the Court. Namely, in view to prevent the factor of time to serve the impediment for consent of the parties to participate in mediation, prioritized convocation of the sitting "on mediation-tested cases" would be justified in the event of resubmis-

72 *Kekelia M. (ed.),* Georgian Customary Law, Vol. 3, Tbilisi, 1991, 185.

sion of the case to the Court, which requires the High Council of Justice to update the rule of organizational activity and business administration of the Common Courts already being outdated;[73]

– In view of motivation of the Judges, reflection of the number of the cases accomplished with mediation on the "Rule of Evaluation of Efficiency of Activity of the Judges"[74] and on criterion of promotion of the Judges.

The recommendations clearly reveal that transmission to the mandatory mediation would be justified if the judicial system provides adherence to the Ethics Rules of the mediators and norms regulating quality of the process. Correspondingly, it would be expedient for the Council of Justice to develop in participation with all the parties concerned the "Code of Conduct for Mediators" to apply to all the mediators participating in the Court mediations and to ensure protection of the values of Court mediation.

Undoubtedly, regulation of the issues related to administration along with the regulatory norms is necessary for establishment of the mediation institution and effective activity thereof in Georgian jurisdiction. The analysis of the results since enactment of the legislation up-today reveals that elimination of the reasons entailing adoption of the law provided in the explanatory note to the draft and achievement of the outlined goals failed to be achieved during four years,[75] facilitated with the gaps revealed in the course of administration of the project. Namely, sequent and gradual development of Court mediation in the Courts of all instances of Georgia was hindered with unavailability of the common approaches, strategy and action plan of development of mediation in judicial authority, as well as undue engagement of the new composition[76] of the High Council of Justice (as the body developing the judicial policy). The process of establishment of the mediation institution in Georgian judicial system with disorganization of the hereof issues takes place without planning and common coordination. At that, it creates the risks of favoritism and partiality in the judicial system, complicates the administration process necessary for establishment of Court mediation, enhances skeptical attitude of lawyers towards mediation and entails lack of confidence of the users to the mediation. Solution of the hereof problems and effective management, control and development of the mediation centers in the Courts of all three instances entail expediency of the High Council of Justice, in capacity of the coordinating body of the judicial system reform, with participation of the parties concerned and taking the recommendations into account, to develop the strategy of Court media-

[73] Currently, the Ordinance of October 27, 2000 №466 on "Endorsement of the Provision on Organizational Activity and Business Administration Rule in the Regional (City), District Courts, the Common Courts of Abkhazia and Adjara Autonomous Republics" applies in the Common Courts, see <https://matsne.gov.ge/ka/document/view/114292>, [12.12.2015].

[74] With the Decision of September 25, 2007 (#1/208-2007) the High Council of Justice of Georgia adopted the Rule of Estimation of Activity of the Judges of the Common Courts of Georgia, where naturally, the Judge, for the cases accomplished with mediation, fails to obtain respective estimation – points, which serves no additional motivation for the Judge to try to convince the party in privilege of mediation.

[75] The hereof is confirmed with the expectations reflected in the Evaluation of 2011 and real statistic data.

[76] In July, 2013 the High Council of Justice of Georgia was re-composed and on July 22, the new composition convened the first sitting, see <http://hcoj.gov.ge/ge/2013-tslis-22-ivniss-gaimarteba-iustitsiis-umaghlesi-sabchos-skhdoma/2092>, [11.11.2015].

tion and the annual action plan. According to the strategy of the Court mediation, as the recommendations issued by the experts provide, envisages necessity to outline the ambitious objectives and to define the particular steps for achievement thereof to ensure effective integration of the mediation institution into the judicial system. The following shall be the pillar ideas of the Court mediation strategy:

- Increase of Court capacities in terms to deal with the received cases;
- Offer of the flexible service oriented to the Court users;
- Encouragement of early resolution of disputes;
- Increase of degree of satisfaction of the Court users through dispute resolution alternative means.

Establishment of Court mediation requires complex approaches. All details are important for effective enactment of this institution, especially at the initial stage. Establishment of the culture of accomplishment of the mediation – discord with settlement in Georgia requires the judicial authority to pay particular attention to maximal effective usage of the available resources and rapid and peaceful resolution of the disputes upon developing the judicial system strategy[77]. Enactment of mediation institution with the hereof model, with high probability will allow formation of the culture of accomplishment of the disputes with settlement in Georgia on the one hand and achievement of balanced correlation between the cases considered in the Courts and the disputes solved with mediation and on the other hand, unloading jurisprudence, rapid and peaceful resolution of disputes and optimal usage of the available resources. *Ilia Chavchavadze* used to mention priority nature of the hereof issues in the beginning of the XIX century and the same is reiterated nowadays by Georgian and international experts. Correspondingly, it is reliable as for the persons developing the judicial policy, so for the society.

[77] Obligation of development of the strategy and the action plan of the Judicial authority for 2016 was officially assumed by the High Council of Justice under the National Action Plan for 2016 on Implementation of the Agenda of the Georgia-EU Association Agreement. See <http://hcoj.gov.ge/ge/saqartvelos-iustitsiis-umaghlesi-sabchos-mier-momzadda-asotsirebis-shesakheb-shetankhmebisa-da-asotsirebis-dghis-tsesrigis-gankhortsielebis-2016-tslis-samoqmedo-gegmis-proeqti/2519>, [11.12.2015].

Dimitry Gegenava*

Some Technical and Legal Problems of the Constitutional Agreement

Constitutional Agreement between Georgian State and the Georgian Apostolic Autocephalous Orthodox Church was signed in 2002. It includes many interesting norms, concerning Church-State relationship, but its full implementation hasn't begun. Constitutional Agreement, as the legal act has some technical and even legalproblems. The main goal of this article is to analyze these methodical and formal problems to make some recommendations to fix and improve them.

Key Words: *constitutional agreement, Georgia, church, legal problem, legal act, concordat, Orthodox.*

I. Introduction

Constitutional Agreement between the state of Georgia and Georgian Apostolic Autocephalous Orthodox Church was concluded in 2002, but, in spite of this fact, it remains a kind of "misty" document and judgment on its advantages and disadvantages and content has not started yet. Its reason lies, on the one hand, in delicate nature of the sphere of its regulation, and, on the other hand, the content of these issues, processing and analysis of which requires specific, interdisciplinary knowledge.

Many questions exist in regard to Constitutional Agreement, most of which is related to the aspects of its content and problems of enforcement. Its technical side, especially the aspect of legal technique, which, ultimately, conditions all other aspects, is no less important. The goal of the article is to analyse terminological issues of the Constitutional Agreement, consider the problem, related to its nature and place in the hierarchy of normative acts, outline purely legal-formal shortcomings and develop the ways of their resolution.

II. Terminological Shortcoming of the Title of the Constitutional Agreement

Relation of law and language is one of the permanent problems in legal theory and it never loses actuality, the more so for the legal place, which is in the process of formation.[1] Issues, related to language and notions cannot be secondary, as law, as such, is the system if behaviour rules, revealed in language and linguistic forms.[2] For this reason, well-defined terminology is one of the necessary components of legal system; moreover, it is one of the prerequisites of development of these systems.

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* Doctoral Student, Assistant, TSU Faculty of Law, Director of Prince David Institute for Law.

1 *Gegenava D.,* On Appropriateness of Some Notions in Georgian Constitutional Law, in the Book: Zurab Akhvlediani 80, Tbilisi, 2013, 191 (in Georgian).

2 *Khubua G.,* Theory of Law, Tbilisi, 2004, 121 (in Georgian).

The title of the Constitutional Agreement, as a legal document, is outstanding. Its contractual nature, on the one hand, and "constitutional" status, on the other hand, makes it etymologically outstanding document too. By using the word "constitutional", the legislator stresses its special importance, its constitutional-legal nature and status in the state system.[3]AAs professor Khetsuriani explains, giving the Agreement the name of "constitutional" is justified by the circumstance that "the possibility of concluding it and the circle of subjects will be determined only by the basic law of the state"[4].

The Constitution-based status of the Constitutional Agreement is quite proper and expedient. Nothing can stress the status and significance of legal act stronger than even terminological linkage to the Constitution, the more so that, in this case, it is based on the basic law content-wise. "Constitutional" ("კონსტიტუციური") and "Constitution-based" ("საკონსტიტუციო") in Georgian are often used as equivalents, which leads to many problems (It is conditioned by Georgian language, in Enlglish and other languages both of them can be determined by the term "Constitutional").[5] These two notions are very similar phonetically, but content-wise, taking the specificity of Georgian language into account, they significantly differ. "Constitution-based" means appropriate for Constitution, intended for Constitution, provided by Constitution, and "Constitutional" means complying with Constitution.[6] Content-wise, the mentioned notions cover overlapping meanings. All the above states obtain even more ambiguity in regard to the Constitutional Agreement. The "Constitutional Agreement", following its literary and grammatical content, means the agreement, which complies with the Constitution. From this viewpoint, any agreement, which does not contradict the Constitution, is constitutional. Besides, it is the prerogative of the Constitutional Court to determine whether something – including Constitutional Agreement – is constitutional or not, i.e. it (totally or partially) can turn out to be potentially unconstitutional, which fundamentally excludes its "constitutional" status.

"Constitution-based Agreement" truly reflects the content wise and terminological load, inherent to this institute. In this case, it completely includes the idea, which its creators had – following from the Constitution, directed towards the Constitution, having Constitution-based legal status and content. Giving the title "Constitution-based" will make the legal form of the institute proper not only technically, but also content wise and will create adequate perception in regard to its legal nature. In this case, the document will fit in the uniform system of normative acts of Georgia. After that, the issue of constitutionality of the "Constitution-related Agreement" will be logical as well as adequate, unlike the constitutionality of "Constitutional Agreement".

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[3] *Manitakis A.*, Comments on the Draft Constitutional Agreement between the State of Georgia and the Apostle Autocephalous Orthodox Church of Georgia, CDL (2001) 64, European Commission for Democracy Through Law (Venice Commission), Strasbourg, 28 June 2001, 2.

[4] *Khetsuriani J.,* The State and the Chirch, Journal The Human and the Constitution, №1, 2001, 11 (in Georgian).

[5] See *Gegenava D.,* On Appropriateness of Some Notions In Georgian Constitutional Law, in the Book: Zurab Akhvlediani 80, Tbilisi, 2013 (in Georgian); *Gegenava D., Kantaria B., Tsanava L., Tevzadze T., Macharadze Z., Javakhishvili P., Erkvania T., Papashvili T.,* Georgian Constitutional Law, 3rd ed., Tbilisi, 2015 (in Georgian).

[6] See Explanatory Dictionary of Georgian Language, <http://ena.ge/explanatoryonline>, [05.11.2015].

III. Constitutional Agreement in the Hierarchy of Normative Acts

The provisions on the power of normative action of the Constitutional Agreement are included in the Constitution, as well as the Law "On Normative Acts". Unfortunately, some of these provisions are contradictory and vague, not allowing to arrive to clear conclusion on the place of the Constitutional Agreement in the hierarchy of normative acts.

In accordance with the Constitution of Georgia, the supreme law of Georgia is the Constitution and all legal acts shall comply with it.[7] Certainly, in this regard, the acts cover the Constitutional Agreement, which, like any other act, is a document, subordinated to the Constitution. Besides, the Constitution gives to international treaties and agreements prevailing legal power in regard to internal normative acts and considers them subordinated to the Constitution of Georgia and Constitutional Agreements.[8] Similar order is determined by the Law of Georgia "On Normative Acts", which repeats the provision of the basic law word for word.[9]

Confusion is brought about by the provision of the Constitution, according to which the Constitutional Agreement shall be in full compliance with the universally recognized principles and norms of international law, in particular, in the sphere of human rights and fundamental freedoms.[10] The purpose of the norm is easy to determine. Its goal is prevention of violation of fundamental human rights, infringement of religious rights of other persons and discrimination by the Constitutional Agreement; the above mentioned shall be ensured by stating the compliance with the rights of the Constitutional Agreement.[11] Nevertheless, internationally recognized rights and principles are unimaginable to exist separately, abstractedly; they shall be provided in some international legal act, and the latter, in its turn, has less power than the Constitutional Agreement – it turns out to be illogical – how the Constitutional Agreement shall comply with these principles and rights.[12]

It is not clear which governmental authority can determine the compliance of the Constitutional Agreement with the universally recognized principles and norms of international law in the sphere of human rights and fundamental freedoms. Logically, the primary governmental authority, which, in this regard, creates illusion, is, certainly, the Constitutional Court of Georgia. Unfortunately, it has not such authority according to the Constitution and legislation.[13] The main act, which is the primary source for it, is the Constitution; consequently, the litigation on compliance of normative acts with each other is beyond its competence. Professor Korkelia sees the way out in consideration and resolution of the compliance with the Constitutional Agreement and international treaty by common courts.[14] Such judgment is logical and hierarchic compliance of acts falls within the competence of administrative court, although the delicacy of the situation is in the fact that in

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7 Part 1 of the Article 6 of the Constitution of Georgia.
8 See Ibid, 2nd sentence of part 2.
9 See part 3 of the Article 7 of the Law of Georgia On Normative Acts.
10 2nd sentence of part 2 of the Article 9 of the Constitution of Georgia.
11 *Korkelia K.,* Application of European Convention on Human Rights in Georgia, Tbilisi, 2004, 86 (in Georgian).
12 See Ibid, 87.
13 See part 1 of the Article 89 of the Constitution of Georgia, Article 19 of the Organic Law of Georgia On the Constitutional Court of Georgia.
14 *Korkelia K.,* Application of European Convention on Human Rights in Georgia, Tbilisi, 2004, 87 (in Georgian).

this case, dispute touches fundamental human rights and not material or formal legality of the act itself.

Second sentence of p. 2 of the Article 9 of the Constitution is quite excessive and does not fit either in normative fabric of the Constitution or in uniform structure of deontic logic of the basic law. Constitutional Court can consider the issue of constitutionality of any normative act; besides, in this case, any person can apply to it for the purpose of determination of compliance of normative act or its part with the fundamental rights and freedoms recognized by Section 2 of the Constitution.[15] If the aim of the legislator is prevention of violation of fundamental right, it could be achieved without excessive norm. Even in the case of absence of the second sentence of p. 2 of the Article 9, any person could apply to the Constitutional Court and have litigation on constitutionality of provisions of the Constitutional Agreement. Besides, systemic analysis of the Articles 7 and 39 of the Constitution of Georgia makes it obvious, that fundamental rights, recognized by international law, provided in specific international acts could be accepted as the constituent part of not only legislation, but the Constitution; it would enable the Constitutional Court to fulfil the normative purpose, implied by the second sentence of p. 2 of the Article 9 and, even in the case of absence of specific norm in the Constitution, protect fundamental human rights and ensure practical realization of the rights. Consequently, the above-mentioned provision of the basic law is quite excessive and does not ensure protection of human rights; on the contrary, it creates normative casus, for resolution of which no empowered authority exists.

IV. Violation of Secularism and Limitation of the Church

Active modernization process does not mean disappearance of the purpose of the church in the society.[16] Although Orthodox Church always treats global novelties and initiatives with caution, and, it could be said, with certain fear, which is conditioned by its (ultra)conservative nature.[17] Nevertheless, it should not serve as a reason for limitation of autonomy of the church by the state instead of advantages and privileges in relations of the state and church. Historically, any state, granting constitutional privileges and special official status to the church, always demanded service and support from the relevant church.[18] The above mentioned has become the thing of the past and presently support from the side of the church is expressed mainly in social sphere through promotion and encouragement of integrity, unity of the state and public peace.

With consideration of specificity of modern church and state, the issues, exclusively managed by the church are education and training of ecclesiastic persons, religious services and labour relations with ecclesiastic persons, etc.[19]

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[15] Sub-paragraph "f" of part 1 of the Article 89 of the Constitution of Georgia.

[16] *Fokas E.*, Religion and Welfare in Greece: A New, or Renewed, Role for the Church? in: Orthodox Christianity in 21st Century Greece, The Role of Religion in Culture, Ethnicity and Politics, Edited by *V. Roudometof* and *V.N. Makrides,* Ashgate, 2010, 175.

[17] See Ibid, 180.

[18] *Dawson J.F.*, Friedrich Schleiermacher and the Separation of Church and State, Journal of Church and State, Vol. 7, №2, 1965, 219.

[19] See *Von Campenhausen A.F.*, Church Autonomy in Germany, in: Church Autonomy, A Comparative Survey, Edited by *G. Robbers*, Frankfurt am Main, 2001, 81-82.

1. Keeping Secrecy

The law provides the privilege of keeping secrecy for the lawyers, doctors and ecclesiastic persons.[20] It does not matter, to which legal system the country belongs and what legal understanding in there in the country, the privilege of keeping secrecy is guaranteed for these three categories. Georgian legislation ensures protection of such secrecy.[21] Besides, it shall be mentioned that there is certain differentiation between secrecy of these three categories. Unlike others, the principle of keeping secrecy for ecclesiastic persons is absolute and the state does not oblige them to reveal the secret of confession in any case.[22] Whereas a doctor and a lawyer, in exceptional cases, are obliged to apply to the relevant authorities, ecclesiastic persons enjoy absolute legislative privilege. In the case of Georgia, under "ecclesiastic person", a person with the relevant authority of any confession is implied and in this regard, the legislation does not provide for any kind of differentiation.

According to the Constitutional Agreement, the state equips orthodox ecclesiastic persons with the privilege of keeping secrecy in two direction: 1. Secrecy of confession and 2. Ecclesiastic secrecy.[23] The secret of confession is defined as the secret of remorse, established by Jesus Christ himself; voluntary recognition of sin in front of the God to confessor[24], which he has no right to tell others;[25] and ecclesiastic secrecy means confidential information of the church.[26] The information, obtained during confession, is a secret and church does not know the possibility of its disclosure; on the contrary, it is forbidden to give it out to anybody in any form or to tell it to anybody.[27] Moreover, ecclesiastic person, who commits it, will be punished according to ecclesiastic laws.[28]

As surprising as it can be, the state rules the secret of confession and ecclesiastic secret not as the privilege, but as the obligation and obliges ecclesiastic person not to give out information, which he, as a confessor, has, or became known to him, as to a confessor.[29] Establishing such obligation is unimaginable in the environment of constitutional secularism. The state is not authorized to interfere in internal affairs of the church, a fortiori, establish any kind of obligation to the person under the jurisdiction of the church, with the exception of civil, secular obligations, which, as a rule, any citizen has, anyway. The provision, formulated this way, contradicts the principle of delimitation of the state and the church and violates the constitutional-legal idea of autonomy of the church. The obligation of keeping the secret of confession and church secret shall be determined for ecclesiastic person

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[20] *Greenawalt K.*, Religion and Equality in: Christianity and Human Rights, An Introduction, Edited by. *J. Witte Jr.* and *F.S. Alexander,* NY, 2010, 243.

[21] See Criminal Procedural Code of Georgia, the Law of Georgia On Doctors' Rights, Code Of Ethics of Lawyers, the Law of Georgia On Lawyers.

[22] *Greenawalt K.*, Religion and Equality, in: Christianity and Human Rights, An Introduction, Edited by *Witte Jr.J.,* and *Alexander F.S.,* NY, 2010, 243.

[23] The 1st sentence of the Article 2 of the Constitutional Agreement between the State of Georgia and Georgian Apostolic Orthodox Church, (Hereinafter – the Constitutional Agreement).

[24] Ecclesiastic Person of Orthodox Church, who Hears Confession from this or that Person and Directs his/her Spiritual Life. Ibid, Explanations of Terms, part 16.

[25] Ibid, part 13.

[26] Ibid, part 14.

[27] *Bumis P.I.,* Canon Law, translated by *I. Garakanidze,* Tbilisi, 2007, 91 (in Georgian).

[28] Ibid.

[29] 2nd sentence of theArticle 2 of the Constitutional Agreement.

only by church and canon law. The state shall be absolutely neutral in this case and shall ensure the privileged status of secrecy not by obligation, but by the mechanism of granting authority.

Second sentence of the Article 2 of the Constitutional Agreement contradicts the Article 9 and p. 1 of the Article 19 of the Constitution of Georgia. Its formulation shall be changed and absurd obligation shall be transformed into legal privilege.

2. Licenses and Permits

Following the legal status and organizational capacities of the state, it often undertakes to carry out some event in favour of specific or certain religious associations. Most often, the state ensures collection- administration of taxes and fees from the church members.[30] Cooperation in this aspect is quite natural, as taxes are exclusively state's prerogative and it has much refined, properly working and simple system to ensure effective collection of taxes from the members of religious associations; but in any other case the state shall avoid implementation of any activity on behalf of the church, the more so when it directly falls under the competence of the church, as organizational-legal subject and, most importantly, it is absolutely possible to do without active interference of the state.

According to the Constitutional Agreement, the state undertakes the obligation to issue, in agreement with the church, a permit or license for the use of official terminology and symbols of the church, as well as manufacturing, import and supply of religious products.[31] Official terminology of the church is: "Georgian Apostolic", "autocephalous", "orthodox", "Catholicos-Patriarch", "Holy Synod".[32] The Constitutional Agreement conceded definition of symbols to the "Church Management Charter".[33] It shall be mentioned that the latter does not exist at all. The title of the document, adopted on September 18-19, 1995, on the extended local meeting of Georgian Orthodox Church is the "Regulations" and not "Charter". Besides, most importantly, the mentioned document does not regulate the issues, related to symbols at all.[34] Consequently, it could be said that the issue of symbols is left without regulation.

Undertaking of the obligation of issuing licenses/permits by the state is justified for the purpose of creation of uniform, centralized approach so that Orthodox perish does not fall under the influence of various trends, pretending as Orthodox for various reasons.[35] Nevertheless, this argument is of little use because in this case the state, undertaking such obligation, rather interferes with the religious freedom autonomy of the church, as religious association, independent subject, than helps it. Delimitation of the church and the state, primarily, liberated the church itself from interference of the state in its affairs, giving it absolute freedom of action.[36] Besides, religious freedom en-

[30] *Narindoshvili M., Gogelia V., Julakidze T., Jashi Z., Glurjidze E.,* Freedom of Religion, Tbilisi, 2004, 113 (in Georgian); See *Darby v. Sweden*, [ECtHR], App. №11581/85, 23 October 1990.
[31] Part 6 of the Article 6 of the Constitutional Agreement.
[32] Ibid, Explanations of Terms, part 28.
[33] Ibid, part 27.
[34] See Regulation of Management of Georgian Autocephalous Orthodox Church, September 18-19, 1995, Mtskheta, Svetitskhoveli.
[35] See *Chikvaidze D.,* Comments to the Constitutional Agreement, Concluded Between the State of Georgia and Georgian Apostolic Autocephalous Orthodox Church, Comments, Tbilisi, 2005, 29 (in Georgian).
[36] *Heckel M.*, Religious Human Rights in Germany, Emory International Law Review, Vol.10, 1996, 108.

sures legal expectation that religious association will be able to function without gross interference and encumbrance from the state.[37]

The church, which is the legal person of public law and is equipped with full legal capacity and ability, has enough capability to protect its rights using legal mechanism, through the court, including prohibition of use of its official terminology and symbols, etc. In this case, this dispute will have not religious but civil nature, resolution of which is the competence of Civil Court.[38] On the other hand, the state will avoid obvious favouritism towards specific religious association and expenditure of state resources, whether they are human or financial. It shall try to distance itself from the dispute of such content, the more so, in the sphere like licenses and permits, tax and customs law. It is how it happens in practice: the state did not reflect the mentioned provision of the Constitutional Agreement in the relevant legislation,[39] consequently, this record is a dead norm and it has not gone beyond formal boundaries. Nevertheless, it could be said that its existence in this form and placement in hierarchically second state act is the violation of the principle of secularism and, even in the environment of cooperation model, is obvious favouritism, which goes beyond normal boundaries of relations of the state and the church.

3. Limitation of Economic Freedom

The Constitutional Agreement includes the provision, according to which the church does not directly implement entrepreneurial activities.[40] The purpose of the norm should be to stress the primacy of implementation of spiritual function by the church and to promote its higher purpose; but the motivation of placement of such normative content in the Constitutional Agreement is not clear, the more so that the norm has declarative nature and contains the statement rather than any kind of legal obligation. Nevertheless, in the course of definition of the rules of model behaviour of relations of the state and the church, it is illogical – why limitation of entrepreneurial activities or distancing from the opportunity of implementation of such activities is required for the church.

Ensuring of autonomy for religious association is an integral part of modern democratic society and necessary condition of observance of the Article 9 of the European Convention.[41] European state shall not interfere and shall not be even interested in the internal affairs of the church; its main purpose shall be popularization and actualization of democratic values.[42] The principle of religious autonomy implies the right of the religious association to independently decide the issues, related to it and manage itself without the interference of the government.[43] Religious association has the right to independently resolve internal organizational issues, elect spiritual leaders, form and develop reli-

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[37] *Hasan and Chaush v. Bulgaria*, [ECtHR], Grand Chamber, App, № 30985/96, 26 October 2000, §62.
[38] *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 709 (1976).
[39] The Law of Georgia On Licenses and Permits, Tax Code of Georgia, Customs Code of Georgia.
[40] Part 3 of the Article 6 of the Constitutional Agreement.
[41] *Hasan and Chaush v.* Bulgaria, [ECtHR], Grand Chamber, App. № 30985/96, 26 October 2000, §62.
[42] *Kurtanidze K.,* Recommendation of EU Parliamentary Assembly: State, Religion, Secularity and Human Rights, Journal Solidarity, №1 (34), 2010, 99 (in Georgian).
[43] *Durham W.C.Jr.,* Religion and the World's Constitutions, in: Law, Religion, Constitution (Freedom of Religion, Equal Treatment, and the Law), Edited by *Cr. Cianitto, W.C. Durham, S. Ferrari, D.* Thayer, 2013, 6.

gious issues, determine the rules of acceptance and exclusion of members, etc.[44] The church shall decide itself where it will gain additional income from, what funds it will have and how it will dispose them. Certainly, it shall be implemented within the framework, determined by the law, but in this case private law will apply and the church, as the independent legal person, will have economic or personal freedom, autonomy. Its legal form does not matter, as it is not classical legal person of public law and the relevant legislation shall not be applicable to it.[45] Besides the church can establish the relevant legal person, who will implement entrepreneurial activities and nobody can prohibit it. Against this background, the provision of the Constitutional Agreement obtains hue that is more comic; it is not only declarative, but has completely resultless and fruitless content.

One of the main goals of freedom of religion is ensuring of autonomy and independence of religious association.[46] It is prohibited even for the court to interfere with the internal affairs or spiritual sphere of the church during proceedings.[47] In such environment, the existence of similar norm is completely out of the uniform logical context of legal system. Orthodox Church, which always had conservative position, has to revise its positions in parallel with modern challenges, technological development.[48] For this very motive, it has to apply to various, legal mechanisms of funding and may implement entrepreneurial activities too. It's a different story how it will use this opportunity in practice, but if other religious associations do not have similar limitation, it is also illogical to set it for the church, which enjoys privileged status and, on the contrary, may have more privileges.

4. Immunity of the Patriarch

In Middle Ages, the state used to rule judicial immunity in regard to the church and religious servants.[49] Immunity was protecting religious servants from lodging of charges.[50] This principle acted for a long period and the factor, conditioning it, was the sacral status of religious servants itself. Nevertheless, gradually, the immunity weakened and finally completely disappeared, which was conditioned by advancement of fundamental human rights and the principle of equality in the eyes of the law.

According to the Constitutional Agreements, the Catholicos- Patriarch is immune.[51] There is no legal definition of "immunity" in Georgian legal space; consequently, it shall be defined based on its every day, literary meaning. Consequently, legal immunity implies the impossibility of occurrence of legal, mainly criminal, responsibility in regard to the person. Detention, arrest, punishment of immune person according to the procedure, provided by the law, is impossible. The Constitution of Georgia grants such status to the only person, leader of the country – President of Georgia, during

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[44] *Svyato-Mykhayliyska Parafiya v. Ukraine*, [ECtHR], App. № 77703/01, 14 June 2007, §150.
[45] Part 5 of the Article 1509[1] of the Civil Code of Georgia.
[46] See *Sirico L.J.Jr.*, Church Property Disputes: Churches as Secular and Alien Institutions, Fordham Law Review, Vol.55, 1986, 335.
[47] See *Presbyterian Church v.* Hull Church, 393 U.S. 444 № 3 (1969).
[48] *Gegeshidze D.,* Criticism of Theological Concept of the Place and Role of Christianity in the History of Georgia, Tbilisi, 1985, 5 (in Georgian).
[49] *Dolidze I.,* Old Georgian Law, Tbilisi, 1953, 60 (in Georgian).
[50] *Vacheishvili Al.,* Essays from the History of Georgian Law, Vol. II, Tbilisi, 1948, 50 (in Georgian).
[51] Part 5 of the Article 1 of the Constitutional Agreement.

his/her period in the office.[52] It's unimaginable other way, as the President shall be able to exercise the power without obstacles, without any pressure and influence. However, his immunity is limited and expires with the expiration of dates in the office. Otherwise, the key principle of equality in the eyes of the law would be violated.

The idea of the church, as universal organization, did not prove to be successful and ultimately, it established in the form of national churches on state level.[53] Similar thing happened in Georgian reality; consequently, the leader of the church – Catholicos- Patriarch – enjoys special social status. As a result of the Constitutional Agreement, special legal status was established for him, but, unlike the President, which is an elected position with the number of the related limitations, "Patriarch" is a lifetime title. Consequently, immunity is guarantees for the Patriarch for much longer time. Besides, it is not clear what the purpose of immunity is in regard to the person, who is the church leader and why the law assumes the probability that he might commit a crime, in the case of which legal responsibility will occur towards him. The purpose of such wording in the text of the Agreement was stressing of respect in regard to the Catholicos- Patriarch and his promotion, but the result appeared to be reverse: full jurisdiction of the state will not apply to him, the principle of equality in the eyes of the law is violated, he obtains superior status and it shouldn't be favourable either fir the state of for the church.

Special status of the Catholicos is the sphere of social and not legal regulation; consequently, the state shall restrain from establishment of discriminative ruling, which may have special impact on specific groups of the society.

V. Conclusion

The Constitutional Agreement of Georgia is far from perfection; moreover, it contains and gives rise to numerous terminological, content-related and legal problems. It is necessary to improve it and establish better regulation to that the order, established by the Constitutional Agreement completely fits in Georgian governmental organism and legal space and ensure protection of others' rights at maximum level in this process.

Primarily, formal title of the Constitutional Agreement, as the legal act, hall be changed. "Constitutional" shall be replaced by "Constitution-based" and thus the legal nature and the idea of the Agreement will be finally determined – it will become based on the Constitution, directed towards the Constitution, instead of meaning simply compliant with the Constitution.

The Constitutional Agreement shall comply with fundamental human rights and freedoms, universally recognized by international law, otherwise is makes hierarchic relations completely vague and absurd. Universal norms and principles of international law in the sphere of fundamental human rights and freedoms will necessarily be provided in international acts in positive legal form. The Constitutional Agreement shall comply with the Constitution of Georgia, which automatically

[52] Part 1 of the Article 75 of the Constitution of Georgia.

[53] *Cranmer F.,* National Churches, Territoriality and Mission, Law & Justice, Vol.149, 2002, 157, see The Idea of an National Church, in The Church and Nation: Charges and Addresses, (London, 1901), 214.

means the necessity of it compliance with fundamental human rights, recognized by the Section 2 of the Constitution.

If there is a contradiction between the Constitutional Agreement and fundamental rights, recognized by the Constitution, the dispute will be resolved by the Constitutional Court of Georgia through constitutional proceedings on the basis of the suit/application of the interested person. Consequently, modification shall be made to the p. 2 of the Article 9 of the Constitution of Georgia and the second sentence of p. 2 shall be removed, the existence of which, from the point of view of legislative technique, is not related either to obligation or to the validity of mechanism for protection of rights. The Constitutional change shall be reflected in p. 4 of the Article 7 of the Law of Georgia "On Normative Acts", where the first sentence shall be also removed.

According to the second sentence of the Article 2 of the Constitutional Agreement, the state establishes the obligation of keeping the secrecy of confession, which is completely illogical, as it cannot interfere with the internal affairs of the church, the more so, impose religions responsibility on religious servant. Modification shall be made to the Article 2 of the Constitutional Agreement and its second sentence shall be formulated in the following wording: "Nobody shall have the right to request information from religious servant, which was confided to him, or became known to him, as to confessor".

Use of official terminology of symbols of the church by the state, production of religious products in agreement with the church, as well as undertaking the obligation to issue license/permit for import and supply of religious products is inadmissible. Georgian church enjoys full legal capacity, it has legal and practical ability to protect its rights. Besides the taken obligation is not just demonstration of good will, but imposition of religious functions to the state, as the church, as the legal person of public law, has the ability of administration and practical realization of the above mentioned. Consequently, p. 5 of the Article 6 of the Constitutional Agreement shall be abolished.

According to the Constitutional Agreement, the church is not directly performing entrepreneurial activities, which can be understood in two ways. On the one hand, the construction has declarative nature, so no obligation follows from it. On the other hand, such formulation is not unambiguous and during interpretation, allows possibility of another definition. In this case, an obligation is ruled for the church, prohibiting entrepreneurial activity for the church. In the case of any interpretation, the provision contradicts the idea of secularism. As far as similar limitation is not established for other religious associations, its application exclusively to Orthodox Church is not justified. The latter is free to decide what kind of activities it will perform. Besides, if it performs entrepreneurial activities not "directly", but through other person, established by it, this provision will still be useless. Following from the above mentioned, p. 3 of the Article 6 of the Constitutional Agreement shall be abolished.

By granting of immunity on the basis of the Constitutional Agreement, special respect and attitude towards the Catholicos-Patriarch is expresses, although, the above mentioned is, at the same time, degrading in some sense. It is hard to imagine that the Patriarch needs to me liberated from criminal responsibility; and, if, theoretically, such case occurs, it shall be asked – why any citizen of Georgia shall be liberated from responsibility; this way, discriminative and non-democratic prece-

dent may be established. All people are equal in the eyes of law; consequently, each has to be responsible for his/her action. P. 5 of the Article 1 of the Constitutional Agreement shall be abolished for its incompliance with the Article 14 of the Constitution.

As a result of taking of consideration of the recommendation, certainly, not all problems of the Constitutional Agreement will be eliminated; nevertheless, the document will be improved from the point of view of legal technique. Besides, by removal of several absurd provisions from the text of the Constitutional Agreement, Georgian model will partially fit into some system of relations of church and state. From the viewpoint of the content, many more changes are to be made to the Agreement and, most importantly, the issues, related to its enforcements, still create a vast agenda.

Eka Kavelidze*

Understanding of the Vote of Non Confidence, as a Political-Legal Mechanism

The vote of non-confidence is a very important mechanism, which is directly related to the realization of the principle of distribution of powers. Inter-relation of the Government and the Parliament and balancing of their authorities mostly depends on the vote of non-confidence. In the environment of strong Government, Parliament shall have real lever of influence over the Government, ensuring placement of the activities of the Government in certain frames. And for determination of the characteristics of the mechanism the status of executive and legislative bodies is of utmost importance. Nevertheless, alongside with the basic function, the vote of non-confidence can be used by political parties as the means of influencing certain political developments. Meanwhile, it is important to consider the vote of non-confidence as the mechanism for overcoming political crisis.

Key words: *distribution of power, vote of non-confidence, constructive cote of non-Confidence, responsibility of the government, governmental control, strong government, collective responsibility, resignation of the government, political crisis, parliamentary majority, status of the parliament, balance of political forces.*

1. Introduction

Democratic governance is the problem of almost all contemporary states. Each of them tries to achieve the mentioned goal in its way, but they are all driven by the validity of the principle of distribution of power, the so-called "check and balances", which is achieved by balancing the branches of power.

The main problem is the executive power, as the majority of levers of state governance are accumulated in its hands. Due to the above mentioned, presently, development and implementation of efficient mechanism of controlling/ balancing the government is an actual issue throughout the world. Constitutionalists recognize the vote of no confidence as such, which represents the most efficient, but ultimate mechanism for controlling the government.

Although the purpose of this mechanism is mostly expressed in control and deposition of government, the essence of the vote of no confidence, as political-legal mechanism will be discussed in the article. Number of different opinions and views are spread in legal literature on the mentioned institution regarding its essence, as well as its purpose and goal.

There are almost no differences in the opinion, that the mentioned mechanism is political one and law determined the procedures of its application. There are differences in modern assessment of the above mentioned mechanism, providing for different loading and meaning to the vote of no confidence.

* Doctoral Student, TSU Faculty of Law.

2. The Essence of the Vote of Non Confidence

2.1. Main Purpose

It is considered that the main purpose of the vote of no confidence, as it was mentioned in the introduction, is control of government, especially in the countries with parliamentary governance, where executive power is completely accumulated in the hands of the government. In such conditions it is necessary for the parliament to have the mechanism ensuring control and accountability of the government. Consequently, the principle – accountable government – is expressed the existence of the mechanism of controlling its political responsibility. The accountability of the government to the parliament, as a rule, is insured by the vote of no confidence. Besides, the opponents often use the vote of no confidence for the purpose of "defeat" the government; however, the stricter are the conditions of its utilization, the more counterproductive the vote of no confidence is for its initiator. The above mentioned is conditioned by the circumstance, that in the case of non-adoption of the resolution of no confidence, the parliament completes its operation ahead of the scheduled time. For this reason, this mechanism is assessed as dramatic alternative of government control.[1]

The motion of no confidence is mainly directed towards resignation of the whole composition of the government. However, constitution of some countries provides for its use against specific minister. The above mentioned regulation provides for accountability of ministers to the parliament according to the area of their operation. In this case, individual responsibility of ministers describes the "chain of responsibility". However, holding the minister accountable individually is seldom successful in the environment, where the government enjoys significant support of the parliament. The above mentioned shall be taken into account also when the minister is called to be held accountable to the parliament[2]. Questions and interpellation to the minister is sometimes related to adoption of the resolution of no confidence, however, it seldom achieves dismissal of the government.[3]

Although the main purpose of the vote of no confidence is dismissal of the existing government, the mentioned mechanism can divert political crisis, conditioned by its application and election of a new candidate as a future prime-minister. The above mentioned, as a rule, happens by one voting procedure and is referred to as constructive vote of no confidence, country of origin of which, we may say, is Germany. Constructive motion of no confidence, presently, is the most efficient and painless process to replace the existing government, and, at the same time, appoint new prime-minister, so Constitutionalists arrived to the opinion that in the case of vote of no confidence it is better to use constructive vote, when new candidate of prime-minister will be nominated at the same time.[4]

The motion of no confidence, especially constructive vote, is regarded as the main characteristics of the countries with parliamentary governance. As an example, according to the opinion, spread in literature, the mentioned mechanism represents the characteristic feature of presidential and par-

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1 *Lijphart A.,* Parliamentary Versus Presidential Government, Oxford University Press, 1992, 91.

2 *Rosenfeld M., Sajo A.*, The Oxford Handbook of Comparative Constitutional Law, Oxford University Press, 2012, 664.

3 Ibid, 668.

4 *Twomey A.,* The Governor-General's Role in the Formation of Government in a Hung Parliament, The University of Sidney, Sydney Law School, Legal Studies Research Paper, № 10/85, 2010, 6.

liamentary governance: in parliamentary country the prime minister and his government are accountable to the parliament and may be dismissed by means of the vote of no confidence, and in the case of presidential governance the vote of no confidence is not used by the president, directly elected by people.[5] The vote of no confidence appears as the means of balance not only in the system of distribution of powers, but even in the forms of governance.

The vote of no confidence, as a rule, is regarded as the only mechanism, which will result into elections in parliamentary system ahead of expiration of the term of parliament's authority.[6] Such lack of faith is demonstration of the fact, that the leader of the government isn't governing the parliamentary majority. It leads to new elections, which, at certain extent, restore legislative as well as parliamentary governance. The vote of no confidence grants the parliament different flexibility, which is not inherent to the countries with presidential governance.[7]

2.2. Way of Overcoming the Crisis

The fact, that political crisis and the vote of no confidence are indivisible notions, is not the news. Sometimes the vote of no confidence causes crisis and sometimes – vice versa – political crisis results into the vote of no confidence. When the motion of no confidence is used as a result of political crisis, this mechanism has the capacity and levers of resolution of the above mentioned crisis, especially constructive vote of no confidence. Basically, this mechanism is used as the method of overcoming crisis in the countries with parliamentary governance[8], following from the fact that constructive vote exists in the countries of just this type.

Application of the vote of no confidence means that the existing government has lost the trust from the parliament's side and the latter wants to dismiss the cabinet of ministers, i.e. executive power shall remain without governor for certain period. This fact, in itself, indicated to political crisis and vacuum, as formation of the new government and announcement of trust to it is related to certain time frame. The way of resolution of the mentioned problem is constructive vote of no confidence, which, on the one hand, provides possibility to transfer the executive power from one team to the other without delay; and on the other hand, the parliament's interest is satisfied and the existing government resigns, i.e. bears political responsibility for the implemented governance. For this reason, constructive vote of no confidence is regarded as efficient way of overcoming the crisis.

In addition to the constructive vote of no confidence, destructive motion of no confidence shall be mentioned in regard to crisis; i.e. the case, when the prime-minister in nominated and government is formed only after dismissal of the existing government. In this case, the mechanism represents the method of crisis resolution in the way that due to the tense political situation or deviation from political direction by the government, the parliament immediately dismisses the govern-

[5] *Lijphart A.,* Patterns of Democracy, Government Forms and Performance in Thirty-six Countries, Yale University press, New Haven and London, 1999, 117.
[6] *Albert R.*, The Fusion of Presidentialism and Parlamentarism, Boston College Law School, Legal Studies Research Paper Series, Boston, 2010, 551.
[7] Ibid.
[8] Ibid, 564.

ment and thus the fundamental problem, causing confrontation, is eliminated. In the mentioned case the parliament, following dismissal of the existing government, begins to select the candidate prime-minister and government members. Questions may arise in regard to efficiency of this mechanism, as is doesn't provide for selection of candidate prime minister in advance. Nevertheless, the fact, that selection of the candidate prime-minister may delay initiation of the processes of motion of no confidence by the parliament, may be considered as favorable argument, as selection of the future leader of the government will required certain period, but meanwhile, dismissal of the existing government may be inevitably necessary. In this case, nomination of the candidate prime-minister may serve as hampering factor for quick and valid response by the parliament.

2.3. Chance of Oppositional Parties

vote of no confidence is a kind of action tool for the political parties, not having parliamentary majority, i.e. for the so-called minority. The mentioned parties don't have majority of seats in the parliament, however, they have the number of votes, required for initiation of the issue. It allows them to use the mentioned mechanism in their favor. Political parties are motivated to obtain the required number of votes and get the relevant positions. In the case of motion of no confidence the votes, directed against the governing power, as a rule, shall be used by the oppositional party. In the case of the vote of no confidence political forces shall focus on negative factors like weak economic policy or other political scandals. In other words, much more can be achieved by the motion of no confidence, than by arrangement of other political performance by unification of parties.[9]

The mentioned principle is acceptable for parliamentary opposition of many countries and they take this chance as far as possible. E.g. the vote of no confidence was used in Finland in 1998. Centrist opposition used the change to focus attention on poor situation of farmers in Finland.[10] The above mention indicates that the vote of no confidence obtained one more purpose/motivation – it enhanced public awareness by criticism of the government in regard to coalition policy.

Oppositional parties often apply to the vote of no confidence to weaken the image of the governing party. Due to the above mentioned, only little number of the motions of no confidence gets the required number of votes to make the government resign and appoint new parliamentary election. The Liberals' vote of no confidence against Conservative Party in Canada in 1979 was conditioned by high prices in the sphere of energy supply.[11] The vote of no confidence is often announced in order to draw attention to people's problems, for resolution of which the government has the ability and the competence. Even the vote of no confidence, having very little chance to get the required number of votes, manages to reveal certain problem. As the above mentioned examples show, oppositional parties often skillfully use the vote of no confidence, "packaged" in social problems, to cause damage to the governing party in the eyes of electors. The mentioned circumstance is particu-

[9] *Williams K.L., Somer-Topcu Z.*, Motion of No Confidence Can Negatively Impact Upon the Public's View of the Government, By Democratic Audit, 2014, <http://www.democraticaudit.com/?p=5725>, [22.11.2015].

[10] See ibid.

[11] *Williams K.L., Somer-Topcu Z.*, Motion of No Confidence Can Negatively Impact Upon the Public's View of the Government, By Democratic Audit, 2014, <http://www.democraticaudit.com/?p=5725>, [22.11.2015].

larly topical during elections as, following the vote of no confidence, escalation of new political forces through elections is usually noticed.[12] The vote of no confidence is not the opposition's tool only for dismissal of the government. This mechanism helps them to create people's negative attitude towards the government, and the above mentioned helps oppositional parties to have favorable political position for elections.[13]

3. Basic Features of the Mechanism

3.1. According to the Status of Executive Body

Use of the vote of no confidence, the terms of use and the results largely depend on the status of the highest body of executive power. The status of the government is a kind of factor, conditioning initiation of the vote of no confidence. Just according to the status of the government, the parliament decides whether to use the extreme mechanism of control towards it or not; or other mechanism is enough for its controlling and balancing its power.

Since the middle of the XX c., the idea of dominating status of legislative power among the branches of power, following to the existing political-legal relations diminished at certain extent and executive power obtained a kind of leading role in power triad. This circumstance was conditioned by the factor that financial, material and technical, technological, organizational, human and other resources are mostly accumulated in the area of competence of executive power.[14]

As a result of observation of the branches of power, special role of government in state system becomes obvious. It implements control of financial and other physical resources of the state. Consequently, it is distinguished from other state authorities by its significant competence, i.e. factually unlimited scope, referred to its governance, wide range of issues and valid authorities of resolution of these issues, strengthened by political support.[15]

The government in a collegial body of general competence of executive power, central point of the whole system of public administration, which ensures management of public administration without executive- regulatory activities, entrusted to it, manages the whole administration of the state; the whole public office, state finances, international relations, armed forces[16], i.e. the whole executive power is under its management. The government is responsible and accountable to the parliament, however the factor, that it is supported by parliamentary majority, creates substantial opportunities for it to play central role in the course of legislative process. Practice shows that major-

[12] *Williams K.L., Somer-Topcu Z.*, Motion of No Confidence Can Negatively Impact Upon the Public's View of the Government, By Democratic Audit, 2014, <http://www.democraticaudit.com/?p=5725>, [22.11.2015].

[13] *Williams K.L., Somer-Topcu Z.*, Motion of No Confidence Can Negatively Impact Upon the Public's View of the Government, By Democratic Audit, 2014, <http://www.democraticaudit.com/?p=5725>, [22.11.2015].

[14] *Kverenchkhiladze G.,* Constitutional Status of the Government of Georgia (comment to the Article 78 of the Constitution), Contemporary Constitutional Law, edited by *G. Kverenchkhiladze and D. Gegenava,* Vol. 1*, D.Batonishvili* Institute of Law, Tbilisi, 2012, 10 (in Georgian).

[15] *Demetrashvili A., Kobakhidze I.,* Constitutional Law, Tbilisi, 2010, 303 (in Georgian).

[16] *Melkadze O.,* Constitutionalism, Series of Poitical- Legal Literature, Vol. XXI, Mag, Universal, Tbilisi, 2008, 318 (in Georgian).

ity of bills, considered by parliaments, is submitted on legislative initiative of the government. E.g. their quantity, in relation with total number of considered bills reaches 80% in Germany.[17]

Andrash Shayo describes the strength of contemporary executive power as follows: "executive power is like a centaur: its lower part is bureaucracy, public administration, and the upper part – party politician, who, thanks to his elector, parliament, and, primarily, the party, expresses public interests. The strongest lower part of the body makes executive power the strongest branch, having the greatest chance for achievement of its goals".[18] The opinion that the government is called to execute the laws, adopted by the legislative body (and this mechanism was established for this very purpose), is sell actual at present stage, as the government formed as highest political body, directing public administration and implementing common national governance.

Increase of government's functions and the level of independence in modern states, based on the principle of "checks and balances", established in constitutionalism and with consideration of governance models, conditioned development of specific forms of implementation of control over the activities of the government in the form of political-legal responsibility.[19] For this reason, in the case of strong government, certainly, vote of no confidence is used. And following the above provided judgment, recently we see just such governments; consequently, the vote of no confidence is, or shall be used more frequently.

In the middle of the XVIII c., political responsibility of executive power – which is the most characteristic feature of parliamentary governance – meant that obtaining of support of parliamentary majority and relying on it was necessary for continuation of existence of the government.[20] The mentioned principle is still valid, however, more theoretically than practically. According to the present situation, the executive authorities have been given the power which once belonged to monarch. For this reason, Lloyd George considers that the parliament really doesn't have control over the executive power, it's a pure fiction.[21] In other words, mutual relation of the parliament and the government is not equal. In multi-party system, the weakness of the government depends not on the parliament, but on other parties, whose support is important. If modern party system is strong and well-disciplined, they will have better chances to change and form the government, than the parliament, as the institution.[22] And in such situation the possibility and even necessity of use of the vote of no confidence arises.

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[17] *Melkadze O.,* Constitutionalism, Series of Poitical- Legal Literature, Vol. XXI, Mag, Universal, Tbilisi, 2008, 134 (in Georgian).

[18] *Shayo A.,* Self-Limitation of Government, Introdeuction to Constitutionalism, with introduction by *S. Holmes,* translated by *M. Maisuradze.,* edited by *T. Ninidze,* "Airis" Georgia, Tbilisi, 2003, 235 (in Georgian).

[19] *Kverenchkhiladze G.,* Constitutional Status of the Government of Georgia (comment to the Article 78 of the Constitution), Contemporary Constitutional Law, edited by *G. Kverenchkhiladze and D. Gegenava.,* Vol. 1, David Batonishvili Institute of Law, Tbilisi, 2012, 12 (in Georgian).

[20] *Gardbaum S.*, Separation of Powers and Growth of Judicial Review in Established Democracies (or why Has the Model of Legislative Supremacy Mostly Been Withdrawn From Sale?), American Journal of Comparative Law, The American Society of Comparative Law, Vol. 62, Issue 3, 2014, 629, <http://law.ucla.edu/~/media/Files/UCLA/Law/Pages/Publications/CEN_ICLP_PUB%20Separation%20Powers.ashx>, [24.11.2015].

[21] *Lijphart A.,* Parliamentary Versus Presidential Government, Oxford University Press, 1992, 91.

[22] *Gardbaum S.*, Separation of Powers and Growth of Judicial Review in Established Democracies (or why Has the Model of Legislative Supremacy Mostly Been Withdrawn From Sale?), American Journal of Comparative Law, The American Society of Comparative Law, Vol. 62, Issue 3, 2014, 634, <http://law.ucla.edu/~/media/Files/UCLA/Law/Pages/Publications/CEN_ICLP_PUB%20Separation%20Powers.ashx>, [24.11.2015].

If the parliamentary majority and the government team represent one and the same political force (which is often the case, following from the parliamentary way of formation of the government), there is no need to use this radical mechanism of responsibility, if, of course, there is no internal political confrontation. And if diverse spectrum of political forces is represented in the parliament, the government, at certain extent, is under the danger of initiation of the motion of no confidence, as all political parties and coalitions will have a desire to staff the executive body with its members. The governments of minorities are vulnerable to other parties, the more so to the announcement of the vote of no confidence. Thus, the government of minority is in permanent readiness regime for elections.[23] Structural research, conducted in 2003 by several authors demonstrated that the procedures of the vote of no confidence reduce the governments of minorities, which are less stable.[24]

3.2. According to the Status of Legislative Body

The highest legislative and representative body – parliament – represents one of the figures of the principle of distribution of powers and the body, which is entitled to use the main mechanisms, checking the powers/responsibilities of the government. He above mentioned authority of the parliament is particularly actual and important in the countries, where the constitution knows the mechanism of the vote of no confidence.

As it was repeatedly stated above, the purpose of adoption of the vote of no confidence is dismissal of the government, which is the main expression of its political responsibility. The matter of usage/non-usage of the mentioned mechanism by the parliament also depends on its status. That the parliament is directly elected by people and, for this reason, is the body with high legitimacy, indicates to status of the parliament. The fact that this body is the legislative body, basic function of which, in addition to lawmaking activities, is staffing of the executive power and balancing and control of its activities, also indicated to its status.

However, unlike the above established facts, the status of the parliament is also determined by the balance of political forces, existing in the parliament, which indicated to the influence of the highest legislative body and its weight in the policy of public administration. The parliament may consist of one party, two or multiple parties, coalition, etc.; just the diversity of political spectrum conditions governance of parliament and making certain political decisions by it, primarily, initiation of the vote of no confidence.

In the middle of the XX c. the dominating theory in Britain, New Zealand and Canada was political constitutionalism. In the case of parliamentary governance, political constitutionalism doesn't deny the importance and strength of governmental power, but underlines, primarily, political influence as compared with legal. Practically, there are two limitation of political mechanism – strength

[23] *Albert R.*, The Fusion of Presidentialism and Parlamentarism, Boston College Law School, Legal Studies Research Paper Series, Boston, 2010, 566.

[24] *Tergiman C.*, Institution Design and Public Good Provision: an Experimental Study of the Vote of Confidence Procedure, University of British Columbia and NYU's Center of Experimental and Social Sciences, Canada, 2013, 5.

and obligation of the parliament to have the government in its hands, which is expressed in individual and collective responsibility of the government and responsibility of the government to the electorate. Certain trend is noticed, that political responsibility stands above the legal responsibility of the government and they are more afraid of political responsibility as compared with legal.[25]

The main idea of the parliamentary system is that the cabinet shall have the parliamentary confidence. Also, the main rule of parliamentary confidence is to ensure highest credibility of deputies, elected by people, as the representatives are stronger. Formation of new cabinet paralyses the activities of executive power and parliament for several weeks and even months because conducting of complicated and long negotiations is inevitable for creation of new cabinet coalition. Thus, when the parliament is on the verge of application of the vote of no confidence, it, mostly, is resolved in favor of cabinet. Painfully formed parliamentary majority supports the cabinet, despite a lot of many questions, remaining towards it.[26]

In parallel to the above mentioned opinion, there is another, the most widely spread practice, according to which the government in parliamentary systems in accountable to the parliament, which means that if the government acts "unreasonably" and in unconstitutional way, the parliament refuses to support it, dismisses it and the need of formation of new cabinet will be put on agenda.[27] The vote of no confidence may be initiated by the parliament for the purpose of making sure in support of the parliamentary majority, in spite of complex program of the government, or due to one bill or the policy, implemented by the government. These motions somehow keep the members of the parliamentary majority, instigating confrontation, from voting against the government.[28] And the above mentioned circumstances indicate to the unity and strength of the parliament.

The initiation of the vote of no confidence is not a simple procedure and the above mentioned mechanism creates threat for the parliament itself, in addition to the government. So, its application requires really strong parliament. Often, the desires of the parliament are expressed in the vote of no confidence[29], but a question arises here – is the parliament ready to take responsibility for realization of its desires? Because, in the case of adoption of the vote of no confidence, the parliaments puts itself under the risk of termination of its authorities ahead of time. Dismissal of the parliament is excluded in the number of countries during one year after new elections (France, Spain), or, is possible after failure of formation of new cabinet and "failing" of the vote of no confidence (Germany).[30] Consequently, it is clear, that initiation of the vote of no confidence requires sufficient efforts and

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[25] *Gardbaum S.*, Separation of Powers and Growth of Judicial Review in Established Democracies (or why Has the Model of Legislative Supremacy Mostly Been Withdrawn From Sale?), American Journal of Comparative Law, The American Society of Comparative Law, Vol. 62, Issue 3, 2014, 630, <http://law.ucla.edu/~/media/Files/UCLA/Law/Pages/Publications/CEN_ICLP_PUB%20Separation%20Powers.ashx>, [24.11.2015].

[26] *Lijphart A.,* Parliamentary Versus Presidential Government, Oxford University Press, 1992, 191.

[27] Ibid, 36.

[28] *Rosenfeld M., Sajo A.*, The Oxford Handbook of Comparative Constitutional Law, Oxford University Press, 2012, 664.

[29] *Twomey A.,* The Governor-General's Role in the Formation of Government in a Hung Parliament, The University of Sidney, Sydney Law School, Legal Studies Research Paper, № 10/85, 2010, 18.

[30] *Rosenfeld M., Sajo A.*, The Oxford Handbook of Comparative Constitutional Law, Oxford University Press, 2012, 665.

unanimity from the parliament, so that this mechanism doesn't turn out to be a trap, in which it may find itself trapped.

In parliamentary system of governance the cabinet shall be formed the way to either enjoy the parliament's confidence or, minimum, its good will. Can we estimate the composition of the new government if we know the balance of strengths of different parties? If only one party has the majority of parliamentary mandates, prognostication is easy and one-party government will be formed. Such estimation, as a rule, is justified, but it is also possible that the majority forms coalition from one or several small parties. If none of the parties have the parliamentary majority, it represents a kind of blockage of the cabinet of the parliamentary minority, as the cabinet will be formed but who will be in majority?[31]

Another problem arises when the parliamentary majority starts to support the government instead of keeping the government accountable. In other words, mutual dependence grows into dependence. Executive power dominates over the parliamentary power to preserve the party unity in the case of attack of opposition parties. Loss of parliamentary independence instantly increased the influence of executive power, which already has little fear towards parliamentary accountability; consequently its realization already becomes virtual[32], whereas the central point of the parliament is accountable government. It means that the government, created of the ministers and the prime minister is accountable to the newly elected legislative body and shall maintain its trust.

The theory of accountable government requires that the parliament shall possess power to express mistrust towards the government. When the government fails to obtain the parliament's trust, two things happen: the cabinet, the members of which failed to deserve trust, shall resign, or the government shall demand dismissal of the parliament and appointment of new election.[33]

Unlike the control, implementation of which is permitted by the doctrine of accountability of the government, the main purpose of parliamentarism is to neutralize, or, moreover, terminate the influence, which the executive power may abundantly produce over the legislative branch.[34] The purpose of the vote of no confidence is different in the case of two-party system and multi-party systems.

In the case of two-party system, the corresponding power of the parliament and the government is equal, where the increase of influence of the executive power means weak, dependant parliament. Party substitutes the parliament as central, non-executive political institution, where the prime minister has great change to lose to position in favor of leader of this party, through the vote of no confidence, arranged by the parliament.

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[31] *Lijphart A.,* Patterns of Democracy, Government Forms and Performance in Thirty-six Countries, Yale University press, New Haven and London, 1999, 92.

[32] *Gardbaum S.*, Separation of Powers and Growth of Judicial Review in Established Democracies (or why Has the Model of Legislative Supremacy Mostly Been Withdrawn From Sale?), American Journal of Comparative Law, The American Society of Comparative Law, Vol. 62, Issue 3, 2014, 632, <http://law.ucla.edu/~/media/Files/UCLA/Law/Pages/Publications/CEN_ICLP_PUB%20Separation%20Powers.ashx>, [24.11.2015].

[33] *Albert R.*, The Fusion of Presidentialism and Parlamentarism, Boston College Law School, Legal Studies Research Paper Series, Boston, 2010, 550.

[34] Ibid, 540.

Consequently, contemporary party system made the parliament more dependent on it, rather than vice versa.[35] Following from the above stated, with consideration of the present-day situation, the trend of strengthening of the executive power, and even more, political parties, over the legislative body and its activities is noted, which is not desirable, as only strong parliament is authorized to balance the executive power and only strong parliament is able to initiate the vote of no confidence and carry it through.

4. Conclusion

In the present paper, the vote of no confidence is considered in different aspect, which made is possible to understand it as political-legal mechanism. The vote of no confidence is a very interesting mechanism to be studied by modern constitutional law, which is used for different purposes, in different cases and in the countries with different governance systems.

Its main purpose is expressed I the government's accountability towards the parliament. Executives always were accountable and responsible to legislative power, and the legislative power – directly to the electorate.[36] Due to the above mentioned accountability, the government has the responsibility to the parliament, and act of holding accountable is expressed through the vote of no confidence and dismissal of cabinet.

However, application of this mechanism if also possible by opposition parties, which, due to the existing social or public problems, can criticize the government, initiate the vote of no confidence and, in the case of dismissal of the government, use the political situation in their favor.

The vote of no confidence may also be used for the purpose of overcoming of crisis, when the tense political situation is discharged through adoption of the resolution of no confidence; besides, the mechanism also represents the distinguishing feature of governance models.

The above mentioned issues, certainly, show the essence of the vote of no confidence, however, use of the vote of no confidence according to the status of the government and the parliament demonstrates its purpose in better way. The judgment, developed above, provides sufficient grounds to conclude that the vote of no confidence is just a kind of way to achieve the balance of executive and legislative powers.[37] The idea of no confidence remains the main instrument of dismissal of the cabinet. The government and the parliament have a lot of obligations, which they have to fulfill in coordination with each other.

Nevertheless, the reality convinces us that in majority of cases the grounds for the status of the government and the parliament, as well as dismissal of the government, are the existing situation. None of mechanisms are so dependent on the balance of political forces and the circumstances as the

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[35] *Gardbaum S.*, Separation of Powers and Growth of Judicial Review in Established Democracies (or why Has the Model of Legislative Supremacy Mostly Been Withdrawn From Sale?), American Journal of Comparative Law, The American Society of Comparative Law, Vol. 62, Issue 3, 2014, 634, <http://law.ucla.edu/~/media/Files/UCLA/Law/Pages/Publications/CEN_ICLP_PUB%20Separation%20Powers.ashx>, [24.11.2015].

[36] *Rosenfeld M., Sajo A.*, The Oxford Handbook of Comparative Constitutional Law, Oxford University Press, 2012, 668.

[37] *Lijphart A.,* Patterns of Democracy, Government Forms and Performance in Thirty-six Countries, Yale University press, New Haven and London, 1999, 35.

vote of no confidence. How strong the parliament/ government may be, or vice versa, the indicator of their status is the existing political situation, which is expressed in the status of the governing party or coalition. So, application of the above mentioned mechanism by the parliament, disregarding its status, is related to the risk, as, in the case of non-adoption of the resolution of no confidence the parliament terminates implementation of its authority.

For this reason we consider that the vote of no confidence makes the parliament stronger and weaker in some way. In reality, delimitation of power occurs not between the branches of power, but between the governing majority and parliamentary minority;[38] and application of the vote of no confidence represents just the expression of the above mentioned principle, which, indisputably, gives it the status of political-legal mechanism.

[38] *Izoria L.,* Presidential, Parliamentary or Semi-presidential? Way Towards Democratic Consolidation, Tbilisi, 2010, 20 (in Georgian).

Lasha Margishvili[*]

Territorial Organization of the State – Way of Overcoming the Conflict or the Form of National Self-Determination

The conflicts, existing in the society are inhomogeneous according to their origin as well as their course. Negative outcomes, caused by these conflicts, go beyond the boundaries of one country and form part of global politics. Neutralization of the conflicts, existing in the society is a long-term and extremely complex task and their ultimate neutralization is almost impossible. Consequently, all models, created for the purpose of resolution of such conflicts, are directed towards their maximum neutralization. On the basis of consideration of the examples of the number of countries is became clear that federalism may be used as effective way of resolution of the existing conflicts. Federative state is one of the best mechanisms for various minorities to develop their national and cultural originality. Federalism facilitates peaceful resolution of conflicts and, at the same time, preserves unity and territorial integrity of the state. This form of state organization can't be viewed as universal way of resolution of problems. It may play positive role in the process of unification of Georgia and provide the required and significant positive outcomes for the country.

Key words: *territorial organization of the state, unitarian state, federalism, confederation, conflicts, ethnic minority, the right of nations to self-determination.*

1. Introduction

Regulation of conflicts of different forms, existing in the world, and their maximum neutralization remains the most important problem on almost all stages of development of society, as creation of stable state and its development is impossible without it.

The conflicts, existing in the society, are diverse according to their origin (social, economic, religious, ethnic, etc.) as well as progress. The primary source of such conflicts mainly comes from the past and, regardless the development of society, in most cases, becomes more and more complicated, obtains new scales and depths and creates serious problems in internal or foreign politics of number of countries.

Disintegration of socialist system at the end of the 20th century created new centers of severe conflicts (mostly ethnic and social) all over the world, especially in Russia and Europe.[1] Negative outcomes of these conflicts go beyond the boundaries of one country and become the part of global politics.

Presently different opinions exist in science on conflict assessment, as well as the ways of overcoming them. Even on the example of our country, it's difficult to agree with the view of one

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[*] Doctoral Student, TSU Faculty of Law.

[1] *Khubua G.,* Federalism, as the Way of Overcoming Ethnic Conflicts, Zhurnali Samartali (" Journal of Law"), №6-7, 1999, 15 (in Georgian).

part of conflict scholars recognizing conflicts, as the means of stimulation of progress and development of society. Social and ethnic conflict, existing in the society, carry such negative impacts for individual groups of people and for the country, that they are in the centre of attention of the whole world and the governments of individual countries, hence, leading politicians and social scientists give special priority to the necessity of their regulation and neutralization.

Neutralization of conflicts of different natures, especially those emerging on ethnic ground, existing in the society, is a long-term and extremely complex task and their final elimination is almost impossible presently. Consequently, following from the existing reality, all models, created for the purpose of regulation of the mentioned conflicts, are directed towards their maximum neutralization.

2. Federalism – the Way of Overcoming Ethnic Conflicts (Confrontation)

One of the recognized ways of overcoming ethnic and social conflicts in global science is determination of the relevant territorial organization of the state. The given section overviews one of the forms of territorial organization, namely, creation of federal state, as one of the ways of overcoming internal conflicts of the country. The mentioned model is more and more often is considered by the leading countries of the world and political scientists as quite fruitful and successful form of resolution of internal conflicts. One of the key criteria for evaluating federal governance system is its efficiency in overcoming the conflict, existing in the society. .[2]

Different views exist around this issue too. One group of scholars consider federal model the ideal means to overcome the existing confrontations, and others rebut all achievements of the mentioned model in this direction. There are two different – American and German models of federalism, which, with consideration of the modern requirements and the existing reality, are quite close to each other, so it will be more appropriate to analyze the key characteristics s of federal governance, as the means of overcoming the differences, existing in the society, which express the main idea and purpose of this model.[3]

In the opinion of famous German scientist, *Frenkel*, Federal governance model, due to its dynamic nature, has the ability of prompt adaptation to changing situations and, in the case of timely identification of conflict and necessity, allows their peaceful resolution. For this reason, with consideration of the requirements of contemporary society, the above mentioned functions of federalism have presently moved to the front line.[4]

It is recognized, that federal governance model is much efficient, more peaceful and liberal way of resolution of all types of conflicts, including ethnic, unlike centralism, which tries to resolve conflicts radically, from the positions of strong centre. In such case, obviously, the interests of national minorities are violated and they experience strong pressure; besides, it cannot eliminate the reasons, causing the conflict, on the contrary, in some cases it creates new confrontations, facilitates creation of public tension.

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[2] *Khubua G.,* Federalism, as Normative Principle and Political Order, Tbilisi, 2000, 152 (in Georgian).

[3] *Khubua G.,* Federalism, as the Mean of Overcoming Ethnic Conflicts, Zhurnali Samartali, Journal of Law, № 6-7, 1999, 19 (in Georgian).

[4] *Khubua G.,* Federalism, as Normative Principle and Political Order, Tbilisi, 2000, 153 (in Georgian).

Federal model excludes accumulation of powers in any centre. It provides wide opportunities of independent actions to the subjects of federation, taking into account their interests and desires and somehow neutralizing the conflict situation this way; besides, this way of resolution of the mentioned problem excludes the possibility of forced suppression of conflicts and, at the same time, preserves the unity of the state.[5]

The fact, that federal model takes into account – as much as possible – the historical, cultural and religious differences of different regions of the country and becomes the guarantor of preservation and development of these differences in the future.

Consideration of interests of individual regions and development of mechanism for their protection, certainly, reduces the confrontation, existing in the society, facilitates approximation of regions with the centre and with each other. Individual subjects of federation actively participate in political and economic management of the country and in resolution of common national problems; common structures of the centre and regions are established, facilitating regulation of the process, formation and amplificationof common interests.

Origination of conflicts, as a rule, is related to the existence of different views and interests of individual subjects or social groups. Different views of small ethnic groups, individual subjects are accepted and shared in centralized state at less extent. This function is better implemented by federative state, granting the right of independent action and wide area of its implementation to the subjects of federation whether they represent the majority or the minority.

The main principle of federative state – "diversity in unity" – greatly helps individual subjects to maintain the united system with consideration of their own interests. Federalism should be able to achieve the unity of the state through incorporating federation subjects and state system. Federal unity shall not be lost in the environment of maximum autonomy and diversity of territorial units; otherwise, federalism will transform into particularism, separatism. At the same time, if the accent is unilaterally shifted only to the unity, unitarism and centralism, notions incompatible withidea of federalism, develop. Consequently, federalism can be viewed as mosaic. It will not be complete if it is not placed in certain boundaries and if it doesn't have certain shape.[6]

On the other hand, regardless all the good, arrangement of the state on federal basis in not an ideal way towards resolution of conflicts once and forever. It should be taken into account that the existence of different centers of power in regions, as well as different interests of the subjects of federation may complicate overcoming of conflict; besides, new differences may emerge between the center and the subjects, nevertheless, confrontation of views between them has positive effect too in the terms of distribution of power, checks and balances.[7] It shall be mentioned that this model presently operates in many countries of the world. These countries, in many cases, are the states with different systems and resolution of the existing conflicts in each of them shall be carried out with consideration of characteristic peculiarities and not based on general stereotypes or dogmatic schemes.

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[5] *Khubua G.,* Federalism, as Normative Principle and Political Order, Tbilisi, 2000, 156 (in Georgian).

[6] *Khubua G.,* Federalism, as Normative Principle and Political Order, Magazine Overview of Georgian Law, 4th quarter, Tbilisi, 1999, 15 (in Georgian).

[7] *Khubua G.,* Federalism, as Normative Principle and Political Order, Tbilisi, 2000, 158 (in Georgian).

For society in many states, including Georgia, one of the severe problems is the resolution of ethnic conflicts. Origination and development of ethnic conflicts, as a rule, comes from far past and mostly manifest in separatist movements. Last decades of the past century was marked with significant increase of ethnic conflicts. In 1993-1994 about 50 ethnic conflicts were registered in the world. They represent one of the forms – presently quite widely spread – of civil war and their severest result was emergence of thousands of refugees or IDPs, not to mention political tension and lowering of economic potential of individual countries.[8]

It shall be mentioned, that ethnic conflicts don's have homogeneous nature. Their majority is caused by historical reality, besides, their progress, level of tension, area of spreading is different. Consequently, it would be desirable to develop the mechanism of regulation of ethnic conflicts, which would ensure objective assessment and consideration of all the above mentioned aspects, including historical reality.

Majority of present-day political scientists, as we have already mentioned above, see federal governance system as one of the effective models for resolution of ethnic conflicts. From the viewpoint of resolution of ethnic conflicts, it is important to keep in mind the fact, that federalism shall not be seen as petrified, motionless, static legal structure; it is necessary to implement federal principles in political processes and, to build state governance mechanism on federal principles.[9]

One of the famous researchers of the issues of federalism, *Elisar,* introduces notions "federal principle" and "federal division". In the opinion of the author, the essence of federalism is that, on the one hand, the constituent parts of the state are granted independence and self-governance, and on the other hand, their participation in state governance is ensured. *Elisar* particularly stresses that federalism is such type of connection of small groups with large association, which allows realization of common objectives and, meanwhile, ensures the independence of the part of the whole. Consequently, in *Elisar*'s opinion, federalism is one of the most important ways of resolution of national, ethnic, racial and other conflicts and fort bringing positive results.[10]

The UN Declaration on the Granting of Independence to Colonial countries and Peoples explains the right to self-determination as follows: all peoples have the right to self-determination, based on which they freely and independently determine their political status, basic directions of their economic, social and cultural development.[11]

One of the UN resolutions,[12] defining the notion of aggression, maintains that use of force for realization of the right to self-determination, as well as action, directed against the sovereignty, territorial integrity and political independence of the other country, is inadmissible.[13]

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[8] *Khubua G.,* Federalism, as the Mean of Overcoming Ethnic Conflicts, „Zhurnali Samartali", Journal of Law, №6-7, 1999, 14 (in Georgian).

[9] *Khubua G.,* Federalism, as Normative Principle and Political Order, Tbilisi, 2000, 162.

[10] Ibid, 162-163 (in Georgian).

[11] Declaration on the Granting of Independence to Colonial Countries and People, adopted by General Assembly resolution 1514, 1960, <http://www.un.org/en/decolonization/declaration.shtml >, [20.11.2015]

[12] Definition of Aggresion, United Nations General Assembly Ressolution, 3314, 1974, <http://www1.umn.edu/humanrts/instree/GAres3314.html> , [11.10.2015].

[13] *Halberstam M.*, Nationalism and the Right to Self-Determination: The Arab-Israel Conflict, Journal of International Law and Politics, N.Y.U. 26, 1993-1994, 574.

In regard to the right to self-determination, opinion is accepted that this is the right, originally enjoyed by the peoples, living in the conditions of colonial regime and which could be used only for overthrow of the relevant colonialist regime. Basically, this right was deemed to be the right of the group of people, living in one certain territory, which would help them to make collective decision on what kind of governance they would like to live under. Presently it is clear, that the right to self-determination is an immune right for all peoples, but nevertheless, it is not necessarily absolute. Clearly, people, living in non-colonial countries, as a rule, do not need it.[14]

Although the series of international acts, allegedly, uniformly ensure the realization of the right of self-determination for all nations, the world history has shown, that in reality, its implementation was not desirable and neither expedient for the countries of international community. As an example, we could quote the long-lasting Arab-Israel conflict, which was recognized by international organizations as the desire of Israeli people to implement the right of self-determination. Nevertheless, it should be taken into account, that the right of nations' self-determination has never been real reason, causing the mentioned conflict.

Israel purposefully put the pretext of realization of the right to self-determination behind the existing conflict in order to obtain the support of other states and the UN. In reality, two circumstances were the key reason of the mentioned tension: territory and establishment of non-muslim country in the Near East.[15]

The right to self-determination may have different meanings: the right to freedom of people and determination of its international status; the right of the population of the state to determine the form of the government and participate in its activities; the right of the state in regard to territorial integrity and inviolability of its borders, as well as non-interference in its internal affairs; the rights of the state to cultural, economic and social development; the right of national minorities, living in the country or even beyond its borders to have the rights of special social and economic development.[16]

According to the Declaration, adopted by the assembly of the UN, it is not necessary to implement the right to self-determination in the form of declaration of the state independence and reconsideration of the state borders. Self-determination can be implemented in the form of self-governance (autonomy) as well. National minority can determine its political status independently without secession and declaration of sovereignty within united state. In this aspect, national self-determination means the opportunity of selection of independent governance form and participation in governmental decision-making.[17]

It is clearly proven by the 4th and 5th Republics of France, when this country had long-standing unresolved problem in regard to the status of former colony – New Caledonia. The persons, residing

[14] *Smith R.K.M.,* International Human Rights, Publishing House of Oxford University, New York, 2005, 381 (in Georgian).

[15] *Halberstam M.*, Nationalism and the Right to Self-Determination: The Arab-Israel Conflict, Journal of International Law and Politics, N.Y.U. 26, 1993-1994, 573.

[16] *Smith R.K.M.,* International Human Rights, Publishing House of Oxford University, New York, 2005, 381 (in Georgian).

[17] UN General Assembly Resolution 2625 (XXV), 1970, <http://www.un-documents.net/a25r2625.htm>, [09.10.2015].

in the mentioned territory, were demanding withdrawal from the French Republic and formation of independent state. The authorities of the 5th French Republic resolved this problem in 1982-1987 by applying the relevant territorial arrangement. In particular, New Caledonia was granted large powers in social, cultural and economic spheres. Local population, the Kanakas, was given opportunity to preserve and develop their habits and customs, traditions and culture within the single state. As a result, in 1987, during the referendum, conducted in New Caledonia, majority of local population rejected the idea of formation of independent state and confirmed that their rights to self-determination was fully realized in the united state of the French Republic.[18]

It is noteworthy that during the world history none of the states has really realized the rights to self-determination of any group within its territory. Notwithstanding the universal recognition of the right to self-determination, neither the United States granted the right to self-determination indegenous people, nor the Great Britain – to the North Ireland.

There are many examples in the world, where different ethnic, national, religious and racial groups live within the territory of one state. In some cases the representatives of the mentioned groups are so assimilated with each other, that it's impossible for them to independently implement the right to self-determination. Otherwise, wide and multiple implementation of the right to self-determination will lead to origination of many small states, which will jeopardize international security and global order[19]

And if the ethnic minority has the opportunity of living in political, social and cultural environment, where preservation and development of its social-economic and cultural rights is possible, the right to self-determination may be realized in the form of granting of the status of the subject of federation to the minority. Consequently, optimal concordance of the right to self-determination and sovereignty will be achieved. On the one hand, territorial integrity of the state will be preserved, and, on the other hand, the representatives of ethnic minorities will have the opportunity to protect their interests and rights within the boundaries of the united state.

As we have already mentioned, in many countries of the world (Bosnia and Herzegovina, Kingdom of Belgium, Russian Federation, Ethiopia, Canada, etc.) the model of federative system, as the form of territorial-political organization of the state was successfully used, which facilitated regulation of different types of conflicts, and in some cases – establishment of peace and real implementation of the desired rights of ethnic minorities.

The present state of our country, violated territorial integrity necessarily requires drawing on the experience of other countries and fundamental analysis of the model of territorial arrangement, which enabled regulation of various conflicts in these countries, facilitated peaceful co-existence of different groups in the united state.

Besides, it should be specially mentioned that being maximally adapted to the interests of particular countries, federal organization model was implemented in different forms, though nevertheless, their basic characteristics and principles were preserved. Flexible nature of federal arrangement

[18] *Marrani D.*, Principe of Indivisibility of the French Republic and the People`s Right to Self-Determination: The New Caledonia Test, Journal of Academic Legal Studies, Vol. 2, 2006, 18-19.

[19] *Halberstam M.,* Nationalism and the Right to Self-Determination: The Arab-Israel Conflict, Journal of International Law and Politics, N.Y.U. 26, 1993-1994, 575-576.

even further facilitated its successful implementation and achievement of positive results in the countries with diverse conflicts.

2.1 Bosnia and Herzegovina

Administrative-territorial arrangement form of Bosnia and Herzegovina is not directly determined by the Constitution. P. 3 of the Article 1 of the Constitution rules that Bosnia and Herzegovina consists of two subjects – Bosnia and Herzegovina Federation and Sparska Republic.[20] Consequently, active discussions are still ongoing whether Bosnia and Herzegovina represent unitary, regional, federative or confederative state. So, for better understanding of the problems, related to territorial arrangement of Bosnia and Herzegovina, the history of creation of the mentioned state, its territorial-administrative structure and the political environment, existing in the country, should be considered.[21]

Disintegration of Yugoslavia in 1991-1992 was followed by creation of 5 new states: Slovenia, Croatia, Macedonia, Bosnia and Herzegovina and Federative State of Yugoslavia. The latter united the states of Serbia and Montenegro. Primary escalation of conflict in Bosnia and Herzegovina was caused by the Referendum, conducted on February 29, 1991, where 98% of population of Bosnia and Herzegovina voted for the unity and independence of the country. After the Referendum, in April 6, 1992, the Countries of European Community and international organizations recognized Bosnia and Herzegovina, as independent and sovereign state within the borders, existing by that period.[22]

Serbs, living in Bosnia and Herzegovina categorically opposed the idea of conducting the Referendum from the very beginning and boycotted it. It was the desire of Serb population either to create independent state or join Federative State of Yugoslavia.[23]

It should be taken into account, that due to multi-ethnicity, Bosnia and Herzegovina repeatedly became the subject of unrest and manipulation by various political groups, during which the major political groups facilitated instigation of religious and ethnic confrontation among the peoples in order to obtain the support of certain part of population. Unhealthy political climate and different views on the future of Bosnia and Herzegovina finally led the country to the war, which lasted from April 1991 to September 1995.

During military actions, several state-like formations were created without any legal basis on the territory of Bosnia and Herzegovina. On November 9-10, 1991 Serb population conducted plebiscite and supported creation of independent state of Serbia (further known as Republic of Sparska). During the same period, Croatians created the state of Posavina Croatia and then union of Herzeg-Bosnia-Croatia.[24]

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[20] Constitution of Bosnia and Herzegovina, Article 1, <http://www.ohr.int/dpa/?content_id=372>, [10.09.2015].

[21] *Meskic Z., Pivic N.*, Federalism in Bosnia and Herzegovina, Vienna Journal on International Constitutional Law, Vol. 5, 2011, 597.

[22] Ibid, 597.

[23] *Oklopcic Z.*, The Territorial Challenge: From Constitutional Patriotism to Unencumbered Agonism in Bosnia and Herzegovina, German Law Journal, Vol. 13, № 01, 2012, 33.

[24] Ibid, 598, Also see *Friedmann F.,* Bosnia and Herzegovina – a Policy on the Brink London, London, 2004, 120.

As the confronting parties had no desire to find solution out of the existing complicated situation, international community several times suggested different ways for resolving problem resolution to the subjects, involved in military actions. Primarily, on March 1, 1994, on the initiative of the United States, Ceasefire Agreement was concluded between Herzeg- Bosnia- Croatia Union and Bosnia and Herzegovina, which is known in international law as Washington Agreement. The purpose of the mentioned agreement was recognition and protection of sovereignty and territorial; integrity of Bosnia and Herzegovina, as federative state, protection and respect of national equality of the population of different groups on the territory of the country and fundamental human rights and freedoms. According to the Agreement, federation must be the form of territorial arrangement of Bosnia and Herzegovina.

The procedure of adoption of the new constitution of the country, competences the governmental authorities of central and federation subjects, structure, procedure of election, important issues related to cessation of military actions and fundamental human rights were defined in the document in details.[25]

Despite the agreement and, besides, series of activities, military actions didn't stop in Bosnia and Herzegovina. Another Ceasefire Agreement was concluded in the United Stated, in Dayton, which put an end to the 4-year war between the confronting parties. The mentioned Agreement was concluded among the three dominant national groups, living in the Federative State of Yugoslavia, Croatia and Bosnia and Herzegovina with participation of 5 leading states (the USA, Russian Federation, England, German Federation, French Republic). This Agreement and the annexes thereto were signed on December 14, 1995 in Paris. The Ceasefire Agreement includes 12 Annexes, the most important of which is the Framework Agreement on Ensuring of Peace and Annex 4, which includes the Constitution of Bosnia and Herzegovina and determined organizational-legal form of the state, model of governance, powers, structure and functions of the governmental structures. The purpose of the mentioned Agreement was ensuring of peace, stability and development in Bosnia Herzegovina and in the whole region. The mentioned document obliged the parties to respect each other's sovereignty and equality. Resolution of the existing conflict should happen only in peaceful manner, the parties should restrain from any threat or violence, directed against territorial integrity and political independence of Bosnia and Herzegovina or any of the parties.[26]

It could be said that Dayton Agreement in that period was the only way out, which triggered the parties to put an end to many-years military actions and confrontation.[27]

Regarding outstanding importance of Dayton Agreement the US diplomat *Richard Holbrooke* mentioned that the agreement, achieved in Dayton formed the basis for ending the war and formation of multi-ethnic state.[28]

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[25] Washington Peace Agreement, 1994, <http://www.usip.org/sites/default/files/file/resources/collections/peace_agreements/washagree_03011994.pdf>, [10.10.2015].

[26] The General Framework Agreement for Peace in Bosnia and Herzegovina, 1995, <http://www.ohr.int/dpa/ default.asp?content_id=379>, [05.09.2015].

[27] *Meskic Z., Pivic N.*, Federalism in Bosnia and Herzegovina, Vienna Journal on International Constitutional Law, Vol. 5, 2011, 602.

[28] *Bose S.,* Bosnia after Dayton, Nationalist Partition and International Intervention, Oxford University Press, 2002, 52-53.

Immediately upon signing the Agreement, concluded in Dayton, new Constitution of Bosnia and Herzegovina was adopted, according to which Bosnia and Herzegovina, within the boundaries, recognized by international law and international community, represents sovereign and independent state, consisting of two subjects: Federation of Bosnia and Herzegovina and Republic of Sparska.[29]

Both subjects of Bosnia and Herzegovina – Republic of Sparska and Federation of Bosnia and Herzegovina, from constitutional – legal viewpoint, have the status of federation subjects and non-sovereign states. From territorial-organizational standpoint, Bosnia and Herzegovina, due to the above-mentioned legal status, represent absolutely different phenomenon. In particular, Bosnia and Herzegovina consist of one unitary (Republic of Sparska) and one federative (Federation of Bosnia and Herzegovina) subjects and Brchko district, which in not included in either of the subjects. In its turn, Federation of Bosnia and Herzegovina consists of 10 cantons, administrative borders and ethnic composition of population of which is conditioned by the results of the war.[30]

In general, the idea of establishment of ethno-cultural justice stimulates countries to form, as decentralized subjects, where the originality of various nations included in it is protected and developed on institutional level. The mentioned result can be achieved in t\federative state through establishment of federation subjects, where peaceful and rational co-existence of various national and/ or ethnic minorities will be ensured.[31]

It is worth mentioning, that in the first years of enforcement of the Constitution of Bosnia and Herzegovina some scholars considered that the mentioned country did not represent the state of federative arrangement, but confederation, as the subjects had sovereignty and wide powers like independent state.

On the other hand, certain part scholars considered that as Bosnia and Herzegovina was created on the basis on international law and not on the basis of national legislation, it represented the union of states, i.e. confederation. Consequently, it was considered in legal doctrine that Bosnia and Herzegovina was not a united state, but the union of two independent states (Republic of Sparska and Federation of Bosnia and Herzegovina).

Certain time later when central authorities of Bosnia and Herzegovina widened powers in number of spheres at the expense of subjects, Bosnia and Herzegovina was recognized as one federative state, which consisted of 2 subjects and one district, and without which it would not exist as a state. Nevertheless, as, according to the Constitution, the governmental bodies of the subjects of federation are equipped with the competence, inherent to sovereign state, the scholars, working on these issues considered that territorial-organizational form of the mentioned state was "sui generis" (unique, different from all), where subjects had high level of decentralization and several characteristics for independent, sovereign states.[32]

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[29] Constitution of Bosnia and Herzegovina, Article 1, <http://www.ohr.int/dpa/?content_id=372>, [05.08.2015].

[30] *Meskic Z., Pivic N.*, Federalism in Bosnia and Herzegovina, Vienna Journal on International Constitutional Law, Vol. 5, 2011, 599.

[31] *Oklopcic Z.*, The Territorial Challenge: From Constitutional Patriotism to Unencumbered Agonism in Bosnia and Herzegovina, German Law Journal, Vol. 13, № 01, 2012, 34.

[32] *Meskic Z., Pivic N.*, Federalism in Bosnia and Herzegovina, Vienna Journal on International Constitutional Law, Vol. 5, 2011, 602-603.

Political scientists, supporting formation of Bosnia and Herzegovina as united federative state consider, that Bosnia and Herzegovina is established on the basis of free will, manifested by peoples of different nations. It is important to understand, that Bosnia and Herzegovina belong no to the representatives of any specific, one nation, but to all its citizens, who participate in the revival of the state at equal level.[33]

In general it is considered that Bosnia and Herzegovina is an ethnic federative state, as each subject is formed on the basis of just ethnicity. High level of independence of the subjects is conditioned by the circumstance that Bosnia and Herzegovina is deemed to be the state, uniting 3 etatist nations (Serbs, Croatians and Bosnians). In the given case, specific form of territorial arrangement – federalism- was used as efficient way of cohabitation of different ethnic groups in united state. Ethnic minorities were given the opportunity to fully preserve and implement their social-cultural and political rights, national interests and widely participate in building of united state.[34]

The form of territorial arrangement of Bosnia and Herzegovina may be considered as the compromise, based on realization of the right to self-determination of Serbs living in Bosnia and the desire of Bosnians (to preserve united Bosnia and Herzegovina). As a result, for preservation and development of their political, social-cultural rights and traditions within the united Bosnia and Herzegovina, Serbs created the subject of federation – Republic of Sparska.[35]

It is important that establishment of federative state in Bosnia and Herzegovina was the only and necessary way out, which could stimulate the confronting parties to put away the weapon and sit down at negotiation table. Federalism became the weapon, which managed to put an end to military operations. This form of state organization in Bosnia and Herzegovina ensures stability and peace, facilitated progress and development of united state with consideration of interests and rights of Bosnians, Croatians and Serbs.[36]

It is generally considered that for realization of self-determination rights of different ethnic or national groups it is enough to create federative state and grant wide social-economic and cultural rights to the subjects, with exception of the cases when minority in the united state suffers from extreme, unbearable discrimination. Only in this case, realization of the right to self-determination may be followed by the requirement of formation not as the federation subject, but as independent state.[37]

In addition, it could be mentioned that for consideration and preservation of interests of all etatist nations, the following conditions are established by the legislation of Bosnia and Herzegovina: Bosnians, Croatians and Serbs are equally represented in legislative, executive and judicial authorities; re-consideration of the Constitution of Bosnia and Herzegovina is admissible only on the basis of agreement, achieved among the etatist nations; the representatives of all the above-

[33] *Oklopcic Z.,* The Territorial Challenge: From Constitutional Patriotism to Unencumbered Agonism in Bosnia and Herzegovina, German Law Journal, Vol. 13, № 01, 2012, 40.

[34] *Meskic Z., Pivic N.*, Federalism in Bosnia and Herzegovina, Vienna Journal on International Constitutional Law, Vol. 5, 2011, 606.

[35] Ibid, 33.

[36] *Meskic Z., Pivic N.*, Federalism in Bosnia and Herzegovina, Vienna Journal on International Constitutional Law, Vol. 5, 2011, 608.

[37] *Oklopcic Z.*, The Territorial Challenge: From Constitutional Patriotism to Unencumbered Agonism in Bosnia and Herzegovina, German Law Journal, Vol. 13, № 01, 2012, 39.

mentioned nations equally participate in the process of development and implementation of the state policy; the state equally ensures preservation, protection and development of their national, religious, linguistic and social-cultural originality and traditions for Serbs, Croatians and Bosnians.[38]

Consequently, it can be concluded that since conclusion of Dayton Ceasefire Agreement and up to the present, federalism proved to be the successful model of state territorial arrangement, which really ensured peaceful coexistence of Bosnia and Herzegovina, as independent and sovereign state.

2.2. The Kingdom of Belgium

In opposition to the unifying role, federative organization may serve for segmentation of uniform political organism into parts, which shall be protected against final disintegration by federal system. Presently, in many states, such progression of political processes conditions its federalization. Political wisdom implies introduction of certain federal elements in even strictly unitary state.[39] The same is required for the interests of unity of the state itself. Neglecting of this principle resulted for Denmark into the loss of Schleswig-Holstein, for Holland – Belgium, for England – American colonies.

Belgium became new example of federalization of unitary state, where organization of the country on federative basis began as early as in 1970 and completed in 1993 by adoption of new Constitution, according to the Article 1 of which Belgium became "federative state, which consists of communities and regions".[40]

Belgian federalism may be considered as one of the examples of ethnic federalism. Belgium is a multinational state, where about 58% of population lives in Dutch-speaking north, about 32% – in French-speaking area, and about 9.5% – in bilingual capital – Brussels, where French-speaking group form majority of population. Small group of German-speaking Belgians (little more than 0.5%) lives in east Belgium.[41]

Change of unitary system in the Kingdom of Belgium was conditioned by acute national issues between the two basic nations, residing in the country – Vallonians and Flamandians. Disagreement between them began on lingual basis and gradually it transformed into acute national confrontation.[42] Consequently, as a result of long analysis and consideration of different variants, the choice of the people, as well as the government came to federal resolution of national issues.

Territorial re-organization of Belgium was implemented in two stages. Four language-based regionswere formed in Belgium in 70-ies: Dutch-speaking, French-speaking, German-speaking and bilingual capital city – Brussels. Language-based region mainly had cultural-social competence.

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[38] *Meskic Z., Pivic N.*, Federalism in Bosnia and Herzegovina, Vienna Journal on International Constitutional Law, Vol. 5, 2011, 611.

[39] *Gogiashvili G.,* Comparative Federalism, Tbilisi, 2000, 209 (in Georgian).

[40] *Gerven V.,* Federalism in the US and Europe, Viena Online Journal on International Constitutional Law, Vol. 1, 2007, 11-12. Also see *Vos H., Orbie J., Schrijvers A.,* Belgium: Federal Engineering in the Heart of Europe, Eastern Mediterranean University Press, Famagusta, 2008, 7.

[41] *Khubua, G.,* Federalism, as Normative Principle and Political Order, Tbilisi, 2000, 322-323 (in Georgian).

[42] *Gogiashvili G.,* Comparative Federalism, Tbilisi, 2000, 210 (in Georgian).

Since 1970, on the initiative of Vallonians, three regions were formed in Belgium: Flamandian, Vallonian and capital city Brussels.[43]

Belgium is also divided in three communities: Dutch-speaking, German-speaking and French-speaking. German-speaking community doesn't have its own region in Belgium, as its area of settlement includes Vallonian region. French-speaking community, in its turn, doesn't include all residents of Vallonia, but unifies majority of population of Brussels. Flamandian community includes all residents of Flamand and, besides, Dutch-speaking minority of Brussels.[44]

It shall be considered as the peculiarity of the state reform in Belgium that through federalization, regions were not only granted wide rights, but the process of formation of political will of the central government changed dramatically. By means of this system Belgium somehow mitigated the confrontation between different language groups. The unique nature of Belgian situation is that the French-speaking majority of the population of the country resides in the capital city of Brussels, located Flamandian territory, whereas the Dutch-speaking group makes majority of population throughout the country.[45]

By Federal organization of the state, certain parity between Dutch-speaking and French-speaking groups was formed in Belgium, in Brussels as well as in the whole country. Quite complex reconstruction of territorial division of the Kingdom of Belgium represents synthesis of elements of territorial and personal federalism. Some authors define Belgium, as the only, unique case, where the elements of decentralization, regionalism and even confederalism are unified.[46] Nevertheless, it should be mentioned that the combination of territorial and personal federalism was one of the most acceptable and favorable methods, which effectively ensured residence of Flamandians and Vallonians in the united state.

From the legal viewpoint, federative nature of subjects included in the composition of the state of Belgium is defined by substantial characteristics: the subjects of federation are granted constitutional autonomy and they determine the issues of their own political organization within the Constitution. The regions of the country have their own legislative and executive authorities with their own powers and finances.[47] It should also be mentioned that Flamandian region and French-speaking community have common government and parliament. The communities and regions, included in the Kingdom of Belgium, have their own capital, national emblem, flag and anthem. The competences of federal government, regional authorities and communities are defined and delimited by Belgian legislation.[48]

Participation of the subjects of Belgian federation in the process of formation and implementation of common governmental will is ensured by the two-chamber structure of the Parliament of

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[43] *Vos H., Orbie J., Schrijvers A.,* Belgium: Federal Engineering in the Heart of Europe, Eastern Mediterranean University Press, Famagusta, 2008, 8.

[44] *Khubua G.,* Federalism, as Normative Principle and Political Order, Tbilisi, 2000, 324 (in Georgian).

[45] *Arend L.,* Conflict and Coexistence in Belgium: the Dynamics of a Culturally Divided Society, Berkeley: Institute of International Studies , University of California, Vol. 46, 1981, 54.

[46] *Khubua G.,* Federalism, as Normative Principle and Political Order, Tbilisi, 2000, 325 (in Georgian).

[47] Articles 165, 175 and 176 of the Constitution of Belgium.

[48] *Gerven V.,* Federalism in the US and Europe, Viena Online Journal on International Constitutional Law, Vol. 1, 2007, 12.

Belgium. The Federal Parliament of Belgium consists of the Chamber of Deputies and Senate. The members of Parliament are divided into Dutch and French language groups, which act in conformity with the interests of the unity of these two groups.[49] The procedure of formation of the highest legislative body of Belgium provides the opportunity of cooperation of different linguistic groups on federal level, ensuring the guarantee of resolution of all federal issues in Belgium not solely, but on the basis of agreement. The ratification mechanism of international agreements and treaties represents its clear example; according to it an agreement, as a rule, shall be considered and approved in Belgian Federal Parliament, as well as in legislative authorities of the 5 subjects (Flamand, German community, Brussels, Vallonia and French-speaking community).[50]

Belgian Federal model deserves special interest due to the circumstance that through the federal system of governance this country managed to neutralize and resolve problems, following from multi-ethnic and multi-cultural nature of the state. As early as since 1992, quite real prospects of disintegration of Belgium was openly discussed, but re-organization of Belgium as a federal state completely deprived separatist trend of the ground and created successful mechanism for regulation of relation between the nations, as well as for general progress of the country.

2.3. Ethiopia

Severe armed conflicts on ethnic grounds took place in Ethiopia since 1855. Different ethnic groups were demanding to grant the authority of self-determination to them. The mentioned processed ended in 1994, when new Constitution of Ethiopia was adopted. By the power of this act, Ethiopia was announced as federative and democratic republic.[51]

It should be taken into account, that Ethiopia represents multi-ethnic state, where about 80 ethnic groups live presently. Just the need of avoiding of confrontation among them conditioned creation of 9 subjects and 2 cities of federal importance based on ethnic sign.

It is interesting that the Constitution of Ethiopia grants the right to secession to the subjects of federation, but established complicated procedural norms for its implementation.[52]

Famous scientists – *Baogang He* and *Tsegaye Regassa*, considering the example of Ethiopia, come to the conclusion that federalism, as the form of territorial-political organization of the state, represents significant positive instrument in the process of resolution of territorial and ethnic conflicts.

Professor Baogang He expresses opinion, that, on the example of Ethiopia, federalism may be deemed as one of the successful means of termination and reduction of conflicts, emerged on ethnic basis.[53] This opinion is shared by the Doctor of Law Tsegaye Regassa, who mentioned, that federal-

[49] Articles 42 and 43 of the Constitution of Belgium.

[50] *Vos H., Orbie J., Schrijvers A.,* Belgium: Federal Engineering in the Heart of Europe, Eastern Mediterranean University Press, Famagusta, 2008, 13.

[51] Constitution of Ethiopia, Article 1, <http://www.africa.upenn.edu/Hornet/Ethiopian_Constitution.html>, [15.08.2015].

[52] Constitution of Ethiopia, Article 39, <http://www.africa.upenn.edu/Hornet/Ethiopian_Constitution.html>, [20.11.2015].

[53] *He B.,* The Federal Solutions to Ethnic Conflicts, Georgetown Journal of International Affairs, Vol. 7, №2, 2006, 29.

ism is considered as the only effective, relevant and legitimate means in the process of resolution of ethnic-national conflicts.[54]

Baogang He mentions additionally, that presently more and more countries strive towards federalism. Mainly the states, where confrontational-separatist movements of ethnic and religious minorities and civil wars occur, actively step out with the demand of organization of the country on federal bases.[55] *Tsegaye Regassa* formulates interesting opinion in regard to the mentioned issue. In his opinion, federalism represents the means, stimulating peace. The parties to conflict understand that achievement of agreement through the armed confrontation is excessively long process with quite grave results. The main characteristic feature of arrangement of the state on federal basis is that it instigated parties to put down the weapon and make decision in peaceful political-diplomatic way. This very role was performed by federalism in regard to Ethiopia.[56]

It is interesting, that re-integration of Ethiopia, aiming at rising of ethnic and religious awareness among different groups in the state, can only be implemented by means of federalism. The advantage of federalism is based on the principle, according to which implementation of powers in the state is distributed between the central authorities and authorities of the subjects of federation. The mentioned model of territorial arrangement will allow the confronting groups inside the country to develop their originality and social-cultural rights.[57]

Political scientist *Baogang He* formulated interesting on federal system. He writes, that the constitutions of federal countries, established according to this sign (Canada, Belgium, Spain) allow compactly settled ethnic groups to relatively fully implement their rights, including the right to self-determination and presence their ethnic-national originality.[58]

In this regard *Tsegaye Regassa* notes that federative organization of the country helps Ethiopia to protect the rights of ethnic minorities consider their interests, as well as form the local political elite.[59]

Acceptable and worth of sharing is the opinion of the above-mentioned authors that in the state, established on federal bases, the representatives of ethnic minorities will be able to realize themselves much better, than in the countries, having the form of unitary or regional territorial organization.

It is obvious that the similar scientific views, which are based on practical experience and achievements of individual countries, shall be taken into account, especially by the states, where the conflict centers still exist and human rights and freedoms are still violated.

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[54] *Regassa T.,* Learning To Live With Conflicts: Federalism as a Tool of Conflict Management in Ethiopia – An Overview, Mizan Law Review, Vol. 4, Issue 1, 2010, 54-55.

[55] *Baogang He,* The Federal Solutions to Ethnic Conflicts, Georgetown Journal of International Affairs, Vol.7, № 2, 2006, 30.

[56] *Regassa T.,* Learning to Live With Conflicts: Federalism as a Tool of Conflict Management in Ethiopia – An Overview, Mizan Law Review, Vol.4, Issue 1, 2010, 75-76.

[57] *Mehretu A.,* Ethnic Federalism and its Potential to Dismember the Ethiopian State, Progress in Development Studies, Vol. 12, Issue 2/3, 2012, 126-127.

[58] *He B.,* The Federal Solutions to Ethnic Conflicts, Georgetown Journal of International Affairs, Vol.7, №2, 2006, 32.

[59] *Regassa T.,* Learning to Live With Conflicts: Federalism as a Tool of Conflict Management in Ethiopia, An Overview, Mizan Law Review, Vol. 4, Issue 1, 2010, 72.

3. Conclusion

As a result of review of the examples of Bosnia and Herzegovina, the Kingdom of Belgium and Ethiopia, several important provisions are formed: federalism, as the form of territorial-political organization of the state, can be used as effective method of resolution of ethnic conflicts. The cited examples have clearly shown that federative state, established on ethnic basis is one of the best mechanisms for ethnic minorities to develop their national and cultural originality much more freely and successfully. This way is somehow neutralizes conflict situations and facilitates their peaceful resolution, meanwhile preserving the unity and territorial integrity of the state.

If ethnic minority has the opportunity to preserve and develop social-economic and cultural values, defining their own identity, the right of the peoples to self-determination may be realized through granting of the status of the subject of federation to the minorities. Consequently, the principles of self-determination of peoples and federalism not only don't conflict, but complement each other; nevertheless, the mentioned form of state organization can't be considered as universal method of ultimate resolution of the above-mentioned problems, even from the viewpoint that introduction of this form of territorial organization has not brought equally positive result to all countries of federative organization.

With consideration of currently existing situation, when jurisdiction of Georgia doesn't cover the whole territory of Georgia, valid steps shall be made towards ensuring of territorial-governmental arrangement of Georgia, which could play significantly positive role in the process of restoration of integrity of the country. For re-integration of the territories of Abkhazia and South Ossetia into Georgian space it is necessary to offer them the status, which would provide best opportunities of safety, preservation of their culture, language and originality to the populations, living in the mentioned territory and real guarantee of their protection. The above-reviewed examples of the countries and the positive results, brought by organization of the states on the basis of federative system gives us the basis to suppose that this form will work in the context of Georgia and bring so necessary and significant positive results.

Lana Tsanava[*]

The Power Balance Issues in the Semi-Presidential Republic

Creation of a semi-Presidential system is related to the second wave of rationalization of Parliamentarism. In this event, enhancement of the executive authority has gained far wider scale than implemented by the authors of the Bonn Constitution. Weakening of the legislative body at the account of strengthening of the executive authority is clearly evident in the system, which entails significant discourse in the context of checks and balances of power. The hereby article aims to analyze the hereof problem, to study and estimate the theoretical and practical aspects of the semi-Presidential Republic.

Key words: *scientific characteristic of the semi-presidential system, classification of semi-presidential republics, balance of power, intra-executive conflict.*

1. Introduction

Creation of a semi-Presidential system is related to the second wave of rationalization of Parliamentarism. In this event, enhancement of the executive authority has gained far wider scale than implemented by the authors of the Bonn Constitution. The Constitution of France of 1958 is the document providing the most distinct indication of enhancement of the executive authority.[1] The hereof Constitution did really change the then unstable political situation in France, thus becoming the model document for many countries.

The first scientific characteristic of the semi-Presidential system belongs to the French scientist, *Duverge. Maurice Duverge* has established the concept of the semi-Presidential Republic and predicted emergence of new political system to be the dominant Constitutional form for new democracies.[2] Indeed, the semi-Presidential form of administration became particularly actual after 90s of the previous century in the post-Communist countries and Africa. The specialists note that establishment of the flexible semi-Presidential system becomes particularly important in the countries of new democracy, characterized with the political and economic transitional period and unstable electoral and party system.[3]

The parallel executive structure in capacity of the President[4] is created in the semi-Presidential system in view of provision of balance of the Government. The Constitutional arrangement creating

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[*] Doctoral Student, TSU Faculty of Law.

1 *Shaio A.,* Self-restriction of Authority, Introduction to the Constitutionalism, translated by *M. Maisuradze,* edited by *T. Ninidze,* Tbilisi, 2003, 123 (in Georgian).

2 *Shugart M.,* Semi-Presidential Systems: Dual Executive and Mixed Authority Patterns, 344, <http://www.palgrave-journals.com/fp/journal/v3/n3/full/8200087a.html>, [15.07.2014].

3 *Nakashidze M.,* Peculiarities of Relations of the President with the Governmental Branches in the semi-Presidential Systems (Based on the Example of Azerbaijan, Georgia and Armenia), 17, (in Georgian) see <http://www.tsu.edu.ge/data/file_db/faculty-law-public/Malkhaz%20Nakashidze.pdf>, [15.05.2015].

4 *Krupavicius A.,* Semi-Presidentialism in Lithuania: Origins, Development and Challenges, Semi-Presidentialism in Central and Eastern Europe, edited by *Elgie R., Moestrup S.,* 2008, 83.

numerous hubs of authority and impeding to personalization of the regime, creates more favorable basis for protection of legitimation.[5]

However, the semi-Presidential system unifies various models, some of which with their negative consequences of system functioning exceeds the negative characteristics existent in the Presidential and Parliamentary systems. Most of the specialists consider the possible conflict within the dual executive power as the main disadvantage of the semi-Presidential system. Besides, weakening of the legislative body at the account of strengthening of the executive authority is clearly evident in the system, which entails significant discourse in the context of checks and balances of power. At that, the standard formula of the semi-Presidential Republic formulated by *Duverge* is as well problematic. The problem is absence of one of the criterion, "quite important competence" – clear definition, entailing aggregation of the states of various types within one category.

The hereby article aims to analyze the hereof problem, to study and estimate the theoretical and practical aspects of the semi-Presidential Republic. The article provides theoretical characteristics of this system, and system analysis reveals categorization of the semi-Presidential countries, outlining the common characteristics thereof. The article provides consideration of positive and negative trends of various models of the semi-Presidential Republic, the problem of checks and balances and diversity of solution ways of the problem in each of them. Emphasis is made on practice of Central and East European countries, which is conditioned with the fact that current Constitutional system in Georgia is closely related to the configuration between the Governmental branches in the hereof countries and hence, study of the practice of these countries is relevant for the legal space of Georgia.

2. Historical Overview

The fifth Republic of France headed by Mr. *de Gaulle,* in view of elimination of the negative sides of the Presidential and the Parliamentary systems and especially in view to overcome the Parliamentary crisis and to form the stabile Government, has created the mixed Republic unifying the characteristics of the Presidential and the Parliamentary Republic. The term "semi-Presidential" does not indicate to the intermediary state of the President between the Parliamentary and the Presidential Republics but on the contrary, the President holds the greatest authority in all the spheres of state administration. *Charles de Gaulle* has unified the concepts of the French Bonapartism, American Presidentialism and the powerful British Prime Minister in this form of administration.[6]

Within the period of 1870-1958, France had the democratic and viable but unstable Government. Lots of the parties were entitled to form the Government which could be easily substituted when failed to overcome the crisis. The Algerian war years of 1940-44 and 1954-58 convinced everyone in necessity of the powerful executive authority to ensure uninterrupted functionality of the

[5] *Fisch S.*, Constitutional Development of Georgia in the perspective of the comparative Analysis*, Babek V., Fisch S., Reihenbergh Ts.*, Revision of the Constitution, Georgian Way to Europe, with the *preface by A. Demetrashvili,* Tbilisi, 2012, 66, (in Georgian), See <www.giz.de/law-caucasus>.

[6] *Eremadze Q.,* Inter-Relation of the Legislative and Executive Authorities in the Mixed Republic (on the example of France), Magazine People and Constitution, №4, 2002, 36 (in Georgian)

state in crisis. Elimination of the political crisis without creation of the Governmental vacuum was the main aspiration of the authors of the *"Gaullist"* Constitution.[7]

As a result, after the Revolution of 1789, it is for the first time when no one in France argues which political institutions better fit the French society. The Governments are no longer changed upon confrontations of the political-institutional changes of the society. The Right-wing and Left-ring representatives do unanimously recognize that the Constitution of 1958 gained political stability that the third and the fourth Republics lacked. Some people in France even proved that the French Revolution taking start in 1789 at last ended and that the fights lasting for two centuries and seeking of viable institutional arrangement have achieved the logical culmination.[8] As a result, "everyone today is *Gaullist",* as criticism of the institutions established under the Constitution of 1958 is no longer admissible.[9]

The main author of the Constitution of 1958, *Michel Debré* has described the main principles of the Constitution as follows: for stability and power of the executive authority, I have used the idea of the Republican Monarch. At the same time, it was necessary to have the real Parliamentary system where the Cabinet administers the Governmental activity and the organized Parliament is as well functioning, the wills of which are not supreme.[10]

3. The Original, French Concept of the Semi-Presidential System

The French model of administration reveals the primacy of the President. It contains the authorities characterized for the Presidents of the Presidential and the Parliamentary Republic. The President is not only the Head of the State but he/she is equipped with wide range of executive authorities. The President is one of the parts of the executive authority. He/she is the milestone of the system and is not dependent on the Parliament. The Prime Minister and the Government are as well the parts of the executive authority but unlike the President, their authority is based on the Parliament. The hereof concept in aggregation creates the unique system and forms the bicephalous executive authority.[11]

This very dual executive system attracts the particular attention of other countries. As *Charles de Gaulle* stated, the Governmental branch shall be divided but not unified. At that, the branches shall not have one and the same source. The President, in the hereof executive authority, is free from responsibility while the Government carries the political responsibility for its activities. The "responsibility" of the President towards the Parliament ensures primacy of the executive authority to the parties and the legislative body.[12]

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[7] *Suleiman E*., Presidentialism and Political Stability in France, The Failure of Presidential Democracy, Vol. 1, Edited by *Linz J., Valenzuela A.,* Baltimore and London, 1994, 138.

[8] Ibid, 139-140.

[9] Ibid, 140.

[10] Ibid, 143.

[11] *Sedelius T.,* The Tug-of-War between Presidents and Prime Ministers, Semi-Presidentialism in Central and Eastern Europe, 2006, 43, <http://www.diva-portal.org/smash/get/diva2:136841/FULLTEXT01.pdf >, [04.01.2015].

[12] *Suleiman E.,* Presidentialism and Political Stability in France, The Failure of Presidential Democracy, Vol. 1, Edited by *Linz J.,* and *Valenzuela A.,* Baltimore and London, 1994, 151.

The President is the Head of the political structure. He/she is elected with public voting and enjoys the Constitutional authority to nominate the Prime Minister and the Ministers with the recommendation of the Prime Minister. The President is responsible for uninterrupted functioning of the executive authority and the state and is logically equipped with the authority to dismiss the Assembly and to circumvent the Parliament by means of the Referendum.[13]

The main difference between the semi-Presidential and the Parliamentary systems lays in the fact that in the Parliamentary system the President is not attributed to the executive authority. His/her functions are purely of ceremonial nature. He/she is the Head of the State and represents the country in international relations while in the semi-Presidential system, the President, as being the Head of the State, enjoys the range of symbolic and personnel authorities such are: pardon and appointment of the high rank public servants and military persons, as well as hosting the Ambassadors and appointment of the missions abroad. Unlike the Head of the State with the Parliamentary system, the President of France also holds the powers having the direct impact on the executive authority, including the right to nominate the Prime Minister, Ministers with the recommendation of the Prime Minister, to return the bills to the Parliament for reconsideration, to dismiss the Parliament etc. Difference from the Presidential system is that the President of the Presidential Republic is the sole Executive Authority which implies non-formation of the dual executive structure. The President in the Presidential Republic pays for the sole administration of the executive authority at the account of disability to dismiss the legislative body.[14]

The norms of the Constitution stipulate that the Prime Minister is the person responsible for implementation of daily policy and is the hub of the political decision-making, however the President often dominates and is de facto political leader. The Prime Minister is the central figure but subordinated. French Presidentialism enjoys the expectations and the prestige created for the hereof position by the political leadership of *Charles de Gaulle.* The semi-Presidential system resembles old dissociation between the "reign" and "administration" in Monarchies. The Presidents often define policy but the Prime Minister shall ensure conversion of the hereof political ideas into the legislative initiatives. The President in France holds the predominant power while the Prime Minister plays supporting role. In some countries applying the French concept, the Prime Minister is relatively independent from the President. Despite of the fact that the President exercises important functions, his/her control over the Prime Minister is limited. In some other countries, the Prime Minister depends on the President and the Legislative Body.[15]

The President in this system plays a dominant role if supported by the Assembly. He/she exercises the executive authority but the responsibility towards the Parliament is imposed to the Government. In crisis, the Prime Minister plays the role of the "shield" protecting the President from the political attacks. If the economic policy of the executive authority fails, the President is entitled to sacrifice the Prime Minister to the Parliament.[16]

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[13] *Suleiman E.,* Presidentialism and Political Stability in France, The Failure of Presidential Democracy, Vol. 1, Edited by *Linz J.,* and *Valenzuela A.,* Baltimore and London, 143-144.

[14] *Sedelius T.,* The Tug-of-War between Presidents and Prime Ministers, Semi-Presidentialism in Central and Eastern Europe, 2006, 31-42, <http://www.diva-portal.org/smash/get/diva2:136841/FULLTEXT01.pdf >, [04.01.2015].

[15] *O'Neil P.,* Essentials of Comparative Politics, New York, London, 2013,143-144.

[16] Ibid, 53.

The text of the Constitution of 1958 allows existence of two rival powers with public legitimation – the President and the Parliament.[17] As *C. de Gaulle* stated in his famous manifest, one Assembly does not necessarily imply its farsightedness. Thus, the Second Assembly is necessary to be elected and formed by different means.[18]

Strengthening of the executive power simultaneously restricts the competences of the Parliament. The Parliament is deprived of the part of its legislative authorities, putting the distrust institute and Parliament-Government relationship upended. The Constitution of France is a clear example of deviation from the classic model of responsibility of the Government. According to the famous Article 49 of the Constitution, issue of confidence can be related to some concrete bills. The bill, other than the events if rejected by 10% of MPs, is adopted without ballot. Ballot shall be held within 48 hours not taking the number of abstainers upon voting on vote of confidence into account. It requires absolute majority.[19]

The Weimar Republic also applied the similar model. The Weimar Constitution of Germany of 1919-33 is fairly considered as the first configuration of the semi-Presidential Republic.[20] The first justification on formation of the similar system belongs to *Max Weber,* stating that the Cabinet is better be elected by the Parliament implementing the oversight while the President elected with direct suffrage shall implement executive authority independently from the Parliament based on the Referendums. The leader of this type directly implements the people-approved politics.[21] The author of the Weimar Constitution, *Hugo Preuss* used the concept of *Weber* to be based on although with slightly different accents. The President in Germany of Weimar had the authority to dismiss the Reichstag and the authority to appoint the Chancellor. The President was entitled to circumvent the Parliament and declare the referendum. The system of the current dual executive authority is much alike the construction formulated in then Germany of Weimar.[22]

4. The Scientific Review and the Classification of the Semi-Presidential System

The semi-Presidential system in reference material is described with various terms: bipolar executive authority, divided executive authority, Parliamentarized Presidential system, quasi-Parliamentary and semi-Presidential Government. *Shugart* and *Carey* give definition Premier-Presidential system. This description indicates to the degree of difference between the systems as in theory so in practice.[23]

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[17] *Suleiman E.,* Presidentialism and Political Stability in France, The Failure of Presidential Democracy, Vol. 1, Edited by *Linz J.* and *Valenzuela A.,* Baltimore and London, 1994, 145.

[18] *Gaulle C.D.*, The Bayeux Manifesto, The Failure of Presidential Democracy, Vol. 1, Edited by *Linz J.,* and *Valenzuela A*., Baltimore and London, 1994, 140.

[19] *Shaio A.,* Self-Restriction of Power, Introduction to the Constitutionalism, translated *by M. Maisuradze,* edited *by T. Ninidze,* Tbilisi, 2003, 226 (in Georgian).

[20] *Sartori G.,* Comparative Constitutional Engineering, An Inquiry into Structures, Incentives and Outcomes, 2nd ed., New York, 1997, 125.

[21] *Shaio A.,* Self-Restriction of Authority, Introduction to the Constitutionalism, translated *by M. Maisuradze,* edited *by T. Ninidze,* Tbilisi, 2003, 108 (in Georgian).

[22] *Linz J.,* Presidential or Parliamentary Democracy: Does It Make a Difference? The Failure of Presidential Democracy, Vol. 1, Edited by *Linz J*., and *Valenzuela A.,* Baltimore and London, 1994, 48-49.

[23] Ibid, 48.

4.1. Definition by Duverge

The French scientist *Duverge* was the first who gave the scientific analysis of the semi-Presidential Republic. He was the first to use this term in his book in 1970s. In 1980, the definition used in the article became the standard formula of the semi-Presidential system.[24] As *Duverge* elucidated, the semi-Presidential Republic can be characterized with three signs: a) the President is elected by the people; b) the President holds significant power; c) there are the Prime Minister and the Cabinet requiring confidence of the majority of the Parliament.[25]

The concept by *Duverge* is quite problematic, especially the criterion of "significant power" of the President. The problem lays in the type of the competence to be attributed as "significant". It is considered that "significant" competence exists if the President holds one of the hereof authorities: dismissal of the Parliament, right of veto, appointment of the Government. Even in the event if the President holds no discretion to form the Cabinet or authority to dismiss the Parliament, the power of the President still can be considered as "quite significant" according to the concept by *Duverge* if the President is entitled to veto the Law adopted by the Parliament. Such power is particularly important if the Parliament needs qualified authority to overcome the veto. If the Government fails to pass the bill initiated thereby, it implies obligation of the Government to negotiate with the President.[26]

According to the criterion provided by *Duverge,* quite different systems can be grouped as the form of the semi-Presidential governance. According to the competences of the President, *Duverge* classifies sundry types of the Presidential system: 1. the system with "symbolic President" (Austria, Ireland and Iceland); 2. the system with the "fully authorized President" (France); 3. the system with the balance between the President and the Government (Weimar Germany, Finland and Portugal).[27]

Duverge considered the following countries as semi-Presidential: Austria, Finland, France, Iceland, Ireland and Portugal – despite that Austria, Iceland and Ireland have symbolic Presidents. Many researchers argue that these countries shall not be attributed to the list of the semi-Presidential systems. *Stephen and Skach* considered France and Portugal only as the semi-Presidential Republics and attributed Austria, Ireland and Iceland to the Parliamentary system inasmuch as these countries have the directly elected, though weak President.[28]

4.2. Classification by Shugart and Carey

The initial original definition by *Duverge* was further extended and sub-categorized by the professors, *Shugart* and *Carey.* The criterions provided by *Shugart* and *Carey* are being used for classification of the semi-Presidential system in the modern scientific literature at most extent. They classified two types of the semi-Presidential system: Premier-presidential, and the Presidential-Parliamentary.

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[24] *Sedelius T*., The Tug-of-War between Presidents and Prime Ministers, Semi-Presidentialism in Central and Eastern Europe, 2006, 33, see <http://www.diva-portal.org/smash/get/diva2:136841/FULLTEXT01.pdf>, [04.01.2015].

[25] *Shugart M.,* Semi-presidential Systems: Dual Executive and Mixed Authority Patterns, 324, <http://www.palgrave-journals.com/fp/journal/v3/n3/full/8200087a.html>, [15.07.2014].

[26] Ibid, 339.

[27] *Nakashidze M.,* Peculiarities of the Relations of the President with the Governmental Branches in the semi-Presidential Systems (Based on the Example of Azerbaijan, Georgia and Armenia), , 19, (in Georgian), see <http://www.tsu.edu.ge/data/file_db/faculty-law-public/Malkhaz%20Nakashidze.pdf>, [15.07.2014].

[28] *Elgie R.,* A Fresh Look at Semipresidentialism Variations on a Theme, 99-100, <http://www.stevendroper.com/elgie.pdf>, [20.05.2015].

The main difference between the Premier-presidential and the Presidential-Parliamentary systems according to *Shugart* and *Carey* lays in the fact that in the Premier-presidential system, the President plays his/her role in formation of the Government but the Prime Minister and the Cabinet carry exclusive accountability towards the Parliamentary Majority (it means that the Parliament instead of the President is entitled to dismiss the Government) while in the Presidential-Parliamentary system, the Prime Minister and the Cabinet carry double responsibility towards the President and the Parliamentary Majority (the President and the Parliament enjoy the authority to dismiss the Government).[29]

In the Parliamentary system, the legislative body elects and dismisses the Cabinet while in the Presidential system, it is President who elects and dismisses the Cabinet. In the semi-Presidential system, the institution electing the Government is not entitled to dismiss it. In the Premier-presidential system, the President elects the Prime Minister but the authority to dismiss the Cabinet is granted to the Parliament only. The fact that the President is deprived of possibility to ensure maintenance of desired Cabinet restricts the real power of the President upon election of the Prime Minister. After appointment, the Cabinet is subordinated to the Parliament and not to the President. However, in practice the Cabinet is subordinated to the President when the President and the Parliamentary Majority have one and the same party affiliation. In the Presidential-Parliamentary system, the President elects the Cabinet and is as well entitled to dismiss it. In this system the Cabinet is responsible as to the President so to the Parliament.[30]

We deal with the Premier-presidential system when: 1) the President is elected by people; 2) the President holds significant competences; 3) the Prime Minister and the Cabinet depend on the Parliamentary confidence. We deal with the Presidential-Parliamentary system when: 1) the President is elected by people; 2) the President appoints and dismisses the Prime Minister and the Cabinet members; 3) the Prime Minister and the Cabinet members are subordinated to the dual Parliamentary and the Presidential confidence; 4) the President at usual extent holds some legislative authorities and the right to dismiss the Parliament.[31]

In the Presidential-Parliamentary system, the President holds far powerful position than in the Premier-presidential systems. The term "Prime Minister-President" indicates to supremacy of the Prime Minister and the term "Presidential-Parliamentary" indicates to supremacy of the President.[32]

It is noteworthy that the modern scientific system uses the criterions by *Shugart* and *Carey* for classification of the semi-Presidential system most of all. Correspondingly, the countries of the semi-Presidential system are categorized in two main types: Premier-presidential and the Presidential-Parliamentary.[33]

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[29] *Elgie R.,* A Fresh Look at Semipresidentialism Variations on a Theme, 22-24, <http://www.stevendroper.com/elgie.pdf>, [20.05.2015].

[30] *Shugart M.,* Semi-Presidential Systems: Dual Executive and Mixed Authority Patterns, 333-340, <http://www.palgrave-journals.com/fp/journal/v3/n3/full/8200087a.html>, [15.07.2014].

[31] *Sedelius T.,* The Tug-of-War between Presidents and Prime Ministers, Semi-Presidentialism in Central and Eastern Europe, 2006, 39, <http://www.diva-portal.org/smash/get/diva2:136841/FULLTEXT01.pdf >, [04.01.2015].

[32] *Sedelius T.,* The Tug-of-War betweenPresidents and Prime Ministers, Semi-Presidentialism in Central and Eastern Europe, 2006, 38, <http://www.diva-portal.org/smash/get/diva2:136841/FULLTEXT01.pdf >, [04 01.2015].

[33] *Nakashidze M.,* Peculiarities of the Relations of the President with the Governmental Branches in the semi-Presidential Systems, 24, (in Georgian), see <http://www.tsu.edu.ge/data/file_db/faculty-law-public/Malkhaz%20Nakashidze.pdf>, [15.05.2015].

4.3. The Concept by Sartori

Sartori also does not agree with the definition by *Duverge.* He describes the semi-Presidential Republic as follows:

The current semi-Presidential systems can be described as:

a) The Head of the State is elected by people – directly or indirectly – with the fixed term;
b) The Head of the State shares the executive power with the Prime Minister. Hence, it implies the dual executive authority specified with the following three characteristics:
    a. The President is independent from the Parliament but he/she is not authorized on sole or direct administration of the executive power. Thus, will of the President shall be fulfilled through the Government;
    b. The Prime Minister and the Cabinet are independent from the President but depend on the Parliament: they are the subject of the Parliamentary confidence or distrust. They need support of the Parliamentary Majority in any case;
    c. The dual executive system of the semi-Presidential system allows establishment of various balances in the executive authority and alternation of superiority of the power.[34]

Sartori considers that mistaken inclusion of the examples will inevitably distort perception of this model. He considers that the Presidents of Austria and Ireland hold power only on the papers while the vivid Constitution declines their role. In his opinion, the semi-Presidential system is better than others. However, it leaves unsolved problems as it is the fragile system at some extent. The problem of divided Majority does not disappear regardless of its less quality herein than in the Presidential Republic.[35]

4.4. Classification by Elgie

Robert Elgie considers that the problem is entailed with absence of clear definition of "quite significant competence". In his opinion, in case of strict definition of the hereof element, only the countries with the powerful Presidents shall be attributed to the semi-Presidential system and hence, the internal executive conflict shall be considered as a peculiarity for the semi-Presidential Republic. In case of less strict definition, where Austria, Ireland and Iceland will be classified into this model, it means that internal conflict is no longer a necessary characteristic for the hereof model.[36]

Elgie presumes that extraction of the second criterion and simplification of the definition is a solution, namely, the directly elected President and the Prime Minister responsible towards the legislative body. 55 countries in the world can be attributed to the semi-Presidential system according to this definition.[37]

Elgie himself sub-classifies the semi-Presidential system into three types: highly Presidentialized, ceremonial and balanced systems. In the highly Presidentialized semi-Presidential system

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[34] *Sartori G.*, Comparative Constitutional Engineering, An Inquiry into Structures, Incentives and Outcomes, 2nd ed., New York, 1997,131-132.
[35] Ibid, 125-137.
[36] *Elgie R.,* A Fresh Look at SemipresidentialismVariations on a Theme, 100, <http://www.stevendroper.com/elgie.pdf>, [20.05.2015].
[37] Ibid, 100-101.

where the "winner takes all" the high quality personalized system is being created. As *Elgie* supposes, this state is harmful for democracy. It is recommended for the developing countries to prevent adoption of this system. As *Elgie* considers, many post-Soviet countries, such as Armenia, Azerbaijan, Kazakhstan, Tajikistan and Uzbekistan, have established highly Presidentialized semi-Presidential system.[38]

According to the classification by *Elgie,* the second sub-stage – semi-Presidential system with the ceremonial President functions as the Parliamentary system. The President holds small Constitutional powers and is the more symbolic Head than the active decision-maker. Real authority is exercised by the Prime Minister. The political practice in the countries of this system is similar to the practice of the Parliamentary countries such are Germany and Greece.[39]

As *Elgie* elucidates, the balanced semi-Presidential system is extremely ambiguous. Bulgaria, Croatia, Finland, Lithuania, Poland and France are attributed to this system by *Elgie.* Criticism of the semi-Presidential Republic is related to this balanced model and division of the executive authority against self. According to *Elgie,* this is the very model criticized by *Linz. Linz* states that the semi-Presidential system is associated with politicos and intrigue that may delay decision-making and entail contradictory politics due to confrontation between the President and the Prime Minister. *Stephen and Skach* also states that the semi-Presidential system embodies deadlock and conflict in dual executive authority. These problems can be entailed when the President and the Prime Minister are affiliated to one and the same party and co-habitation further exacerbates the situation. All these systems comprise "co-habitation" period. In Poland, the President *Lech Wałęsa* and the Prime Minister were under constant confrontation. In France, the Constitutional reform of 2003 resulted in reduction of the Presidential term to 5 years to minimize probability of co-habitation entailed on the basis of coincidence of the Presidential and the Parliamentary terms. Inasmuch as these countries managed to consolidate democracy, *Elgie* considers that the balanced semi-Presidential system is not necessarily of the problematic governance form including in developing democracies and upon co-habitation as well.[40]

4.5. Opinions by Georgian Scientists

The hereof issue attracted attention of Georgian scientists as well. According to *Avtandil Demetrashvili,* if the President and the Parliamentary Majority (and correspondingly the Government) represent one political spectrum, then governance is semi-Presidential and if these authorities represent different political powers – then governance is semi-Parliamentary.[41] *Zaza Rukhadze* also subcategorizes the semi-Presidential and semi-Parliamentary Republic within the mixed form of governance.[42] According to *Levan Izoria,* direct election of the President does not mean that the form of governance is semi-Presidential even if the President holds the authority of the suspensive veto, legi-

[38] *Elgie R.,* A Fresh Look at SemipresidentialismVariations on a Theme, 100, <http://www.stevendroper.com/elgie.pdf>, [20.05.2015].
[39] Ibid, 105.
[40] Ibid, 107-108.
[41] *Demetrashvili A., Kobakhidze I.*, Constitutional Law, Manual for the BA Students, Tbilisi, 2008, 109 (in Georgian).
[42] *Rukhadze* Z., Constitutional Law of Georgia, Manual for the Students of Law Faculty, edited by *V. Loria,* Batumi, 1999, 181 (in Georgian).

slative initiative and dismissal of the Parliament in capacity of the Arbiter. Hence, *Levan Izoria* attributes most of the Eastern European countries to the Parliamentary system.[43]

4.6. Conclusion on Classification of the Semi-Presidential System

Deriving from unification of the countries with the diverse systems into the semi-Presidential system, I hereby suppose that at least four categories can be outlined in the initial original definition by *Duverge:* 1. The first category may conclude so-called super-Presidential Republics. The countries of the semi-Presidential system attributed to the Presidential-Parliamentary system by *Shugart and Carey,* where the President holds the authority to form and dismiss the Government, as well as wide discretion to dismiss the Parliament, are: Russia, Armenia, Azerbaijan etc. 2. The system with the powerful President where the President holds the authority to form the Government, however is restricted in dismissal of the Government, and holds the discretion to dismiss the Parliament. At the same time, he/she holds the significant prerogatives in the executive sphere and if supported by the Parliamentary Majority, manages to dominate over the system. The fifth Republic of France can be named as an example of the hereof mode. 3. The third category may conclude the balanced semi-Presidential system where the President holds some prerogatives in formation of the Government, holds fragmented competences in the executive sphere still failing to authorize the President to dominate over the system even if equipped with support of the Parliamentary Majority. The President is a significant figure; the person to hold negotiations with, though he/she shall not become the main actor in any case. Competences of the President serve for balance of the Government at most extent; let's take for instance Lithuania and Poland. This model can be called semi-Parliamentary as well. 4. The semi-Presidential system also comprises the models where the directly elected ceremonial figures head the State, the system with no different functioning from the Parliamentary practice. Such countries are Austria, Iceland, Bulgaria, Macedonia, Slovenia and Romania. We presume that this category shall not be classified as semi-Presidential. It is the sub-category of the Parliamentary system, namely with the Parliamentary system with directly elected President. The President fails to incur any impact on the executive authority and hence, we do not deal with the dual bicephalous executive authority. The hereof fact excludes the basis to classify it as the semi-Presidential Republic.

5. Peculiarities of the Mixed Republic

5.1. Internal executive conflict

Most of the specialists consider the possible internal conflict within the dual executive authority to be the reason for major turmoil of the semi-Presidential system.[44]

In general, internal executive conflict is defined as the political fight between the President and the Prime Minister in view of control of the executive branch.[45]

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[43] *Izoria L.,* Presidential, Parliamentary of semi-Presidential? Road to Democratic Consolidation, Tbilisi, 2010, 38-39 (in Georgian).

[44] *Nakashidze M.,* Peculiarities of the Relations of the President with the Governmental Branches in the semi-Presidential Systems, 62, (in Georgian), see <http://www.tsu.edu.ge/data/file_db/faculty-law-public/Malkhaz% 20 Nakashidze.pdf>, [15.05.2015].

The President, in the semi-Presidential system, is the branch of the executive power and shares the political authority. Despite the President and the Prime Minister are aspired to exercise different functions, they have to co-exist and partially collaborate as in the process of reforming and political activity so upon appointment of the high officials and the Ministers. Any conflict in this cohabitation is considered as a threat in terms of efficiency of executive activity. Dual legitimacy of the semi-Presidential system further exacerbates conflicts. Both, the President and the Prime Minister are entitled to claim the public mandate. Existence of two legitimate leaders even if they have one and the same political affiliation – due to personal ambitions or different opinions – entails threat of stir of the conflict.[46]

In Intra-executive conflict the president and the prime-minister compete with each other for interpretation of constitutional norms, as the text of constitution is vague in the context of separation of competencies between the president and the government. In addition, neither legal act can perfectly regulate all details of relationship of governmental institutions.[47]

5.2. Cohabitation

Semi-presidential political system is characterized by interaction of three distinct majority – presidential, parliamentary and governmental. Presidential power is executed efficiently and unequivocally, when that three majorities are the same.[48] In this case, the prime minister is an alter ego of the president.[49] But if there is a conflict between the president and the parliament, the president plays a subordinate role.

Despite of the fact that president forms government, the president has to take into account the results of parliamentary elections in the process of nominating the prime-minister, whether it is formally regulated in constitution. If after parliamentary election, opposed political party gains majority, the president has to nominate opposed candidate of the prime minister, in another case the president pose a threat not to receive the confidence.[50]

If the president is supported by the parliamentary majority, system generally works with the president's leading. The president leads government de jure and de facto.The president, who enjoys the support of the parliamentary majority, appoints loyal prime minister. In light of the president's significant constitutional powers, this enables him/her to acquire even more competences and man-

[45] *Sedelius T.,* The Tug-of-War betweenPresidents and Prime Ministers, Semi-Presidentialism in Central and Eastern Europe, 2006, 18, <http://www.diva-portal.org/smash/get/diva2:136841/FULLTEXT01.pdf>, [04.01.2015].

[46] Ibid, 20.

[47] *Nakashidze M.,* Peculiarities of the Relations of the President with the Governmental Branches in the semi-Presidential Systems, (In Georgian), 62 see <http://www.tsu.edu.ge/data/file_db/faculty-law-public/Malkhaz%20Nakashidze.pdf>, [15.05.2015].

[48] *Suleiman E*., Presidentialism and Political Stability in France, The Failure of Presidential Democracy, Vol. 1, Edited by *Linz J*. and *Valenzuela A*., Baltimore and London, 1994, 148.

[49] *Linz J*., Presidential or Parliamentary Democracy: Does It Make a Difference?, The Failure of Presidential Democracy, Vol. 1, Edited by *Linz J*. and *Valenzuela A*., Baltimore and London, 1994,52.

[50] *Nakashidze M.,* Peculiarities of the Relations of the President with the Governmental Branches in the semi-Presidential Systems, (In Georgian), 161, see <http://www.tsu.edu.ge/data/file_db/faculty-law-public/Malkhaz%20Nakashidze.pdf> [15.07.2014]

ages executive power at the expense of the prime minister's concessions. The prime minister controls administration and leads technical management of cabinet.[51]

In the second case, when the president faces opposed parliamentary majority, he has to appoint as a prime minister the leader of the parliamentary majority. In this case, the political powers transfers to prime minister.[52] In the case when the president has formed government by opposed political party, the system is established, which is often called "cohabitation" in French literature. It reflects the idea that the two incompatible people are forced to live with each other.[53]

Splitting of the executive body into opposition segments – on the one hand – the president and on the other hand – the cabinet supported by assembly, may cause crisis, if one or both sides ignore each other's rights. Cohabitation is often defined as "executive divided against himself".[54] The president does not have sufficient powers to carry out the executive power independently, but he/she has enough authority to cause a crisis by using his powers against the prime minister. As a rule, in such a case the president retreats and the system is functioning as a parliamentary. Due to this Duverger to the semi-presidential republic called a system, which alters between presidential and parliamentary systems. When the president and the parliamentary majority are from the same party, system is presidential and when it does not, the system works as a parliamentary.[55] However, Sartori doesn't agree with this opinion. He states that in the case of cohabitation, system does not become a pure parliamentary system, as the president retains certain competences and independent legitimacy. There is the president, who has his own legitimacy and is entitled by competencies, which to the presidents elected by the parliaments nearly do not have.[56] The president without the support of national assembly is more than a figurehead, but is much more less than it was de Gaulle's idea.[57]

It should be noted that cohabitation is more likely in premier-presidential than in president-parliamentary systems. In France the cases of cohabitation were three times: 1986-1988 years – between the Socialist president Mitterrand and conservative Prime Minister Jacques Chirac, 1993-1995 years – between president Mitterrand and the second conservative prime minister Edouard Balladur, 1997-2002 years – between president Chirac and socialist prime minister Leon Jospin.[58]

Cohabitation depends on the outcome of the election. In France in order to reduce cohabitation carried out constitutional reform in 2000. The term of the president's office was equalized to the term of French national assembly and it was limited by 5 years. Simultaneous election of the president and the parliament promotes similar electoral results.[59]

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[51] Ibid, 57-59.
[52] Ibid, 59.
[53] Ibid,161
[54] *Shugart M, Carey J,* Presidents and Assemblies Constitutional Design and Electoral Dynamics, New York, 1992, 57.
[55] Ibid, 23.
[56] *Sartori G*., Comparative Constitutional Engineering, An Inquiry into Structures, Incentives and Outcomes, Second Edition, New York, 1997, 124.
[57] *Suleiman E*., Presidentialism and Political Stability in France, The Failure of Presidential Democracy, Vol. 1, Edited by *Linz J*. and *Valenzuela A*., Baltimore and London, 1994, 140, 157.
[58] *Nakashidze M.,* Peculiarities of the Relations of the President with the Governmental Branches in the semi-Presidential Systems, (In Georgian), 60, see http://www.tsu.edu.ge/data/file_db/faculty-law-public/Malkhaz%20Nakashidze.pdf [15.05.2015].
[59] *Pakte P., Melen – Sukramanian F.,* Constitutional Law, Translated by *Kalatozishvili G*., Edited by *Demetrashvili A*., 2012, 851, (In Georgian).

The president has some lavers even during the cohabitation. He can dissolve the parliament by any reason. In France the only prohibition for the dissolution of the parliament is not to dissolve it within a year after the parliamentary election. In other cases, he/she can freely dissolve parliament in order to restore supporting majority. However, the president has to dissolve the parliament only when he/she is sure in voters' support, otherwise, such decision is dangerous for the president. If the voters support the president's opposition party, he has to put up with the opposed government.

In the process of cohabitation prime minister emerges as a major political person, and he/she is responsible for determining the policy of the executive branch. In practice, the prime minister dominates in all aspects of domestic policy, and he/she also has some influence on foreign policy. Contrary to this the president's role is limited. The president manages to keep control over some areas, mainly in the field of foreign policy and national defense, and also can linger the reforms in the domestic policy. [60] During cohabitation the president's powers are mostly negative. He/she can refuse a countersignature and nominating candidates.[61]

According to Suleiman, French executive system is a flexible dual executive structure, the bicephalous executive body, where the "first head" alters in accordance with the changes of the parliamentary majority.[62] The Constitution contains a safe valve, which avoids the conflict between two legitimate leader elected by people's vote, as far as from time to time it operates as a presidential or parliamentary system.[63]

It should be noted that in the literature cohabitation is not considered only in a negative context, somewhat it is regarded as a tool of balance of political power.

6. Semi-Presidential System in the New Democracies

As Duverger noted, semi-presidential system became the most efficient way for moving from dictatorship to democracy in Eastern Europe and the former Soviet Union. In these countries (Slovakia, Slovenia, Bulgaria, Macedonia, Romania, Lithuania, Croatia, Poland, Serbia) premier-presidential system were established. It also should be noted that in this countries different semi-presidential systems were set up. For example, if in Slovenia system is similar to the parliamentary, in Poland the power of the president and the parliament are balanced.[64]

It is noteworthy that the government formation rule has a significant impact on the balance of power between the president and the prime minister.

Almost in all abovementioned countries there is written in the text of constitution that the president appoints the prime minister. This does not indicate the president's real power. In certain

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[60] *Sedelius T.*, The Tug-of-War between Presidents and Prime Ministers, Semi-Presidentialism in Central and Eastern Europe, 2006, 45, <http://www.diva-portal.org/smash/get/diva2:136841/FULLTEXT01.pdf >, [04. 01. 2015].

[61] *Suleiman E.*, Presidentialism and Political Stability in France, The Failure of Presidential Democracy, Vol. 1, Edited by *Linz J.*, *Valenzuela A.*, Baltimore and London, 1994,159.

[62] *Sartori G.*, Comparative Constitutional Engineering, An Inquiry into Structures, Incentives and Outcomes, second edition, New York, 1997,125.

[63] *Suleiman E.*, Presidentialism and Political Stability in France, The Failure of Presidential Democracy, Vol. 1, Edited by *Linz J.*, *Valenzuela A.*, Baltimore and London, 1994, 151.

[64] Ibid, 6.

cases it could mean that the president is the main figure in the government formation process, or it might indicate that the president is acting in accordance with the will of Parliament or the party leaders and performs the function of a public notary. [65]

6.1. Models of government formation

The president's involvement in the process of government formation can be different options:

1) President has a exclusive right to select the prime-minister;
2) The legislature has the power to appoint the prime minister. In this process the president performs the ceremonial role.
3) The president and the legislature jointly appoint the prime minister.[66]

6.1.1. The First Model

A clear example of the first model is France, the president has broad competence in the government formation process. The President selects and appoints the prime minister. The prime minister, for his/her part, selects the candidates of ministers and proposes to the president for approval. In France investiture of parliament is neither necessary nor legally established. The constitution of France entitles the president to nominate the prime minister's candidate without confidence of parliament. The president proposes to parliament the prime minister and government by his/her own decision accordingly to how the president and the prime minister want to express their respect to the institution of parliament.[67] However, in practice the procedure of voting confidence was introduced, because the author of the Constitution so wanted. But in the 1988-1993 years this procedure was avoided, as the government was supported by the minority of the national assembly. In parliament only the basic issues have been declared.[68]

In this model, the president has the exclusive authority to form a government, however, the president is not absolute in this respect, since it takes into account the balance of power in the legislative body.

6.1.2. The Second Model

In the second case, the government is formed like parliamentary system. In this model the legislature directly appoints the prime minister and the president plays a ceremonial role. Typically to the president's competence belongs formal approval of prime minister appointed by the legislature. However, in the case when there is no clear-cut parliamentary majority, as it is in many countries of new democracy, the government formation process becomes complicated and it may require a dif-

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[65] *Bahro H.*, Virtues and Vices of Semi-presidential Government, 1998, 17, see <http://www.rchss.sinica.edu.tw/app/ebook/journal/11-01-1999/11_1_1.pdf>, [25.05.2015].

[66] *Choudhry S., Stacey R.*, Semi-Presidentialism as Power Sharing: Constitutional Reform after the Arab Spring, Center for Constitutional Transitions and International IDEA, 2014, 45, see <http://constitutionaltransitions.org/wp-content/uploads/2014/04/Semi-Presidentialism-as-Power-Sharing.pdf> [25.05.2015].

[67] *Saprani U.*, The Principles of Governing: Executive Power, The Republic: Parliamentary or Presidential, edited by *Melkadze O.*, Tbilisi, 1996, 184, (In Georgian).

[68] *Lovo P.,* Parliamentarism, Tbilisi, 2005, 89-90, (In Georgian).

ferent role of the president.[69] This model is close to parliamentary system. Such models include Bulgaria, Macedonia, Romania, Slovenia.

6.1.3. The Third Model

The third model, which means the president and the legislature jointly appoint the prime minister, includes central and eastern European countries: Lithuania, Croatia, Serbia, Poland. Cooperation between the president and the parliament are different.[70]

The procedures provided by the third model is not radically different from the second model in regard with that in both cases role of Parliament is determinant, without approval of parliament government cannot start functioning. However, in the second model the president's role is weaker. The word "proposal" indicates that the decision is made by the parliament, not the president. In this case the president has to contact with the parties, before proposal. In the third model coordination with the parties is reasonable. However, the appointment of the prime minister contrast with nominating "candidate", entitles the president a certain influential power.[71] Due to this the president plays an important role in the election of the prime minister. In Croatia and Lithuania the refusal to investiture is like to pass a vote of no confidence;[72] In Poland, if government proposed by the president is refused, the parliament has possibility to choose the candidate nominated by the parliament. It should be noted that the Polish parliament has more powers in the process of the prime minister's dismissal than appointment.[73] at the time of government dismissal parliament functions completely independently and the president's powers are limited by approving the choice of the parliament, in the case of a successful constructive vote of no-confidence.

In regard with the third model it should be noted that when the candidate proposed by the president needs approval from parliament and the president has no right to dismiss the prime minister, the president has two choices: a) to appoint a candidate acceptable to the parliament; b) to appoint its chosen candidate, who will be dismissed by the parliament.[74] At the same time, it should be considered the political party system. Where there are strong political parties, the president obeys to the will of the legislature, as it is in France. If the parties are disorganized and institutionally weak, therefore, legislature is fragmented, in this case the approval of the parliament becomes meaningless and the president dominates in the process of the appointment of prime minister.[75]

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[69] *Bahro H.,* Virtues and Vices of Semi-presidential Government, 1998, 18, see <http://www.rchss.sinica.edu.tw/app/ebook/journal/11-01-1999/11_1_1.pdf>, [25.05.2015].

[70] *Choudhry S., Stacey R*., Semi-Presidentialism as Power Sharing: Constitutional Reform after the Arab Spring, Center for Constitutional Transitions and International IDEA, 2014, 48, see: <http://constitutionaltransitions.org/wp-content/uploads/2014/04/Semi-Presidentialism-as-Power-Sharing.pdf> [25.05.2015].

[71] *Bahro H*., Virtues and Vices of Semi-presidential Government, 1998, 17, see <http://www.rchss.sinica.edu.tw/app/ebook/journal/11-01-1999/11_1_1.pdf>, [25.05.2015].

[72] Ibid.

[73] *McMenamin I.,* Semi-presidentialism and Democratization in Poland, Semi-presidentialism in Central and Eastern Europe, edited by *Elgie R., Moestrup S*., 2008, 130.

[74] *Choudhry S., Stacey R*., Semi-Presidentialism as Power Sharing: Constitutional Reform after the Arab Spring, Center for Constitutional Transitions and International IDEA, 2014, 50, see <http://constitutionaltransitions.org/wp-content/uploads/2014/04/Semi-Presidentialism-as-Power-Sharing.pdf> [25.05.2015].

[75] Ibid, 48.

6.2. Government Formation

Appointment of members of governments is also important. Nomination and appointment of members of government can have a significant impact on the role of the president and the balance of power among the branches. The president is depends on the prime minister's proposal, who will become minister. Such decision is not unreasonable, as the prime minister has to rely on that people in his/her policy implementation process.[76]

This helps to strengthen the power of the prime minister against the power of the president. The prime minister, who appoints the members of the cabinet, can much more effectively control the cabinet and creates a bastion against the president's power. Control of cabinet by the prime minister is not only the way to prevent autocracy of president, but it also strengthens the stability of the government. The prime minister, who is able to select his own cabinet, has much more opportunity to create a unified and effective government. However, even when the prime minister has the sole right to select the members of the government, its power is not absolute. The prime minister is an agent of the legislative body and he must select a cabinet, which can retain the confidence of Parliament. Due to this, He/she must take into account the will of the coalition.[77]

The Constitution of many countries require the approval of the whole cabinet by the legislature, for example, Croatia, Poland, Lithuania, Slovakia, Romania, Bulgaria, Macedonia, Serbia.

It should be noted that in the Ukraine and Poland, there were such a model, which considered the separation of power between the prime minister and the president in the process of the appointment of members of cabinet. In the Ukraine (2006-2010), the president was entitled to appoint the ministries of defense and foreign affairs. However, the whole cabinet is approved by the parliament. Also in Poland in 1992-1997, in the conditions of small constitution, the prime minister has to consult with the president in the context of appointment of ministries of interior and security sphere.[78]

6.3. The Dismissal of the Government

The right to dismiss the government is significant criterion of semi-presidential regime. It is not included in the definition of Duverger, but exactly the right to dismiss defines the relationship between president and prime minister. In the semi-presidential system the authority to dissolve the cabinet is a key element to determine the relationship between the three institutional players – the president, the parliament and the cabinet.[79] The power-sharing system can't be without careful regulation of the right to dismiss the cabinet. Entitling that right to the president makes prime minister a doll in the hands of the president, that right consolidates the power of the president. If the president

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[76] *Bahro H.*, Virtues and Vices of Semi-presidential Government, 1998, 19, see <http://www.rchss.sinica.edu.tw/app/ebook/journal/11-01-1999/11_1_1.pdf>, [25.05.2015].

[77] *Choudhry S., Stacey R.*, Semi-Presidentialism as Power Sharing: Constitutional Reform after the Arab Spring, Center for Constitutional Transitions and International IDEA, 2014, 52-53, see <http://constitutionaltransitions.org/wp-content/uploads/2014/04/Semi-Presidentialism-as-Power-Sharing.pdf> [25.05.2015].

[78] Ibid, 53.

[79] *Nakashidze M.,* Peculiarities of the Relations of the President with the Governmental Branches in the semi-Presidential Systems, (In Georgian), 64, see <http://www.tsu.edu.ge/data/file_db/faculty-law-public/Malkhaz%20Nakashidze.pdf>, [15.05.2015].

doesn't have the right to dismiss the cabinet, the president and prime minister are equally strong executives.[80]

In the premier-presidential system only the legislature can resign the prime minister. Due to this, the president is in weaker role.[81] In that system the way to dismiss the government is a vote of no confidence.

7. Dissolution of the Parliament

In the premier-presidential system the president does not have unilateral right to dismiss government, however, the exclusive right of government dismissal of parliament is balanced by the president's right to dissolve the parliament. The legislature's vote of no confidence to the government makes president forced to select parliament's chosen prime minister. However, the president's right to dissolve Parliament, in turn, makes the legislature take into account the president's choice.

The abuse of the president's right to dissolve the parliament can infringe the separation of powers. The legislature, which is under the permanent threat of dissolution, is unlikely to perform balancing mechanism against the president's power. The president's right of dissolution of parliament has a chilling effect, even if it is not used.[82] On the other hand, when the legislature is divided and there is endless rivalry between parties, adopting the legislative acts, for example, the budget law, are unable, due to this, the dissolution of the ineffective parliament might be necessary.[83]

In above mentioned countries the president's discretionary powers not to become a basis of abuse of power, the right to dissolve the parliament is entitled to the president in specific constitutional circumstances.

Three types of limiting the right of the dissolution exist: 1) substantive triggers, when the president can dissolve parliament only if certain specified constitutional circumstances occur; 2) the prohibition of dismissal in certain periods; 3) procedural requirements.[84]

8. The Forms of Limiting Presidential Power

The president is free from political responsibility. However, some mechanisms to restrict his/her power still exists. First of all, it's the prohibition of president's election in two consecutive terms. Also basic form of president's responsibility is impeachment, which is connected to commit-

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[80] *Choudhry S., Stacey R.*, Semi-Presidentialism as Power Sharing: Constitutional Reform after the Arab Spring, Center for Constitutional Transitions and International IDEA, 2014, 56, see <http://constitutionaltransitions.org/wp-content/uploads/2014/04/Semi-Presidentialism-as-Power-Sharing.pdf> [25.05.2015].

[81] Ibid.

[82] *Choudhry S., Stacey R.,* Semi-Presidentialism as Power Sharing: Constitutional Reform after the Arab Spring, Center for Constitutional Transitions and International IDEA, 2014, 30, see <http://constitutionaltransitions.org/wp-content/uploads/2014/04/Semi-Presidentialism-as-Power-Sharing.pdf>, [25.05.2015].

[83] *Stacey R., Choudhry S.*, Semi-presidential Government in the Post-authoritarian Context, Center for Constitutional Transitions at NYU Law, 2014, 7, see <http://constitutionaltransitions.org/wp-content/uploads/2014/06/SEMI-PRESIDENTIAL-GOVERNMENT1.pdf>, [25.05.2015].

[84] *Choudhry S., Stacey R.*, Semi-Presidentialism as Power Sharing: Constitutional Reform after the Arab Spring, Center for Constitutional Transitions and International IDEA, 2014, 66, see <http://constitutionaltransitions.org/wp-content/uploads/2014/04/Semi-Presidentialism-as-Power-Sharing.pdf> [25.05.2015].

ting an offense, and involves many formal procedure, including the conclusion of the court about the president's guilty.

It should be noted that there are also other forms of responsibility. Such a form is removal from the office of the president without court trials and the official charge. Removing procedure is relatively simple, as far as it does not include the court proceedings, however, the quorum of removal is a quite high. This rule exists in Lithuania, where the majority of 3/5 is needed to decide this issue successfully.[85] This is connected to circumstances specified in constitution of Lithuania. In particular, president has a right to dissolve parliament after voting no confidence to the government, if government applies to him/her to set new election. In order to balance this situation, the newly elected parliament can appoint early presidential election by three-fifth majority.[86] In Lithuania at the same time also exists the Institute of the president's impeachment, where the president can be removed from office for violating the Constitution, breaching of oath or committing a criminal offense.

9. Responsibility in Presidential-parliamentary System

In Presidential-parliamentary system, the president elects the cabinet and also holds the power to dismiss it. In Presidential-parliamentary system government is responsible to the president and the whole cabinet can be dismissed by the president. At the same time the government is responsible not only to the president, but also to the parliament and the parliament, through the vote of no confidence, can dismiss it. In contrast, the president has the right to dissolve parliament. It minimizes the principle of separation of powers.

When the president has the right to dismiss the prime minister (presidential-parliamentary system), he has the possibility to coerce the prime minister to support the president politically. As a result, the relationship between the president and the prime minister is hierarchical.[87]The president has little incentive to accommodate different political interests in the parliament, because the president can simply dismiss opposed government. In this case, the president can easily centralize political power.[88]

Presidential-parliamentary model is common in post-Soviet countries. Sometimes it is called super presidential model due to the president's excessive competences. A notable example of this model is Russia.[89] Presidential-parliamentary system entitles the president more powers than the premier-presidential system, such as the law-making powers. In Russia the president has broad com-

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[85] *Stacey R., Choudhry S.,* Semi-presidential Government in the Post-authoritarian Context, Center for Constitutional Transitions at NYU Law, 2014, 8, see <http://constitutionaltransitions.org/wp-content/uploads/2014/06/SEMI-PRESIDENTIAL-GOVERNMENT1.pdf>, [25.05.2015].

[86] *Krupavicius A.,* Semi-presidentialism in Lithuania: Origins, Development and Challenges, Semi-presidentialism in Central and Eastern Europe, edited by *Elgie R., Moestrup S.*, 2008, 70.

[87] *Nakashidze M.,* Peculiarities of the Relations of the President with the Governmental Branches in the semi-Presidential Systems, 57, (in Georgian), see <http://www.tsu.edu.ge/data/file_db/faculty-law-public/Malkhaz%20Nakashidze.pdf >, [15.05.2015].

[88] *Stacey R., Choudhry S.,* Semi-presidential Government in the Post-authoritarian Context, Center for Constitutional Transitions at NYU Law, 2014, 5, see <http://constitutionaltransitions.org/wp-content/uploads/2014/06/SEMI-PRESIDENTIAL-GOVERNMENT1.pdf>, [25.05.2015]

[89] *Izoria L.*, Presidential, Parliamentary of Semi-presidential? The Way to Consolidation of Democracy, Tbilisi, 2010, 39 (In Georgian).

petence of adopting decrees. In premier-presidential system, the president does not have a right to veto or have weak veto, which increases the competences of the parliament.[90]

The president of Russia appoints and dismisses the prime minister and ministers. If the Duma rejects proposed government composition three times, the president can dissolve the lower house and calls for new elections. The same applies to a vote of no confidence. If the parliament passes a vote of no confidence to the government, the president has possibility to dismiss the prime minister. As a result, the prime minister is mainly dependent on the president.[91] Between the lines of constitution, what can be read, is that the president should be win in any case. The formula of effectiveness of French constitution – variable diarchy – is lost in the Russian model. French executive system is a flexible dual executive structure, the bicephalous executive authority, where the "first head" changes according to the parliamentary majority. The Constitution of Russia is basically monocratic.[92]

This creates an autocratic system, the threat of powerful president, especially when the president has the right to dismiss the government, therefore, the government has to follow or agree with the president. The threat of removal does not give the opportunity to the prime minister to really contend for executive authority.[93]

Shugart and Carey questioning the democracy of presidential-parliamentary system. Such a system was in Germany, the so-called Weimar Republic (1919-1933), which ended with the coming of fascism. Today it is in the Republic of Russian Federation and other countries. It is believed that in this system the mechanisms of checks and balances are infringed.

10. Analyze of Semi-presidential System

In Semi-presidential system in order to balance the government it is designed the parallel executive structure – the president.[94] The advantages of the semi-presidential republic are ensuring the check and balance system within the executive branch, the president ensures the replacement of the periods existing without the governments and plays the same role when the government is weak.[95] Constitutional design, which creates poly center of power and prevents the personalization of the regime, is more favorable basis for protected legitimacy.[96] However, the semi-presidential system

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[90] *Shugart M.,* Semi-presidential Systems: Dual Executive and Mixed Authority Patterns, 341, see <http://www.palgrave-journals.com/fp/journal/v3/n3/full/8200087a.html>, [15.07.2014]

[91] *Izoria L*., Presidential, Parliamentary of Semi-presidential? The Way to Consolidation of Democracy, Tb., 2010, 39 (In Georgian).

[92] *Sartori G*., Comparative Constitutional Engineering, An Inquiry into Structures, Incentives and Outcomes, second edition, New York, 1997, 138.

[93] *Stacey R., Choudhry S*., Semi-presidential Government in the Post-authoritarian Context, Center for Constitutional Transitions at NYU Law, 2014, 9, ix. <http://constitutionaltransitions.org/wp-content/uploads/2014/06/SEMI-PRESIDENTIAL-GOVERNMENT1.pdf>, [25.05.2015].

[94] *Krupavicius A*., Semi-presidentialism in Lithuania: Origins, Development and Challenges, Semi-presidentialism in Central and Eastern Europe, edited by *Elgie R., Moestrup S.,* 2008, 83.

[95] *McMenamin I*., Semi-presidentialism and Democratisation in Poland, Semi-presidentialism in Central and Eastern Europe, edited by *Elgie R., Moestrup S*., 2008,132.

[96] *Fish S*., The Constitutional Development of Georgia in the Perspective of Comparative Analysis, *Babek V., Fish S., Raihenbeher Ts*., The Revision of the Constitution – The way of Georgia to Europe, with preface of *Demetrashvili A.,* Tb., 2012, 66, (In Georgian) see: <www.giz.de/law-caucasus>.

combines a variety of models, some of them exceeds the both above-mentioned (presidential and parliamentary systems) models by its negative result of the system functioning. For example, presidential-parliamentary model strengthens the head of state's absolutism and also the instruments of balance of power are rejected.

In French model government responsibility is more effective, as parliamentary majority has the right to dismiss the prime minister and the whole government, however, "this competence loses its classical purpose, when the president formally non-accountable to the parliament effectively absorbs the government functions and retains the right to dissolve parliament".[97] French model at the expense of weakening of the legislature strengthens the executive branch. The given construction does not create a problem in regard with functioning the state institutions in a democratic way, moreover, that configuration promoted the stability and efficiency of the government. However, this is due to the experience of centuries of French democracy, which does not exist in the new democracies. As a result, the powerful president manages to dominate the state bodies at the expense of neglecting their powers.

In the new democracies the attractiveness of the semi-presidential system is the dual executive system, which reduces the risk of centralization of political power in the hands of the president or the prime minister, that system separates the executive powers between the president and the prime minister. Also it is weakened the threat connected rapidly shifting into parliamentary system, as it ensures existing the executive authority even, if the legislature is less effective.

However, the establishment of semi-presidential system is not enough to ensure preventing as the centralization of power, as fragmented legislature in new democracies. The special caution is needed to regulate the relationship between president, prime minister and the legislative body and to determine which constitutional decision provides two named results:

1. effective, but limited, responsible executive branch;
2. Effective and efficient legislature, where the president leads executive branch, when the legislature can not carry out its functions.

It is necessary to determine the appropriate constitutional guarantees to protect the country from the presidential autocracy, such guarantees may be considered the restriction of president's unilateral right to appoint the government. This should be the issue of joint decision of the president and the legislature, as far as there is the two bodies of people's legitimation, will of both of them should be taken into account. As well as the right to dissolve the parliament should be limited by the cases specified in constitution, this should not be a form of punishment for passing a vote of no confidence. In case of proper regulation of that issues there is balanced semi-presidential system, where neither the president nor the prime minister is "an elected monarch". This system is able to protect the country from the risks of pure parliamentary system. In the new democracies, where there is the weakness of the political parties and the lack of experiences of pure parliamentary life, there is created the threat of fragmentation and separation of parliament. At the same time, the executive power

[97] *Gegenava D., Kantaria B., Tsanava L., Tevzadze T., Macharadze Z., Javakhishvili P., Erkvania T., Papashvili T.,* The Constitution Law of Georgia, edited by *Gegenava D.,* The second edition, Tbilisi, 2014, 249, (In Georgian).

is balanced inside, the president and the premier are balancing each other. However, as noted above, this exists if powers are distributed proportionally.

Balanced semi-presidential system gives such a solution, where the president is not the exclusive holder of the executive branch, at the same time the president has given the possibility to exercise executive power, when the legislature refuses to support the prime minister and the government. At the same time, it prevents exercising any extreme policy, as far as it forces many political institutions and groups to compromise and coexist peacefully.

The negative factor of this system is the inner-executive conflict which always may arise semi-presidential system. The reason of this can be that the president is not the leader of the parliamentary majority, or the prime minister is not supported by the majority, or the text of the Constitution is vague and is not established adequate constitutional practice.[98] However, cohabitation should not be always considered in a negative context. Cohabitation can provide a power-sharing. In case of moderate distribution of power between the president and the prime minister, the negative consequences of cohabitation can be reduced, moreover, may have positive impact in the context of the government's control.

[98] *McMenamin I.*, Semi-presidentialism and Democratisation in Poland, Semi-presidentialism in Central and Eastern Europe, edited by *Elgie R., Moestrup S.*, 2008, 132.

Beka Dzamashvili*

Measures Aimed at Efficient Fighting against Discrimination by the State

The article explores the measures to be implemented by the state in order to effectively combat discrimination. In particular, both preventive and responsive dimensions of anti-discrimination activities are analyzed. In the context of prevention, the need of modification of the discriminatory regulations is emphasized, though the request of certain international conventions to replace the discriminatory traditions and customary practice is criticized.

In terms of positive measures, wide application of the principle of reasonable accommodation is recommended, while the temporary special measures aimed at accelerating de facto equality is questioned.

Effective anti-discrimination legislative and institutional mechanisms are also explored in the article.

Key words: *discrimination, effectively combating discrimination, reasonable accommodation, De facto equality, anti-discrimination legislative and institutional mechanisms.*

1. Introduction

Combating discrimination is necessary pre-condition to ensure the right to equality and the state shall take all measures, required for guaranteeing human rights at national level. According to the Human Rights Law, state has a negative obligation not to violate human right as well as a positive obligation to take the relevant measures for ensuring rights.[1] The positive obligation is divided into two parts – the state shall protect people against violation of their rights by third parties *(duty to protect)* and create conditions, required for ensuring human rights *(duty to fulfil)*.[2] The *duty to protect* requires from the state to take efficient preventive measures, and in the case of violation – its timely response by imposing the relevant responsibility on the offender. The existence of the relevant mechanism for reparation is also necessary.[3] As for creation of necessary conditions for ensuring rights, in this case, the existence of the system, mechanisms, infrastructure and similar circumstances, required for realization of right, is necessary.[4]

Hence, it could be said that for the purpose of ensuring the right to equality and consequently, fighting against discrimination, the system and mechanisms, efficiently ensuring prevention, detec-

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* Doctoral Student, TSU Faculty of Law, Master of Queen Mary University of London.

1 *Burduli I., Gotsiridze E., Erkvania T. et al;* Commentaries on the Constitution of Georgia, Chapter Two, Citizenship of Georgia, Fundamental Human Rights and Freedoms, Tbilisi, 2013, 58.

2 *Schutter O. D., Eide A., Khalfan A. et al*, Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights, Human Rights Quarterly, 2012, 34(4), 1090.

3 Report of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, A/HRC/17/31, 21 March 2011, 7.

4 *Green M.*, What We Talk About When We Talk About Indicators: Current Approaches to Human Rights Measurement, Human Rights Quarterly, 2001, 23(4), 1072.

tion of discrimination, imposition of the relevant responsibility and reparation of the violated right shall necessarily exist in the state.

2. Measures for Prevention of Discrimination

As noted above, fight against discrimination and its elimination does not entail only efficient response to the facts of discrimination, but it is an ongoing process, the key component of which is maximum prevention of discrimination.[5] The latter primarily requires raising of the public awareness,[6] which basically, shall be implemented through educational system – encouraging tolerance and eliminating stereotypes causing discrimination.[7] Furthermore, it is necessary to conduct series of trainings and informational meetings, especially for persons, serving public functions.[8] Media training is also important to eliminate discriminative elements in the course of spreading information.[9]

Other measures ofprevention include modification/ abolition of discriminative norms[10] and implementation of positive measures for ensuring equality,[11] which is pertinent to explore separately below.

2.1. Modification of Discriminative Regulations

The obligation to modify the discriminative laws, norms and regulations is directly derived from the UN Anti-discrimination Conventions[12], which is quite logical, as discriminative regulations and norms form the basis for many discriminative actions, implemented on their basis.

In the same context, the requirement of conventions, that the states shall modify discriminative customs shall be underscored.[13] Taking into account the universality of human rights, obligation to modify customs, might be accaptable. However, fulfilment of this obligation is related to several problems: 1) state does not form customs and it begs a question – how can it modify them; 2) custom or tradition is the expression of internal faith of human, playing significant role in human development.

In this respect, the approach, voiced at the Vienna World Conference of Human Rights is important, according to which human rights are universal and shall be ensured for everybody, although, historical, cultural and religious peculiarities shall be taken into account in the process of their im-

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5 ECRI General Policy Recommendation №7 on National Legislation to Combat Racism and Racial Discrimination, 13 December 2002, §8.

6 Explanatory Memorandum to ECRI general policy recommendation №7 on national legislation to combat racism and racial discrimination, §27.

7 International Convention on the Elimination of All Forms of Racial Discrimination, art. 7.

8 Explanatory Memorandum to ECRI general policy recommendation №7 on national legislation to combat racism and racial discrimination, §54.

9 Convention on the Rights of Persons with Disabilities, art. 8(2)(c).

10 International Convention on the Elimination of All Forms of Racial Discrimination, art. 2(1)(c).

11 UN Human Rights Committee, General Comment №18: Non-discrimination, §10.

12 See International Convention on the Elimination of All Forms of Racial Discrimination, art. 2(1)(c); Convention on the Elimination of All Forms of Discrimination against Women, art. 2(f); Convention on the Rights of Persons with Disabilities, art. 4(1)(b).

13 See Convention on the Elimination of All Forms of Discrimination against Women, art. 2(f); Convention on the Rights of Persons with Disabilities, art. 4(1)(b).

plementation.[14] Thus, the World Conference has recognized cultural diversity and demanded to respect it while implementing human rights. This approach gives no answer to the question how the customs, contradicting human rights, shall be respected,[15] though recognizes, that universality of human rights does not imply unification of traditions, customs and culture. Therefore, human rights and not customs shall be universal, meaning that the state shall not modify customs but ensure protection of human rights in the environment of any custom in legal terms. Custom may contradict the rights to equality, but the state shall not attempt to modify it, as the custom is a social rather than legal phenomenon. The custom is formed by the people, not a state, hencethe former shall modify it. Tradition is an important phenomenon for personal development of an individual and when a person voluntarily follows it, state should not interfere with it, even if it contradicts the right to equality. Positive obligation of the state to protect the right to equality shall be manifested through the existence of the relevant legal and institutional framework, enabling a person to protect his/her right, when custom controverts it.

Following the foregoing, a state shall be obliged to modify the norms, regulations and provisions, having legal nature and should not interfere with the process of modification of cultural norms or customs.

2.2. Positive Measures of a State Aimed at Ensuring Equality

Raising awareness and modification of discriminative norms is a type of positive measures to be implemented by a state. Nevertheless, special attention should be paid to the implementation of the measures, without which the equality could not be ensured. According to the right to equality, a state is obliged not to treat the persons in significantly different situations equally. On the contrary, in order to ensure the right to equality, there must be a difference in the treatment of persons in relevantly similar situations.[16] To further elaborate this standard, it could be said that the state shall consider all individual needs in order to avoid violation of their right to equality. This approach, known as a specific principle of reasonable accommodation, was reflected in the UN Convention on the Rights of Persons with Disabilities.[17] The principle aims at ensuring to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.[18] In fact, this principle is fitted to the person's individual needs and primarily used in regard to persons with disabilities, although it is more widely applied.[19] Thus, in any case, when a person, due to disability or any other objective circumstance, has individual need, the state shall take into account it in the course of ensuring his/her rights.

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[14] Vienna Declaration and Programme of Action, Adopted by the World Conference on Human Rights in Vienna (25 June 1993), §5.

[15] *Charlesworth H., Chinkin C.*, The Boundaries of International Law: A Feminist Analysis, Manchester University Press, 2000, 228.

[16] *Thilimmenos v. Greece*, App. no. 34369/97, ECtHR, 6 April 2000, §44.

[17] Convention on the Rights of Persons with Disabilities, art. 2.

[18] Ibid.

[19] *Schutter O.D.*, International Human Rights Law: Cases, Material, Commentary (Cambridge University Press, 2010), 644.

Another category of positive measures is implementation temporary special measures aimed at accelerating de facto equality. This principle is envisaged by the Convention on Elimination of All Forms of Racial Discrimination,[20] as well as Convention on Elimination of All Forms of Discrimination against Women.[21] The principle deems differentniated treatment to persons acceptable if it serves to elimination of factual inequality and this treatment discontinues immediately upon achievement of the objective.[22] It is considered that such action, to some extent, serves to improvement of past forms of discrimination and thus, is justified.[23] However, its implementation might be arbitrary, as the elements are not sufficiently defined. Primarily, it is quite risky to set a target of achievement of de facto equality, as it is unclear when such equality is achieved. The essence of the right to equality is in granting equal opportunities to people,[24] which automatically leads to factual inequality. Consequently, de facto equality in all spheres is either impossible to achieve, or can be achieved only artificially by granting privileges to certain groups, i.e. establishing of inequal conditions. Anyway, it is quite dangerous category, which, by itself, creates the threat of discrimination.

It should also be exmphasized that implementation of temporary special measures is not the conventional obligation, imposed on the state. Rather, the conventions require that different treatment, aimed at accelerating de facto equality, shall not be considered discrimination.[25] Though, creation of such special category is absolutely redundent in this context since different treatment can always be justified on the basis of objective and reasonable grounds, i.e. when it serves to legitimate purpose and the means used are necessary and proportionate.[26] This general formula is sufficiently flexible not to considere all types of different treatment as discrimination and there is no needdesigning to design a new, special category. Besides, even though this category is deemed to be temporary, the temporariness depends on achievement of the pursued objective, which, on its part, is quite indeterminate and creates the risk that the special measures will be "temporary" for indefinite period of time.

3. Efficient Response to the Facts of Discrimination by a State

Prevention is the most important component for elimination of discrimination. However, even in the case of well arranged preventive measures, it is impossible to avoid all facts of discrimination. Consequently, efficient response of the state to each case of discrimination is necessary. Therefore, it is essential to exist the relevant legislative and institutional mechanisms in the state.[27] Hence, it is appropriate to analyse – what type of legal and institutional framework shall exist in order to efficiently fight against discriminationat national level.

[20] International Convention on the Elimination of All Forms of Racial Discrimination, art. 1(4).
[21] Convention on the Elimination of All Forms of Discrimination against Women, art. 4(1).
[22] CEDAW, General recommendation №25, on article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures, §15.
[23] Ibid.
[24] *Khubua G.,* Theory of Law, Tbilisi, 2004, 76.
[25] Convention on the Elimination of All Forms of Discrimination against Women, art. 4(1).
[26] *D.H. Others v. the Czech Republic*, App. no. 57325/00 ECtHR [GC], 13 November 2007, §184.
[27] UN Human Rights Committee, General Comment №18: Non-discrimination, §9.

3.1. Efficient Anti-discriminative Legislation

In order to establish legislative framework for efficient fighting against discrimination, national legislation shall reflect the standards, set forth in international and regional instruments. Primarily, legislation shall provide the definition of discrimination and its types, according to which it will be possible to classify specific case, as discrimination.

It has to be underscored, that the definition, provided in UN conventions[28] differs from the definitions, proposed by the European Court of Human Rights,[29] which, in its turn, is based on the EU anti-discrimination directives.[30] Nevertheless, the interpretation of the UN conventions does not contradict the definition, determined by the latter, and, in general, the following elements of discrimination shall be outlined in the light of international and regional standards: 1) action – unequal treatment; 2) comparator – in comparison with whom unequal treatment is determined; 3) motive of action – existence of grounds, based on which the person was treated differently; 4) the aim or result of action – putting a person into disadvantaged situation; 5) absence of objective and reasonable justification of unequal treatment. Consequently, discrimination in national legislation shall be defined so that all the above-mentioned elements are reflected.

Besides, in the process of defining discrimination at national level, special attention should be paid to two factors, in regard to which there is no clarity in international and regional acts: 1) should dissimilar treatment without any ground be qualified as discrimination? 2) should discrimination be limited to unequal treatment only in the course of using rights, envisaged by the law? In regard to the grounds, it should be emphasized, that the main motive of discrimination, in majority of cases, is existence of these grounds, and for this very reason, international and regional conventions directly stress that enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground. However, equality is also violated when the ground cannot be identified, but different treatment occurs in arbitrary manner. For this reason, it would be appropriate not to make discriminating ground obligatory pre-condition for qualification of action as discrimination. Nonetheless, as long as conventions directly focus on discriminating rgounds and the practice of Strasbourg Court is not homogenous, national legislation, which considers the existence of discriminating ground as compulsory element, cannot be regarded as inefficient. In any case, the list of grounds shall not be exhaustive in order to secure the protection of any ground.

As for the scope of anti-discrimination legislation, the state shall protect a person from discrimination from any third party. However, in order to prevent the state interference with private

[28] According to the UN Human Rights Committee, Convention on Elimination of all Forms of Racial Discrimination and Convention on Elimination of all Forms of Discrimination against Women, discrimination is any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

[29] According to the definition, established by the European Court of Human Rights, a difference of treatment is discriminatory if it "has no objective and reasonable justification", that is, if it does not pursue a "legitimate aim" or if there is not a "reasonable relationship of proportionality between the means employed and the aim sought to be realised".

[30] See Racial Equality Directive (Council Directive 2000/43/EC), art. 2; Employment Equality Directive, Council Directive 2000/78/EC, art. 2.

sector, discrimination should be prohibited in the relations between private persons, linked to publicly offered services or goods.[31] Thus, efficient legislation should impose responsibility not only on public entities, but on private persons as well, if their activities are beyond pure private relations.

Efficient legislation, naturally, should pay particular attention to procedural norms, envisaging practical implementation of anti-discrimination norms. Consequently, national legislation should envisage effective mechanisms of prevention, identification and responding to discrimination. Systemized recommendations on this issue have been developed by the European Commission against Racism and Intolerance (hereinafter – ECRI),[32] which should be analysed for generalized conclusions.

According to ECRI recommendations, national legislation should enshrine the principle of equal treatment and the obligation of the state to protect a person from discrimination into the Constitution. The Constitution should further, provide the exceptions to the principle of equal treatment.[33] In other words, the constitutional norm will not be efficient if the exceptions of different treatment are envisaged by the law, as constitutionality of other legislative acts cannot be assessed on the basis of the norms, enshrined in the law of the same hirarchy. Thus, in order to avoid any kind of collision of norms, discrimination elements should be determined in the Constitution. At least, it should be possible to construe from the text of the Constitution, that the list of discriminating grounds are not exhaustive and unequal treatment can be justified only if it is objective and reasonable. Certaunlythe constitutional norm is subject to interpretation by the Constitutional Courtbut antidiscrimination norm would be efficient if it requires as little interpretation as possible.

Efficient national legislation should fully consider the needs of the victims of discrimination. This requires complex approach and thus, existence of the relevant criminal, administrative and civil legislation.[34] With respect to private law it should be noted that, in the opinion of the Commission, discrimination shall be prohibited not only in public, but also in private sector[35] and, it is necessary to modify discriminatory norms, *inter alia*, in private regulations.[36] As to the administrative law, the Commission demands the existence of judicial and/or administrative procedures, which will be easily accessible for all victims of discrimination and ensure imposition of adequate sanction on the person, who has committed discrimination, *inter alia*, in the form of compensation of material or non-pecuniary damages.[37]

As for criminal responsibility, ECRI recommends liability for grave forms of discrimination like genocide, instigation of racial animosity, etc.[38] It is further suggested that the crime, committed on the basis of discriminatory motivation, be considered as aggravating circumstance,[39] and the

[31] Developing Anti-Discrimination Law in Europe, Prepared by Isabelle Chopin and Catharina Germaine-Sahl for the European Network of Legal Experts in the Non-discrimination Field, October 2013, 65.
[32] ECRI General Policy Recommendation №7 on National Legislation to Combat Racism and Racial Discrimination, 13 December 2002.
[33] Ibid, §2.
[34] Explanatory Memorandum to ECRI general policy recommendation №7 Introduction on national legislation to combat racism and racial discrimination, §3.
[35] Ibid, §7.
[36] Ibid, §14.
[37] Ibid, §12-13.
[38] Ibid, §18-19.
[39] Ibid, §21.

sanction is proportionate having dissuasive effect.[40] These requirements are absolutely logical, although, requirement to impose criminal responsibility for discrimination, committed in the course of implementation of public function, will create practical problems. In fact, in a large majority of cases discrimination occurs during implementation of public function and it is not clear how criminal responsibility should be differed from administrative responsibility, which should also be effective, proportionate and dissuasive.[41] In this respect ECRI further explains, that various types of responsibility shall complement each other and criminal responsibility has stronger deterrent effect.[42] Consequently, the preconditions of imposition of administrative and criminal responsibility for discrimination should be unambiguously distingished.

According to the foregoing, it could be said that efficient anti-discrimination legislation should be oriented to the interests of the victims and provide them with efficient means of reparation of the violated right. Consequently, it is necessary to explore the means of reparation of the rights to equality.

4. Efficient Means of Reparation of Violated Right to Equality

Legal remedy of the violated rights is the intrinsic feature of the fundamental human rights, translating the legal provisions into practice.[43] In other words, the existence of the human right in itself implies possibility of its legal protection, and vice versa, if reparation of the violated rights is impossible, human right does not exist in reality.[44] For this very reason, all basic international[45] and regional human rights instruments explicitely provide for the legal remedy.[46] It is considered, that for reparation of the violated right, the state shall apply effective, proportionate and dissuasive measures.[47] In this respect, there is no explanation of authoritative body on what is meant under each term. Although, according to doctrine, the measures, which really ensure to achieve the aims pursued, are considered efficient. The gravity and nature of the committed action has to be considered in the course of assessing proportionality, and dissuasive effect is inherent to the sanction, which is sufficiently stringent to exclude the possibility of committing the same action in the future.[48] Furthermore, the reparation of the violated right to be effective, proportionate and dissuasive, all the above noted reparation measures shall be applied in multifaceted manner under civil, administrative or criminal law.[49]

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[40] Ibid, §23.
[41] Ibid, §12.
[42] Ibid, §3.
[43] *Tomuschat C.*, Human Rights: Between Idealism and Realism, 2nd ed., Oxford University Press, 2008, 5.
[44] *Steiner H.J., Alston P., Goodman R.*, International Human Rights in Context: Law, Politics and Morals, 3rd ed., Oxford: OUP, 2007, 263.
[45] See, for example, Article 8 of Universal Declaration on Human Rights; also, para. 2 and sub-paragraph "b" of para. 3 of the Article 2 of International Covenant on Civil and Political Rights.
[46] Article 13 of the European Convention on Human Rights; Article 2 of the American Convention on Human Rights; Article 1 of the African Charter on Human and Peoples' Rights.
[47] Remedies and Sanctions in EC non-discrimination law: Effective, proportionate and dissuasive national sanctions and remedies, with particular reference to upper limits on compensation to victims of discrimination, European Commission Directorate-General for Employment, Social Affairs and Equal Opportunities, June 2005, 32.
[48] Ibid, 10.
[49] Ibid, 5.

5. The Need of Special Body for Combating Discrimination

In order to make the fight against discrimination really efficient, in parallel to the legal framework, the relevant institutional mechanisms shall exist ensuring practical implementation of anti-discrimination provisions and taking all required measures, from prevention to identification of discrimination facts and reparation of the violated rights. In accordance with international anti-discrimination instruments, efficient institutional framework should include the existence of judicial and administrative mechanisms, through which fight against discrimination and reparation of the violated rights will be ensured.[50]

Court, certainly, is the most important mechanism to protect rights, but its mandate is strictly defined by the law and is limited with its functions. On the basis of the relevant legislative framework, reparation of the violated rights through courts is possible, however, as already underlined, combating discrimination requires much wider and complex approach than just responding to the identified facts of discrimination. For this reason, to make the fight against discrimination efficient, majority of states establish specialized body, responsible for protection of equality.[51] The need of establishment of such body within the Council of Europe is determined by the *General Policy Recommendation* №2 of the European Commission against Racism and Intolerance.[52] For the EU member states, establishment of specialized body is additionally provided by special directives.[53]

The equality body should have sufficient functions to fulfil its mandate and ensure efficient protection of persons against discrimination. Assessing anti-discrimination laws of individual states, the OSCE Office for Democratic Institutions and Human Rights *(OSCE/ODIHR)* repeatedly states its position, that the mandate of specialized body for protection of equality should cover public as well as private spheres.[54] Besides, such body will not be considered efficient, if it does not have the possibility to impose a fine, secure the reparation of damage or take other efficient measures for elimination of the results of discrimination.[55] Nevertheless, imposition of fines and sanctions shall be limited only to administrative responsibility.[56]

The European Commission against Racism and Intolerance lists the number of functions the specialized equality body for combatting discrimination should be equipped, with[57] and the following are particularly stressed: assistance to the victims of discrimination, examination of cases, sub-

[50] *Kudla v. Poland*, App. no. 30210/96, (ECtHR, 26 October 2000), §157; 15 of General Comment №34 dated 2004 of the UN Human Rights Committee.

[51] <http://www.coe.int/t/dghl/monitoring/ecri/library/links_en.asp#bodies>, [26.05.2014].

[52] <http://www.coe.int/t/dghl/monitoring/ecri/activities/gpr/en/recommendation_n2/Rec02en.pdf>, [26.05.2014].

[53] See Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, 29 June 2000, art. 13; Council Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services, 13 December 2004.

[54] OSCE/ODIHR Comments on the Draft Law on Prevention and Protection against Discrimination of the Former Yugoslav Republic of Macedonia, 13 October 2009, §44.

[55] Ibid, §48; OSCE/ODIHR Opinion on the Draft Law on Preventing and Combating Discrimination of the Republic of Moldova, 29 October 2010, §70.

[56] Ibid, §73.

[57] ECRI General policy Recommendation №2 on Specialised Bodies to Combat Racism, Xenophobia, Antisemitism and Intolerance at National Level, 13 June 1997, Principle 3.

mission of proposals aimed at refining legislative norms, raising awareness, analyzing anti-discrimination situation and preparation of the relevant reports.[58]

This being so, it could be said that institutional mechanisms of fighting against discrimination include the existence of judicial and administrative institutions, which, in unity, shall ensure implementation of all anti-discrimination measures in the form of prevention, identification of the facts of discrimination and elimination of its results.

6. Conclusion

In accordance with the goals purused, the measures to be taken by the state for efficiently combating discrimination were analysed. The research leads to conclude that the fight against discrimination shall be permanent and complex process, including prevention, identification of the facts of discrimination and elimination of its results. However, there is no sufficient clarity in regard to these issues.

First of all, the requirement of the UN anti-discrimination conventions, that the states shall modify discriminative customs, has to be criticized. Imposition of such obligation on states is not reasonable, since a state does not create customs and it begs a question – how can customs be modified by states. Besides, Customs and tradition is the expression of faith, playing significant role in development of the human and it would not be justified for the state to have the obligation of its modification. Therefore, the state should not have the obligation of modification of discriminative customs, but instead legal framework should exist, where a person would be able to protect his/her right to equality, violated on the basis of customs and traditions.

The study has made it clear that the temporary special measures for elimination of *de facto* inequality is problematic. Primarily, it is precarious to aim *de facto* equality, as it is unclear when such equality is achieved and the temporary measure may last for indefinite period of time. Moreover, the very essence of the right to equality lies in granting equal opportunities to people, which automatically results in factual inequality. Consequently, *de facto* equality in all spheres either can never be achieved or can be achieved artificially through granting privileges to individual group, i.e. creating of inequal conditions. For this reason, it is a very dangerous category, creating the risk of discrimination by itself and practical implementation of this principle is not expedient.

In terms of identification and response to the facts of discrimination, the research outlined the need of efficient legal and institutional mechanisms. Anti-discrimination norms reflected in in civil, administrative and criminal legislation should be complementary so that unclear overlaps are avoided. Legislation should adequately set forth the elements of discrimination and its types and secure the legal remedy for the violated right. The latter, in its turn, should ensure effective and proportionate reparation of the negative results caused to the victim and envisage the relevant sanctions having deterent effect.

[58] ECRI General Policy Recommendation №7 on National Legislation to Combat Racism and Racial Discrimination, 13 December 2002.

Effective implementation of anti-discrimination norms necessitates the existence of the relevant institutional mechanisms and it is reasonable to establish special equality body responsible for implementation of complex measures to combat discrimination, in addition to the court. The mandate of such body should include the elements of prevention, identification of discrimination and elimination of its results in public as well as in private sphere.

According to the all aforesaid, it could be concluded that although discrimination is prohibited since the moment of origination of human rights, it still remains quite a complex legal category, identification of which will be related to difficulties in each particular case. Efficient fight against discrimination requires homogenous understanding of legal nature of this phenomenon, adequately reflected in legislation, and existence of the necessary institutional mechanisms.

Paata Javakhishvili*

Constitutional Control over the Decisions of Ordinary Courts: Experience and Perspectives of the South Caucasus States

The place and importance of the Constitutional Law between the state authorities are mostly conditioned with independence of the hereof institution and the competent arsenal thereof. The real Constitutional control occupies the particular place amongst the authorities of the Constitutional Law. The hereby Article aims at estimation of legislative reality of the real control and the Constitutional justice in the South Caucasian countries. The Article considers the essence and importance of phenomenon of real Constitutional control, the place of the Constitutional law in Azerbaijan, Turkey and Armenia, estimates direct impact of this institution on the Constitutional justice and prospects of real control in South Caucasus countries.

Key words: *Constitutional Control in South Caucasus, Judicial review, Real Constitutional Control*

1. Introduction

General control over the constitutionality of normative acts is the most important function of the constitutional court of many states of the world, in carrying out of which the suptemacy of constitution, as a main law, is provided.[1] For the purpose of the protection of constitutional norms and fundemantal human rights[2] the constitutional law monitors the compliance of each field of the governmemt activity to the constitition. The constitutional court is an insitition, the aim of which is to protect the constitution from unconstitutional invasions of fields of governmet activities.[3] The fulfillmet of this function is turning it into a supreme controlling organ of the state government activities.

After the demise of the Sovet Union the countries of Central and Eastern Europe with the support of the European Council and on the basis of adopting a new consitution and reviewing the old one managed to implement an institute of direct applying of physical and legal persons to the consstitutional court. The purpose of the above mentioned insitute was to cover the so called "grey zones"[4] in the sphere of the protection of fundamental human rights. South Caucasus states belong to the group of these countries too.

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* Doctoral Student, TSU Faculty of Law.

1 *Kakhini G.,* Problems of Controlling of Abstract Norms in Acyivities of Constitutional Court of Georgia Journal of Law, №1, 2009, 62 (in Georgian).

2 *Patrono M.,* The Protection of Fundamental Rights By Constitutional Courts – A Comparative Perspective, 2000, 405.

3 *Gegenava D.,* Constitutional Justice in Georgia: Main System Problems of Court Procedures, Tbilisi, 2012, 26 (in Georgian).

4 *Gentili G.,* A Comparative Perspective on Direct Access to Constitutional and Supreme Courts in Africa, Asia, Europe and Latin America: Assessing Advantages for the Italian Constitutional Court, Penn State International Law Review, University of Sussex, 2011, 708.

The aim of the present article is to discuss the models of the constitutional cotrol established in the constitutional legal reality of South Caucasus and the discussion will be based on the methods of analytical, logical and comparative law investigation. For this purpose legislation of the Republics of Turkey, Azerbaijan and Armenia (hereafter Turkey, Azerbaijan and Armenia) and estimations of the International Institutes of Human Rights and scientists upon the constitutional systems of these states will be discussed.

2. Real Constitutional Control – European Reality and Its Inculcation in South Caucasus States

2.1. Real Constitutional Control as an Effective Modern Mechanism for Protection of Fundamental Human Rights

Constitutional action is a main mechanism of protection of undividual's and citizen's rights. It is an individual initiative creating a certain procedural instrument. According to the doctrine of the individual constitutional complaint courts have the right to abolish the government's decisions, when they aren't complying with the constitution.[5] By estimation of the international human rights organizations this mechanism, as a means of the legal protection, mut be accessible for everybody,[6] because in the area of the constitutional action there can be protection of negative, as well as positive rights.[7]

The analysis of statistics of the European Court of Human Rights showed that from those countries, which have a mechanism of the complete constitutional complaint, have much less applications to the European Court of Human Rights than the countries, which don't have an analogous mechanism.[8] Just for this reason the European Court is lobbying to grant constitutional courts the authority of real control.

"In order to be effective the means of protection of human rights it must not only protect indirectly the rights guaranteed by the Convention, but it must provide direct and fast settlement of plaintiff's claim".[9] Despite the nonhomogenous attitude a constitutional control mechanism of general courts decisions is considered to be the procedural possibility and one of the main principles for accomplishment of the above mentioned goal.

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[5] *Karakamisheva T.,* Constitutional Complaint – Procedural and Legal Instrument for Developmant of the Constitutional Justice (Case study – Federal Republic of Germany, Repyblic of Croatia, Republic of Slovenia and Republic of Macedonia), see <http://www.venice.coe.int/WCCJ/Papers/MKD_Karakamisheva_E.pdf>.

[6] See *Mavcic A.M.,* Individual Complaint As a Domestic Remedy th be Exhausted or Effective Within the Meaninig of the ECHR, Comparative and Slovenian Aspect, Preddvor, Slovenia, 2011, 6-7.

[7] See *Ulvan N.C.,* Constitutional Complaint and Individual Complain In Turkey, Ankara Bar Review, 2013, 181.

[8] See *Paczolay P.,* Report Introdaction to the Report of the Venice Commission on Inividual Access to Constitutional Justice, Conference on Individual Access to Constitutional Justice, Strasburg, 2013, 2.

[9] *Sharashidze M.*, Perspectives of Granting the Constitutional Court of Georgia the Authority to Discuss Real Constitutional Complaints; Collected works: Constitutional and International Mechanisms of the Protection of Human Rights, edited by *Korkelia K.,* see reference 6, Dever against Belgium, 1980, §29, 59 (in Georgian).

2.2. Inculcation of the Constitutional Control of General Courts Decisions in the States of South Caucasus

Individuals' right to apply to the constitutional court with an individual complaint in the legal system of Germany was inculcatedin 1969[10] and this form of the complaint is still considered to be the most effective means of protection of the constitution. [11] More than the half of decisions of the federal constitutional court is connected with the cases of just this category.[12] Some scientists think that a mechanism of the constitutional control inculcated in constitutional justice of Germany is universal,[13] as by means of a mere procedure any person can lodge a complaint against the decision of a public authority.[14]

In Turkey the real constitutional control was inculcated in 2010 and after 2 years from the legislative regulation the constitutional court received the first application.[15] According to Article 148 of the constitution of Turkey any person, analogous to the German model of real control, has the right to lodge a complaint not only against the decision of the final instance of courts, but also against any act accepted or action carried out by the government authority, which directly infringes the person's basic right recognized by the constitution. [16] Up to now the Constitutional Court of Turkey has revealed 165 facts of violation of basic rights directly on individual constitutional complaints.[17]

In the constitution of Azebaijan the real constitutional control has been inculcated upon the recommendation of the International Institutions of Human Rights.[18] According to Article 130 of the constitution of Azerbaijan by the rule stated by legislation everybody has the right, in order to restore infringed rights and freedoms, to make a constitutional complaint against the normative acts issued by the public authority and municipalities, as well as in relation to those decisions of courts, which are infringing the individual's rights and freedoms[19].

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[10] *Patrono M.,* The Protection of Fundamental Rights By Constitutional Courts – A Comparative Perspective, 2000, 409.

[11] *Fremuth M. L.,* Patchwork Constitutionalism, Constitutionalism and Constitutional Litigation in Germany and Beyond the State – A European Perspective, 2011, 384-385.

[12] *Prakke C.L.,* Constitutional Law of 15 EU Member States, Edited by *Prakke L., Kortmann C., Brandhof H., Burkens M., Calogeropoulos A., Craenen G., Frieden L., Gilhuis P., Ballin E., Koekkoek A., Kraan K., Lunshof H., Meij J., Schagen J., Steenbeek J., Thill J.,* Deventer, 2004, 356.

[13] See *Singer M.,* The Constitutional Court of the German Federal Republic: Jurisdiction Over Individual Complaints, 1982, 332.

[14] Decision on case Apostle against Georgia, European Court of Human Rights, application № 40765, 02, Strasburg, 2006, §42 (in Georgian).

[15] *Üstün B.,* Protection of Human Rights By the Turkish Constitutional Court, Short History of the Turkish Constitutional Court, <http://www.constcourt.md/public/files/file/conferinta_20ani/programul_conferintei/Burhan_Ustun.pdf>.

[16] The Constitution of the Republic of Turkey, 1982, Art. 148.

[17] See *Arslan Z.,* Constitutional Complaint In Turkey: A Cursory Analisis Of Essential Decisions, The draft paper prepared for the Conference the Best Practices of Individual Complaint to the Constitutional Courts in Europe, 8, Strasbourg, 2014 .

[18] See *Martin C.H.,* Comparative Human Rights Jurisprudence in Azerbaijan: Theory, Practice and Prospects, Journal of Transnational Law & Policy, College of Law The Florida State University, Tallahassee, 2005, 230, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=748124>.

[19] Constitution of the Republic of Azerbaijan 1995, Art. 130.

The system analysis of Article 101 of the constitution and several articles of court rules of Armenia enables us to remark that the constitutional court of Armenia is only discussing the constitutionalism of normative acts and does not have the authority for the contitutional control of the decisions of law courts. Considering this fact and as the purpose of the present work is to analyse the practice of those South Caucasus countries, which have a constitutional control mechanism of law courts, in the following chapters in relation to Armenia there will be only discussed separate legal aspects.

3. Real Constitutional Control in South Caucasus Countries

3.1. Person Authorized to File an Individul Constitutional Complaint to Constitutional Court

The main essence of the real control is that the person authorized to file a complaint might be any individual, who thinks that his/her fundamental right guaranteed by the constitution has been infringed by the decision made by the authority. As a rule, physical and legal persons of private law possess fundamental rights, though in case of a real control only a person, which argues against the infringement of his/her fundamental right, is authorized to file a constitutional complaint.[20]

On the basis of the amendment to Article 148 of the constitution of Turkey, made in 2010, any individual, which thinks that his/her constitutional right existed in the list of human rights of the European Convention has been infringed can apply to constitutional court after completion of other administrative and court procedures.[21] Legal persons of private and public law possessing the fundamental rights are also using these fundamental rights.

According to Article 130 of the constitution of Azerbaijan, according to the rule stated by law, everybody has the right to apply to constitutional court with a consititutional complaint against those normative acts of the legislative and executive government, municipalities and court decisions, which violate their fundamental rights and freedoms.[22] The mentioned entry is also repeated in the law of Azerbaijan "about the constitutional law".[23]

At the same time on the basis of Article 57 of the constitution of Azerbaijan there is adoped a law "about the procedure of discussing citizens' applications, which gives every citizen the right to produce petition or his/her own critical opinion connected with the decisions made by the government authority. The mentioned law is also obliging every person of high political position to devote time for meeting with citizens.[24]

3.2. Preconditions for Accepting the Constitutional Complaint

The basis of checking the constitutionality of the decision of the government authority by the constitutional court is an appeal of the individual having this right, which must respond the requirements for a constitutional complaint stated by normative acts. Among the widely apread require-

[20] See The Constitution of the Republic of Turkey, 1982, art. 148.
[21] See ibid.
[22] Constitution of the Republic of Azerbaijan, Art. 130, V, 1995.
[23] The Law of the Republic of Azerbaijan on Constitutional Court, Art. 34, 1.
[24] Law of the Azerbaijan Republic On Procedures For Review of Citizen Applications, Art, 23.

ments, defined by states having the real control can be mentioned several of them. For realization of the right of applying with an individual application a complainant must be a person authorized to produce an action, all the inner legal means of protection of the right must be exhausted,[25] the purpose of the complaint must be directly protection of the infringed constitutional right of the individual and others.

3.2.1. Direct and Current Effect

If an appealed act does not inflict a direct and current harm to the complainant, then we have an abstract constitutional control. Here can be two moments: 1. as an interested party is a"direct" victim, legislation of some countries prohibits any person from acting in the name of the victim. It means that in hearing of a concrete case constitutional juridical work is abstrct, because the applicant is not a direct victim. 2. The law of some countries describes the character of the infringement of the fundamental rights. In most countries the infringement of the fundamental rights must be directly connected with the complainant's interest and must have a negative influence on the complainant's legal status..[26]

The legislation of the three countries of South Caucasus states as a compulsory rule that a person producing a constitutional complaint can be only one, whose rights and freedoms guaranteed by the constitution are violated by the act issued by the public authority and the complainant at the moment of producing the complaint in the constitutional court is experiencing the violation of this right.

3.2.2. Exhaustion of the Legal Protection Remedies of Fundamental Rights

One of the preconditions of applying to the constitutional court with an individual constitutional complaint in the countries having the real control is the exhaustion of all the inner legal remedies. Under the inner legal remedies there is meant as a system of law courts, as well as any means of appealing the acts issued by the government authority.

According to Article 34.4 of the law about the constitutional court of Azerbaijan a complaint to the constitutional court can be presented only in 6 months from the exhaustion of all the legal remedies.[27] The same picture is in Turkey, where the constitutional court is accepting a complaint in a legal procedure only in case of exhausting of all the legal means.[28]

Requirement of exhaustion legal remedies underlines the individual complaint's subsidiary character, where before hearing the issue by the constitutional court it is necessary to pass all the instances of court and the constitutional court wil start its participation at the final stage, though the use of this rule might cause the irreparable infringement of the individual's rights, it is possible that the mentioned rule can't be used as an exception.[29]

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[25] See *Gonenc L.,* Proposed Constitutional Amendments to the 1982 Constitution of Turkey, 2010, 4-5.

[26] See Study on Individual Access to Constitutional Justice, European Commission For Democracy through Law (Venice Commission), № 538/2009, Strasburg, 2011, 34.

[27] The Law of The Republic of Azerbaijan on Constitutional Court, art. 34, 7.

[28] See <http://www.codices.coe.int/NXT/gateway.dll?f=templates&fn=default.htm>.

[29] See Study on Individual Access to Constitutional Justice, European Commission For Democracy Rhrough Law (Venice Commission), № 538/2009, Strasburg, 2011, 34.

So for example, if in order to protect the complainant's constitutional rights applying to law courts cannot provide protection of the complainant's rights from serious and irreparable injury or in general it is impossible to avoid serious and irreparable injury by applying with a complaint to the other court,[30] like the federal constitutional court of Germany,[31] the complaint can be presented straight to the constitutional court of Azerbailan.[32] This agreement is emphasizing the preference of the interest of protection of human rights compared to the formal requirement.

3.2.3. Fact of Violation of the Fundamental Rights

In juridical literature among other factors the scepticism of ill-disposed persons towards the constitutional control of law courts' decisions is based on the following argument: by carrying out the real control the constitutional court will not be turned into another additional instance, as a result of which a conflict between the courts of general jurisdiction and the constitutional court will become inevitable. Moreover, according to the classical doctrine of the real control the consitutional court is authorized not only to discuss acts accepted by general courts, but also to estimate the constitutionality of decisions made by other departments of the governmeent.

The constitutional court does not estimate the rationality of the general court decision and its compliance with law, but it checks up the result – whether the fundamental human right recognized by tbe constitution was violated or not by the accepted decision. By this model of the constitutional control a constitutional complaint is consideed to be the final means of protection of human rights and freedoms. This authority does not turn the constitutional court into the appellate instance, as hearing of the case does not concern the legal rightness of the complained case; a subject of litigation in the decision is only a part of human rights.[33]

Taking into account this fact, the states possessing the real control, in their own legislation for the precondition of the admissibilty of the constitutional complaint are stating just this requirement. According to professor Besarion Zoidze the fundamental human right is violated, if court is violating a procedural right of the person, participating in the process, whose right is guaranteed by the constitution, court is using a law counteracting the person's fundamental right, on defining the law or using it the court is violating fundamental rights, is acting (intentionally) arbitrarily.[34]

According to Article 130 of the constitution of Azerbaijan, everybody in compliance with the rule stated by law, has the right to apply to the constitutional court with a consititutional complaint, if a legal act of the government authority, as well as court decision violates his/her fundamental rights and freedoms in order to restore the violated rights and freedoms.[35] The constitutional regulation of Turkey is analogous, particularly according to Article 148 any person, who thinks that his/her

[30] The Law of The Republic of Azerbaijan on Constitutional Court, Art. 34, 7.
[31] Federal Constitutional Court Act Of Germany, Art. 90.
[32] The Law of The Republic of Azerbaijan on Constitutional Court, Art. 34, 5.
[33] *Gegenava D.,* Constitutional Jurisdiction in Georgia: Main System Problems of Legal Procedures, Tbilisi, 2012, 26 (in Georgian).
[34] *Zoidze B.,* Constitutional Control and Valuations Order in Georgia, Tbilisi, 2007, 187 (in Georgian).
[35] The Law of the Republic of Azerbaijan on Constitutional Court, Art. 34, 7.

fundamental right provided by the European Convention of Human Rights is violated by the government authorities, has the right to apply to the constitutional court of Turkey.[36]

3.2.4. Abuse of the Right to Appeal to the Constitutional Court with an Individual Complaint

Individuals producing a constitutional complaint are obliged to carry out their rights and duties faithfully.When an applicant abuses this own right, the effectiveness of constitutional justice is distorted, as a procedure of an individual constitutional complint is of special importance for protection of fundamental human rights and such abuse is prejudicial to the constitutional order protected by the constitutional court.[37]

In order to prevent abusing of the right of bringing an action in the countries having the real control there are used financial sanctions. For example, in Germany if the basis of bringing a constitutional complaint is abusing of the right or bringing a complaint is obviously carried out for the lawless purpose, the federal constitutional court has the right to charge a financial payment to the complainant.[38]

Thus the constitutional legislation of Turkey differs from the legislation of Armenia and Azerbaijan, which are not using this type of financial sanctions. The constitutional court of Turkey is authorized to use a financial sanction in amount of 2000 Turkish lira in relation of a complainant for abusing of the right of applying to the constitutional court with a complaint, if it states that producing the complaint is not based on the violation of the fundamental rights guaranteed by the constitution.

3.2.5. Structural Unit Accepting a Constitutional Complaint in Legal Proceedings

A great number of individual constitutional complaints might become harmful even for any European country with rich legal traditions. On accepting a case in legal proceedings the main press is experienced just by those structural units of the constitutional court, which are checking up the admissibility of complaints. In order to avoid oberburdening of the constitutional court states are taking various measures; for example, reformation of the structure of the constitutional court – increasing the number of the court staff or creating smaller structural uits, which will discuss about acceptance of concrete claims in legal proceeding and etc.[39]

In Turkey for examining the admissibility of individual constitutional complaints committees are established as structural units of court, the structure and activities rule of which are defined by the constitution and regulations of the constitutional court of Turkey.[40] The committee is authorized to recognize admissibility or inadmissibility of the examined complaint. If the complaint satisfies the

[36] The Constitution of the Republic of Turkey, 1982, Art. 148.
[37] Study on Individual Access to Constitutional Justice, European Commission For Democracy Rhrough Law (Venice Commission), № 538/2009, Strasburg, 2011, 34.
[38] See *Khubua G., Trauti I.,* Constitutional Justice in Germany, Tbilisi, 2001, 28 (in Georgian).
[39] Study on Individual Access to Constitutional Justice, European Commission For Democracy Rhrough Law (Venice Commission), № 538, 2009, Strasburg, 2011, 59.
[40] The Constitution of the Republic of Turkey, 1982, Art. 149.

preconditions of admissibilty, it will be delegated to one of the panels, which under the leadership of the vice-chairman of the constitutional court consists of 4 members. The panel settles the case on the basis of the presented documents, but it is also authorized to fix a relevant public discussion, if it thinks that it is necssary, in ordinary cases publicdiscussions are not held.[41]

In order to examine admissibility of individual constitutional complaints there is not created any special structural unit in Azerbaijan. Discussion of individual complaints for the purpose of accepting them in legal proceedings is done by the staff of the constitutional court, which also takes decisions on accepting other kinds of complaints in legal proceedings[42]. Several reporter-judges shall be appointed for preparation of session on public hearing of the case.

3.3. Pay and Term of Applying to the Constitutional Court

Some states for carrying out the constitutional review are setting a pay for considering a constitutional complaint.The objective of setting such a pay is the control of the number and the quality of complaints – the complainant should be sure in the reasonableness of his/her own complaint and only then can apply to the constitutional court. The pay for submission of the constitutional complaint is different in different countries, for example, in Russia this pay equals to the minimum living wage, in Armenia it equals to the minimum living wage multiplied by 5, in Austria – 220 euro, in Israel – 400 USA $.[43]

According to the Venice Commission the payment for performing the constitutional review should be comparatively lower for individuals and considering the financial status of the complainant there should be the possibility of decreasing the payment or exemption from payment. The main aim of payment for submission of the complaint must prevent abusing of the right; though setting of the payment must not cause the restriction of court accessibility right.[44]

The constitutional court of Azerbaijan does not consider any kind of payment submission of a consitutional complaint; according to Article 50 of the law "about Constitutional Court" the costs for proceedings are free of charge and all the costs connected with them shall be reimbursed from the State budget,[45] as well as it is in case of normative control the constitutional Court of Armenia does not set any financial obligations for citizens. As for Turkey, according to the law "about Constitutional Court" for submitting an individual complaint a payment of 172.5 Turkish lira is set. [46]

According to the recommendation of the Venice Commission terms must be reasonable, so that each constitutional complaint should be discussed individually or to allow an advocate, which is obliged to submit the comlpaint, to defend individual's rights properly.[47] At the same time terms of

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[41] <http://www.codices.coe.int/NXT/gateway.dll?f=templates&fn=default.htm>.
[42] The Law of the Republic of Azerbaijan on Constitutional Court, Art. 36.
[43] See ibid.
[44] Study on Individual Access to Constitutional Justice, European Commission for Democracy Rhrough Law (Venice Commission), № 538, 2009, Strasburg, 2011, 33.
[45] The Law of the Republic of Azerbaijan on Constitutional Court, Art. 50.
[46] *Ulvan N.C.,* Constitutional Complaint and Individual Complaint In Turkey, Ankara Bar Review, 2013, 184.
[47] Study on Individual Access to Constitutional Justice, European Commission for Democracy Rhrough Law (Venice Commission), № 538/2009, Strasburg, 2011, 41.

taking decision, if they are stated, should not be very short, so that the constitutional court will be able to discuss the whole case without restriction; the terms should not be so long, that protection of fundamental human rights by constitutional justice should become ineffective.

The term of applying to constitutional curt is always defined by a proper normative act and as a rule, it is not more than one year from the moment of violation of the right.[48] For example, according to Aricle 93 of the law "about the Federal Constitutional Court" of Germany a constitutional complaint must be submitted and substantiated within one month,[49] time account for the term is started from the moment of familarization with the complete text of the decision in any form or from the moment of publishing it; if the decision is not published, then from the moment, when it becomes known for the complainant.

According to paragraph 4 of Article 34 "about constitutional court" of the constitution of Azerbaijan a constitutional complaint about violation of fundamental rights will be submitted to the constitutional court in 6 months from the moment of coming into effect the decision of court of the final instance or will be submitted to court in 3 months from violation of the complainant's rights on condition of restoring this term.[50] This term in Turkey is defined by 30 days from the moment of exhaustion of all legal protection remedies.

4. Perspectives of Real Control in South Caucasus States

Models of the constitutional review, acting in Turkey and Azerbaijan, are very important acqisition of constitutional justice of these states. Constitutional courts of these countries were strengthened due to recommendations of the Venice Committee and other international institutions. Since an ideal system does not exist in any state and it is impossible to consider the experience of the other state without taking into account legal culture of the state, Turkey and Azerbaijan will have to take corrective measures in relation to those defects, which are impeding effective functioning of the institution.

Constitutional court rules of Turkey include 7 articles connected with an individual application. Jurisdiction of the constitutional court includes fundamental rights defined by the constitution of Turkey and the European Commission on Human Rights, but appealing against some acts of public authorities goes beyond the limits of the individual application. For example, the decrees issued about emergency and military states are not within the constitutional court control of Turkey. So this "weakness" of constitutional court is already criticized, as the heaviest facts of violation of fundamental human rights might happen just in the period of emergency and military situation.[51] "Legislative and regulating administraton acts" are not under the competence of the constitutional court ei-

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[48] *Frremuth L.M.,* Patchwork Constitutionalism: Constitutionalism and Constitutional Litigation in Germany and beyond the Nation State – A European Perspective, Dunquesne law Review, Vol. 49, Issue 2, 2011, 379.

[49] Study on Individual Access to Constitutional Justice, European Commission For Democracy Rhrough Law (Venice Commission), № 538/2009, Strasburg, 2011, 48.

[50] The Law of the Republic of Azerbaijan on Constitutional Court, Art. 34, 4.

[51] *Özbudun E.,* Judicial Review of Political Questions in Turkey, <http://camlaw.rutgers.edu/statecon/workshop11greece07/workshop5/Ozbudun.pdf>.

ther"[52]. I think constitutional court power of Turkey will be widened just in this direction and individuals will be able to appeal against any act of public authority.

Constitutional tribunal of Azerbaijan is also actively using the means of complete individual constitutional review, though it has not created any mechanism for defining the admissibility of complaints and is examinng the admissibility of complaints submitted by individuals within this right by a general rule. The reason of such situation might be fewer appeals to the constitutional court, though presumably in the future the constitutional court of Azerbaijan will have to take considerable steps just in this direction.

As for the constitutional court of Armenia, the model of normative control used by the constitutional tribunal in this state, is not a real constitutional review, though the tendency approaching this legal system is noticeable – the definition of the constitutional review in the constitution of Armenia has evidently features characteristic for a real control mechanism (reference to exhaustion of legal remedies, fundamental human rights and other elements of the subsidiary principle). So presumably for the future there is a perspective of granting this power to the constitutinal court of Armenia. Furthermore such a recommendation in relation to Armenia already exists from the Venice Commission.[53]

5. Conclusion

Analysis of experience of those countries, where the constitutional court has the right of checking up the conformity of general court decisions with the constitution, obviously shows that a procedure of submitting a constitutional complaint by an individual turns the constitutional court into an effective protector of fundamental rights.[54] Since a mechanism of an individual constitutional complaint is protecting the fundamental rights better and more effectively,[55] implementation of a mechanism of the real constitutional review will be able to contribute a valuable share in creating guarantees for protection of fundamental human rights and to assist the European Court of Human Rights in implementing long-term effective mechanisms for fundamental rights.[56]

From the countries of South Caucasus the republics of Turkey and Azerbaijan, after having considered international recommendations, already gave their own constitutional courts the authrity of constitutional review of law courts decisions. Moreover, the constitutional review mechanism established in these countries is giving the opportunity of revising decisions made by the three spheres of

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[52] *Üstün B.,* Protection of Human Rights by the Turkish Constitutional Court, Short Histori of The Turkish Constitutional Court, see <http://www.constcourt.md/public/files/file/conferinta_20ani/programul_conferintei/Burhan_Ustun.pdf>.

[53] Annual Report of Activities 2011, European Commission For Democracy Through Law, Strasburg, 2012, 39.

[54] Speech of *Mr. Dean* Spielmann, President of the European Court of Human Rights, conference – The best practices of individual complaint to the Constitutional Courts in Europe, Paris, Strasbourg, 2014, 2.

[55] CDL-AD (2004) 043 Opinion on the Proposal to Amend the Constitution of the Republic of Moldova (introduction of the individual complaint to the Constitutional Court) adopted by the Venice Commission at its 61st Plenary Session.

[56] *Paczolay P.,* Report Introdaction to the Report of the Venice Commission on Inividual Access to Constitutional Justice, Conference on Individual Access to Constitutional Justice, European Commission to Democracy Through Law (Venice Commission), Strasburg, 2013, 2.

the governmental authorities. These courts are trying to share traditions of such European states, as Germany, Spain, Czechia and others. In the case of Armenia the constitutional court is confined by the authority of normative control, though a constitutional norm regulating this right is already experiencing a considerable influence from the institution of real control.

In the present article there was estimated the institution of constitutional review of law courts decisions in the states of South Caucasus, as one of the important legal means for protection of fundamental human rights, there were shown issues and peculiarities connected with its functioning and discussed perspectives of real control in these states.

Giorgi Tumanishvili *

Indictment and Deviation therefrom Trial on Merits

Prosecutor's resolution on charge is the main document determining the subject of trial of a criminal case on its merits.

The defendant shall be t ried within the scopes of indictment presented by the prosecutor. The problems arise where it is established that the factual circumstances differ from those stated or the incriminated crime requires different qualification. In this case factual and legal deviation from the indictment takes place and this complicates decision making in judicial practice.

Purpose of the article is to analyze legal outcomes of deviation from the indictment and development of practical recommendations.

Key words: *charge, deviation from indictment, action, In the procedural sense, action in the material sense, re-qualification, principle of correspondence.*

1. Introduction

Subject of trial on the merits in criminal procedure is determined by the prosecutor's decree on charge. Regarding that onus of proof rests on the prosecution party, the prosecutor has to prove, within the scopes of the charge, that the defendant has committed the incriminated crime. Normally, in adversarial criminal trial the judge shall not go beyond the subject of trial and make final decision within the scopes of the charge. Charge includes, together with the qualification of crime, the factual circumstances of incriminated action, i.e. the facts and circumstances that, according to the prosecution's evaluation, is the specific crime[1]. In the judicial practice problem shows up where there is a discrepancy between the circumstances stated by the prosecution and factual circumstances of action established as a result of examination of evidences by the court, i.e. where factual deviation from the charge takes place. This is the case where the court establishes that the defendant has committed the crime he/she is tried for but the method, time, place of object damaged by the crime is different. The cases where the legal deviation from the charge at trial takes place as well, in particular, where the court establishes that the crime elements are different from those specified in the charge. The question is, whether the judge may go beyond the charge scopes and adjudge guilty or re-qualify the stated action and adjudge the defendant for committing of crime not specified in the charge.

In relation to the above issue practice formed in Georgia is non-uniform. Some judges, in case of deviation from the charge, avoid re-determining of the crime as less severe one and adopt acquit-

* Doctor of Law, Associated Professor, TSU Faculty of Law.

1 Supreme Court of Georgia: Guidance on the form of judgment on criminal case, its reasonability and adequate wording. Tbilisi, 2015, 52 (in Georgian).

tal judgment[2]. In addition, there are the decisions where the judge does not agree with the accusations of the prosecution party and finds the defendant guilty of committing the similar crime in qualitative and material-legal respect and of similar gravity (or lesser offence)[3]. Moreover, in judicial practice there are the cases where the defendant was acquitted with respect of the charged crime and was adjudged for qualitatively and material-legally different crime. For example, the defendant was accused of extortion, committed by the group, for the purpose of gaining significant property, more than once, as well as unlawful deprivation of liberty, for the purpose of facilitation of committing of the other crime, in collusion with the group, against two persons, with threat of violence dangerous for their health and lives. The court acquitted the defendant with respect of all accusations and redefined the crime as the one provided by Article 376 of Criminal Code of Georgia. The judge stated in the judgment that based on the evidences examined at the hearing only the fact of presence of the accused at the location of crime was established reliably, that the crime of great severity has taken place in the defendant's presence and that he/she had reasonable time to inform police about the crime and he/she failed to do so and that there were no reliable evidences provided by the prosecution at the trial that the defendant has participated, in any form, in the alleged crime and hence no such evidences were examined[4].

This work is an attempt of defining of the function of indictment and offers the reader solutions of this problem in some cases of violation from the indictment.

2. Indictment and its Function

Effective criminal procedure legislation, unlike the previous one, does not provide for such procedural document as an "indictment". Such document was issued by the prosecutor, in case of existence of the relevant basis, upon completion of preliminary investigation and delivered a copy thereof to the defendant (Section 7, Article 24 of the earlier version of Criminal Procedure Code of Georgia). Article 409 of the same Code provided definition and structure of the bill of indictment.

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[2] Adequate example is judgment of 11 February 2013 of Criminal Department of Mtskheta District Court where the judge has acquitted a person accused for intentional homicide of two or more persons, though the defendant's action apparently included elements of using of excessive force in self-defense/ Later this judgment was cancelled by the decision of 14 May 2013 №1/B-117-13 of Tbilisi Court of Appeal and the defendant was found guilty of committing of offence according to Article 122 of Criminal Code of Georgia (Intentional grave or less grave bodily injury by exceeding the limits of self-defense).

[3] See Judgment of 23 March 2007 on case №1/7129 of Tbilisi City Court, where the court has redefined the action, in particular, acquitted the defendant in relation to the alleged robbery and instead, found him guilty of fraud; see also judgment of 05 May 2015 of Tbilisi City Court on case №1/6856-14, where the judge has redefined the alleged crime provided for by Article 108 of Georgian Criminal Code (intentional homicide) as the offence specified in Article 113 of Criminal Code of Georgia (murder by exceeding the limits of self-defense) as the court regarded the prosecution failed to provide clear, persuasive and concerted set of evidences reliably demonstrating that the defendant has committed intentional homicide. At the same time, the court made conclusion that the consistent evidences excluding any doubt, examined at hearing reliably establishes that the defendant has committed homicide exceeding the limits of self-defense.

[4] See judgment of 11 August 2014 on case №1/6720-13 of Tbilisi City Court; see also similar judgment of 11 August 2014 on case №1/1182-14 of Tbilisi City Court.

Indictment included brief written description of the imputed crime and the basis for bringing of the suspect to the court. The latter document, together with the defendant's identity and legal determination of the crime committed by him/her, contained the circumstances of crime: place, time, method, motif, outcomes, list of evidences of the defendant's guilt, aggravating and mitigating factors. Before completion of preliminary investigation and issuance of the bill of indictment the formal procedural document about the charge was the resolution on bringing of a person to court as the defendant, issued by the investigator, with the prosecutor's approval or by the prosecutor (Article 282 of old Criminal Procedure Code). Such resolution should have contained the identity of the defendant, formulation of indictment, i.e. description of the incriminated action, specifying the place, time, method, means of crime, as well as the outcomes of committing of such action, evidences sufficient for reasonable belief that the mentioned crime was committed by the person in question and the article, section and subsection of criminal procedure code providing for such crime. Unlike the bill of indictment the resolution on bringing to court of a person as a defendant did not include the complete list of evidences. The above prosecutor's decision relied upon certain set of evidences sufficient for reasonable belief that a person has committed the crime while the bill of indictment was issued only if the prosecutor regarded that there was the basis for submission of the case to the court and its trial on the merits. Though a person was brought to the court as a defendant, the prosecutor was entitled to return the case to the investigator for additional investigation, as well as terminate criminal persecution (Article 413 of previously effective criminal procedure code). Thus, the bill of indictment provided full description of the evidences collected as a result of performed preliminary investigation and circumstances significant for the criminal case and such indictment, together with the case, was submitted to the court for hearing on merits and the court studied the case information and performed judicial inquiry.

As we are well aware, the effective criminal procedure legislation is based on the pure adversarial principle, where the judge considering the case on merits is not equipped with the investigation, instruction (inquisition) authorities. Before the hearing on merits, the judge is unaware in the evidences collected as a result of investigation. In addition, he/she does not actively study the evidences whether independently or with participation of the parties. He/she makes final decision on guilt of the defendant or absence thereof on the basis of assessment of the evidences gained, submitted to the court and investigated by the parties and does not perform the judicial investigation. Thus, in the conditions of adversarial criminal trial, such procedural document as the bill of indictment is unacceptable and moreover, it is dangerous, in the sense that it can impact neutrality of the judge providing trial on merits and therefore, in accordance with the effective legislation, only prosecutor's resolution on recognition of a person as a defendant and pre-trial list of evidences submitted by the parties and approved by the judge (including the list of evidences that are not disputable by the parties) shall be sent to the judge. Thus, in Georgia, in contemporary criminal procedure the main document determining the guilt is a decree adopted by the prosecutor and the indictment as such could be interpreted in both, formal and material sense. In formal sense the indictment is a prosecutor's procedural decision on commencement of a person's criminal prosecution and bringing of a person to the court as a defendant. In material sense, the indictment is information on incriminated

action (actions), i.e. information about ***"action in procedural sense"***. For more clarity, it is significant to distinguish between ***"action in procedural sense"*** and ***"action in material sense"***. Action in procedural sense implies the historical event described in the indictment and differing from the other similar actions with some details and describing the factual circumstances of committing certain crime(s) by the defendant[5]. In the procedural sense, single action includes the set of actions, specified in the indictment, relevant with respect of the criminal law that can be assessed legally as a specific crime (i.e. action in material sense) or crimes. In procedural context, for the action it is characteristic that the components of a crime (crimes) are not static, as these may be modified or changed by the court's assessment. The court is not limited to the legal assessment of the action specified by the prosecution. The court is authorized to change the crime category for the defendant's benefit and adjudge a person for less severe crime, if the elements of the crime specified in the indictment contain elements of such crime. Thus, the court assesses not the *"action in material sense"* but rather ***"action in procedural sense"*** that fully determines the subject of procedure.

As for the function of prosecution, primarily, it is informing of the defendant on the substance and bases of the charge. Thus, it is one of significant instruments for informing of the defendant. In addition, as specified above, the indictment determines the subject and scopes of trial on merits of a criminal case. It would be reasonable to provide more detailed discussion of each of the functions of indictment.

2.1. Informing of the Defendant

In accordance with Subsection "a", Section 3, Article 6 of the European Convention on Human Rights, everyone, charged with criminal offence shall be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him. In accordance with Section 1, Article 38 of Georgian Criminal Procedure Code, Upon detention, or if a person is not detained, immediately upon his/her recognition as the accused, also before any interrogation, the accused shall be notified, in the language that he/she understands, of the offence defined by the Criminal Code of Georgia in the commission of which he/she is reasonably suspected. The accused shall be handed over a copy of his/her detention report, or if he/she is not detained, – a copy of a decree to prosecute as the accused. Thus, both, European Convention on Human Rights and effective criminal procedure law obligate the prosecutor to notify the accused about charge against him/her at the earliest stage of legal procedures to allow him/her proper protection at the trial. As mentioned above, the copy of resolution on recognition as an accused specifying the incriminated action, place, time, method, means, instrument of committing thereof, as well as the outcomes of such action shall be delivered to a person recognized as an accused. Decree on charge shall specify also the evidences collected as a result of investigation, sufficient for reasonable belief that the mentioned crime was committed by the accused. In addition, the decree shall specify the

[5] For more details see: *Kühne H.-H.*, Starfprozessrecht, Eine systematische Darstellung des deutschen und europäischen Strafverfahrensrechts, 8. Auflage, Heidelberg 2010, 396-397; *Roxin C., Schünemann B.*, Strafverfahrensrecht, 26. Auflage, München 2009, 128-129; *Beulke W.*, Strafprozessrecht, 11. Auflage, Heidelberg u.a. 2010, 331-332; *Bauer W.*, Der prozessuale Tatbegriff, NStZ 2003, 174.

the article, paragraph and sub-paragraph of the Criminal Code of Georgia that refers to that crime (Paragraph 3, Article 169 of Criminal Procedure Code of Georgia). Hence, the decree on indictment is the primary means for notification of the accused about the charge. In addition, it should be taken into consideration that the decree on indictment is not an only formal source of information about accusation. In addition, the defendant may get familiarized with the evidences collected by the prosecution and he/she may obtain the copies of evidences and materials of criminal case (Paragraph 13, Article 38 of Criminal Procedure Code of Georgia). In addition, the accused is entitled to get familiarized with the information that the prosecution intends to submit to the court as the evidence. The accused may get familiarized with all acquitting evidences (Par. 1, Article 83, CPCG). Nevertheless, the prosecutor's decree on accusation still remains the primary instrument for the defendant's notification and the most important procedural document, in this respect.

To ensure that the decree of indictment performed the function of informing, it shall provide full information about the charge to the accused. In addition, it should be taken into consideration that excessive detailing of the indictment and thorough description of the factual circumstances may complicate proving for prosecution at the trial. If the prosecution fails to properly prove all circumstances specified in the decree of indictment, this may result in acquitting of the person who has committed the crime by the court. Such risk is even higher in case of purely adversarial criminal procedure, where the court does not perform the investigation and study the evidences independently. Therefore, for the purely adversarial procedures, less detailed version of the decree on indictment is adopted. Such decree shall contain at least, so called "*obligatory elements*" and "*factual characteristics*"[6].

Requirement of the "*obligatory elements*" implies that the decree on indictment shall contain reference to the factual circumstances relevant for existence of the key crime elements. In addition, the decree of indictment shall contain information about the facts that demonstrate the defendant's participation in the specific crime[7]. Hence, specifying that the defendant has committed the action of theft, the crime, specified by Par. 1, Art. 177 of Criminal Code of Georgia is insufficient. The decree shall contain the facts of committing the elements of the offence specified in Par. 1, Art. 177 of Criminal Code of Georgia (factual circumstances demonstrating committing of the objective and subjective elements of the action).

Information dealing with the key elements of the corpus delicti of incriminated offence provided in the decree on indictment shall provide sufficient details and this is the significant requirement of the "factual characteristics" of the indictment[8]. The prosecution shall specify the factual circumstances in the indictment so that it was possible to determine not only the specific elements of

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[6] Given criteria of accusation were developed by the judicial law of US Federal Supreme Court. See *Geisler M.*, Die Ausgestaltung des Anklageprinzips nach amerikanischem Strafverfahrens- und Verfassungsrecht, Berlin 1998, 59.

[7] See decision of US Federal Supreme Court on case: *Hamling v. United States*, 418 U.S. 87 (117-118); *United States v. Pearce*, 275 F.2d 318, 324 (1960), *United States v. Carll*, 105 U.S. 611, 23 L Ed. 1135.

[8] See decision of US Federal Supreme Court on case: *Russel v. United states*, 369 U.S. 749, 82 S.Ct. 1038, 8 L Ed. 2d 240 (1962); *McNamara R.B.,* Constitutional Limitations on Criminal Procedure, Sephards/McGraw-Hill, Colorado Springs (Colorado) 1982, 110-113.

the offence but to find out, which actions of the defendant are subject to trial. For example, in case of prosecution for the crime provided for by Article 108, to ensure that the decree performs the function of informing, it would not be sufficient to state that the defendant has intentionally killed his neighbor for vengeance. Factual circumstances shall be detailed so that the defendant was able to protect himself properly. Therefore, the decree on indictment shall specify the location, time of the crime, subject of crime and the identity of the victim. Circumstances characteristic for the incriminated action shall be formulated so that accurate individualization was possible and the danger of confusion with the other crime elements was excluded[9]. In addition, it should be taken into consideration that there is no need to specify all details and factual circumstances characterizing the actions. The main thing is that the contents of the decree on indictment provided to the defendant sufficient information of against what he/she will have to protect himself/herself at the trial.

2.2. Identification of the Subject and Scopes of Trial on Merits

Regarding the principles of charging in the criminal procedure, the court considers the criminal case only within the scopes of formulation specified in the decree of indictment[10]. The court is not authorized to discuss such other action committed by the defendant that is not contained in the decree of indictment. Hence, one of the key functions of indictment is stating of the subject and scopes of hearing on merits. The subject of trial basically consists of two elements. In particular, these are the subjective and objective elements. Subjective element of the indictment covers the defendant's person, in relation to whom the final court decision shall be made. The court may make decision on criminal responsibility of a defendant specified in the decree of indictment only. Objective element of the indictment covers the action committed by the defendant against the law. The legally effective court's judgment shall confirm or reject this. These two elements of the indictment are closely linked with one another as the criminal action to be considered by the court is always an event related with the specific person. Thus, at the trial, only the "*action in the procedural sense*" specified in the indictment shall be considered by the court, with participation of the parties.

Defining of the subject of trial has one more implication. As the decree on indictment provides individualization of the incriminated action to be considered by the court and the final decision of the court is in relation to this action, the effective court decision excludes criminal prosecution or trial of the acquitted or the convict for the same action (in the procedural sense) in the future. This results from the constitutional principle of prohibition of the repeated conviction (Par. 4, Art. 42 of the Constitution of Georgia). Thus, one and the same subject of trial, after the decision made by the

[9] See: *Jakobs G.*, Probleme der Wahlfeststellung, GA 1971, 257, 258. *Puppe I.,* Die Individualisierung der Tat in Anklageschrift und Bußgeldbescheid und ihre nachträgliche Korrigierbarkeit, NStZ 1982, 230.

[10] See: *Laliashvili T.* Criminal Procedure of Georgia, General Part, Tbilisi, 2015, 103 (in Georgian); Supreme Court of Georgia, Supreme Court of Georgia: Guidance on the form of judgment on criminal case, its reasonability and adequate wording. Tbilisi, 2015, 52; *Tumanishvili G.,* Criminal Procedure, Overview of General Part, Tbilisi, 2014, 67 (in Georgian).

court of final instance cannot be subject of the repeated trial (exclusion is revision of the sentence upon discovery of the new facts).

3. Factual and Legal Deviation from the Actions Stated in the Indictment

In criminal procedure of the Continental Europe, where so called instruction-investigation principle is adopted, the judge, within his/her competence, performs the judicial investigation and the law entitles him/her to make factual and legal amendments to the indictment, based on the outcomes of investigation of the evidences. Hence, within the scopes of criminal procedure of the above system the outcome may differ from that of the factual and legal circumstances stated in the indictment as a result of examination of evidences at the hearing on merits. In such case, the judge, in compliance with the procedure provided for by the law, makes corrections to the indictment and make condemnatory judgment. Unlike this, in the purely adversarial procedure the "***principle of correspondence***" is adopted, implying that to pass the condemnatory judgment, the factual and legal circumstances stated in the decree of indictment shall correspond to the outcomes of investigation of evidences. On one hand, the mentioned principle ensures proper protection of the defendant. In particular, the defense party shall be sure that defense strategy shall cover only on the basis and within the scopes of the indictment. On the other hand, the accused shall be protected from the unexpected trial on the basis of factual and legal circumstances different from those derived from the hearing on merits. In addition, the principle of correspondence ensures trial of the defendant only within the scopes of the indictment stated by the prosecution to protect him/her from the repeated criminal prosecution for one and the same crime. It should be noted that at the earlier stages of development of the adversarial judicial procedures, to adopt the condemnatory judgment the judge required from the prosecution to prove at the trial each word of the circumstances specified in the indictment with grammatical accuracy. It is notable that the judge requested not only coincidence of the circumstances relevant for existence of the elements of crime specified in the indictment but also correspondence to the outcomes of investigation of the evidences of those facts that normally are not of legal significance for establishing of guilt. In this respect, the example is one of US cases *State v. Harris*, made in 1841. A person was brought to the court for theft of a pair of shoes. The court of the first instance made condemnatory judgment and this judgment was later cancelled by the court of superior instance. The court stated that the reason of cancellation was the fact that the court of the first instance could not prove the fact of theft of a pair of shows by the defendant as both shoes were for one and the same foot and they did not compose a pair, as specified in the indictment. Similar decision was made in the case *Brown v. Peoble (1872)*, where a person was accused for faking of the signature of a person named "Otha Carr". At the hearing on merits it was established that the falsified signature was of "Oatha Carr". Though the difference was only one letter, the condemnatory judgment was not adopted as there was no correspondence between the factual circumstances stated in the bill of indictment and the outcomes of examination of evidences. Such interpretation of the principle of correspondence results from the perception of the adversarial judicial procedures in that period where the criminal procedure was identified with the sports competition requiring strict com-

pliance with the game rules and no deviation should remain without punishment[11]. With time, the approach to the principle of correspondence has changed and currently, in adversarial judicial procedures it is not applied so strictly. Currently, in the countries of general law, the courts' attitude towards identification of the circumstances different from those stated in the bill of indictment as a result of examination of evidences is more liberal. Currently dominates so called functional approach to the principle of correspondence established in 1935 by the decision of US Federal Supreme Court in the decision on case of *Berger v. United States*, where the matter was as follows: Berger, together with seven other persons, was accused for planning of distribution of the false money. At hearing it turned out that actually two episodes of preparation for the crime have taken place. And Berger has participated in one of them only. Consequently, Berger was recognized guilty by the court of first instance for participation in one of two episodes of crime. The defense party appealed against the court decision to the Supreme Court and required cancellation of the condemnatory judgment, stating that the court was not able to fully prove the crime stated in the bill of indictment, failing to prove that Berger participated in both episodes of the crime. Factual circumstances specified in the bill of indictment did not fully coincide with the facts revealed at the hearing on merits. The defense party regarded that the court of superior instance would acquit the accused. Federal Supreme Court did not share the legal considerations of the party of defense and stated that "***Discrepancy between the circumstances stated by the prosecution and facts established at trial per se does not exclude condemnatory judgment. Condemnatory judgment shall be excluded where the fundamental rights of the accused are violated by deviation from the indictment. Violation of such rights takes place where the indictment has lost the function of "informing" and "protecting" of the defendant. Hence violation of the defendant's fundamental rights shall be established, on one hand, where to the subject of consideration on merits are added such factual circumstances other than the indictment comprising unexpected event for the accused (the accused was not informed about it)or prevents his/her proper defense. On the other hand, the defendant's fundamental rights will be violated where the defendant, in the ongoing process, in case of taking of the new factual circumstances into consideration, would not be able to prove the reality other than provided for by the initial indictment".***[12] In the above case, Federal Supreme Court regarded that deviation from the indictment was insignificant and it have not resulted in violation of the defendant's human rights. Significance of deviation from the indictment depends, in each specific case, on assessment of each circumstance. For example, deviation from the indictment, where as a result of examination of evidences at the trial reveals slight difference in time of committing of the crime is not regarded as significant deviation. If the indictment stated that the crime was committed on 1st September but at the trial it was established that the crime was committed on 3rd September, such deviation does not violate the defendant's fundamental rights and does not deprive the indictment the functions of "informing" and "protection". Though, deviation will be significant if the

[11] See *Pound R.,* The Causes of Popular Dissatisfaction With the Administration of Justice, 29 Reports of the ABA, 1905, 395, 406.

[12] See decision of US Federal Supreme Court on case: *Berger v. United States*, 295 U.S. 78, 55 S.Ct. 629, 79 L.Ed. 1314 (1935).

indictment states that the crime was committed in 2010 while examination of evidences at trial shows that the defendant has committed the incriminated offence in 2013 and not in 2010. It is also recognized that insignificant deviations in relation to the location of the crime will not be regarded as significant deviation from the indictment[13]. The same approach dominates with respect of the other characteristics of the objective elements of the action, as there is no requirement that the circumstances specified in the bill of indictment were precisely confirmed at trial on merits. It is sufficient that the circumstances stated in the indictment were confirmed at least with qualitative significance. For example, if the indictment specified the fact of distribution of the narcotic substance "cocaine" while at the trial it was proved that the defendant was distributing narcotic substance "heroine", this cannot be regarded as significant deviation from the indictment and this does not exclude condemnatory judgment[14]. Unlike the above example, the deviation from the indictment is substantial where examination of evidences at the trial opens the factual circumstances that apparently change the content of the incriminated action stated in the indictment, without even a hint in the bill of indictment. In this respect, one of the decisions of US Federal Supreme Court is of interest[15], where a person has allegedly received certain amount as a bribe from the organization and at the trial it turned out that the defendant had not taken any bribe, in reality, the organization was paying life insurance premium to the insurance company for the benefit of the defendant. The court regarded that such deviation is a substantial one.

As mentioned, requirement of so called accusation principle operating in the criminal procedure is to try the defendant for the crime stated in the bill of indictment. The prosecutor shall persuade the court, based on the evidences and their examination that the defendant has committed the incriminated offence. Otherwise, the defendant shall be acquitted in relation to the accusation. Even if instead of incriminated offence committing of such other crime is evidenced at the trial that is categorized differently from the one initially stated in the indictment, the defendant normally shall be acquitted, unless the crime stated in the indictment contain elements of the offence of relatively less severity that are proved at the trial and at the same time, the crime proved at the trial is not part of the "action in procedural sense". Thus, legal deviation from the action stated by the indictment is mostly substantial deviation and at the same time, circumstance preventing condemnatory judgment. For example, if the defendant is accused of intentional damaging of the other person's property but, as a result of examination of the evidences, the fact of robbery is proved, due to substantial deviation from the indictment imposing criminal responsibility on him/her shall be excluded. The situation is different if the defendant is accused of intentional homicide in aggravating circumstances and at the trial intentional homicide without aggravating circumstances is proved. To prevent unjust acquittal, the criminal procedure legislation does not restrict the judges in making condemnatory judgments and recognition of the person guilty in committing of intentional homicide. Deviation from the in-

[13] See also: *Herrick P.F.*, Underhill's Criminal Evidence, A Treatise on the Law of Criminal Evidence, The Bobbs-Merrill Company Inc., Indianapolis, New Yourk, 6th ed., 1973, 88, 89.

[14] See decisions of US Federal Supreme Court on case: *United States v. Laite*, 418 F.2d 576 (1969); *United States v. Knuckles*, 581 F.2d 305 (1978); *United States v. Schrenzel*, 462 F.2d 765 (1972); *United States v. Sheikh*, 654 F.2d 1057 (1981).

[15] *United States v. Lippi*, 193 F. Supp. 441 (1961).

dictment and impossibility of proving that the defendant has committed homicide in the aggravating circumstances do not prevent recognition of the latter's guilt and his/her trial as the intentional homicide proved by the court (key elements of intentional homicide) includes all elements of qualified corpus delicti. Thus, in the given case one should start from the assumption that a person is automatically accused of committing of the crime specified in Article 108, together with the one specified in Article 109 of Georgian Criminal Code. It is impossible to commit homicide in the aggravating circumstances specified in Article 109 of Georgian Criminal Code so that not all key elements of the crime specified in Article 108 were completed. The situation is the same where the case deals with the accused completed and judicially evidenced uncompleted crime. For example, if a person is accused of the intentional homicide but at the trial the fact of death resulting from the defendant's actions is not confirmed and only attempted intentional homicide is evidenced, such deviation from the indictment will not cause acquittal. It should be taken into consideration that the accused completed crime automatically includes the wrongness content of the same but uncompleted crime, attempted crime or the preparation of the one is the punishable stage of the crime and the crime cannot be completed so that the action did not achieve the stage of attempt. Hence, if the accused preparation of completed crime or the attempted one is punishable according to the criminal code[16], and the court fails to prove completed crime, proved attempt of committing of the same crime shall be used subsidiarily for issuance of condemnatory judgment[17].

The issue, whether the elements of the specific crime are completed together with the elements of the crime accused and hence, to what extent such accusation includes elements of the said crime, shall be established through analysis of each case. Together with the elements of the accused crime the elements of less severe crime will always take place simultaneously, where, by exclusion of the elements of such latter crime would exclude the elements of the incriminated offence.

In addition to the above, both, Continental European and Anglo-American judicial practice recognizes that even in case of proving of the independent crime elements different from the crime specified in the indictment in material – criminal law respect, the judge is authorized to issue the condemnatory judgment if the former action is ***comparable and equivalent to the accused action, in legal-ethical and psychological respects***[18]**.** Legal-ethical comparability of the action other than the indictment implies approximately equal severity with the incriminated action and morally and legally comparable assessment based on general sense of justice. Additionally, for legal-ethical comparability it is significant that the action proved at the trial impinged the same or substantially similar legal values. Psychological comparability requires the defendant's mental attitude that, to certain extent, is similar to the incriminated actions proved as a result of examination of the evidences. Such mental attitude exists where the defendant's attitude and motivation to the legal values are of similar

[16] *Simpson v. United States*, 195 F.2d 721, 723 (1972).

[17] On subsidiary betweenn the crimes see: *Wessels J., Beulke W*., Strafrecht Allgebeiner Teil, Straftat und ihr Aufbau, 37. Auflage, Heidelberg 2007, 307.

[18] See. *Wessels J., Beulke W*., Strafrecht Allgebeiner Teil, Straftat und ihr Aufbau, 37. Auflage, Heidelberg 2007, 315; *State v. Keeler*, 710 P.2d 1279, 238 Kan. 358; *United State v. Lovely*, 77 F. Supp. 619, 621 (1948).

nature[19]. For example, the case where a person is accused of theft (Article 117 of Georgian Criminal Code) though this was not proved at the trial and instead, it was evidenced that he / she has knowledgeably purchased the other person's movable property that was gained in breach of the law (Article 186 of Georgian Criminal Code). In such case it is recognized that both actions are mutually comparable and equivalent in legal – ethical and psychological respect. In addition, encroachment of one and the same legal value (individualized and specified exactly by the indictment) takes place[20].

Unlike the above cases, if at the trial, committing of the crime heavier than incriminated offence is proved, the judge is not a person authorized to adjudge the defendant for the heavier offence.

4. Conclusion

In conclusion, it should be noted that violation from the indictment, as such, does not restrict the judge in making condemnatory judgment if the violation is not substantial and it does not deprive the bill of indictment the informing and protection functions. The judge may re-define the crime at the trial to the other, relatively less severe offence, elements of which are contained in the crime accused and also if elements of such crime stay within the scopes of "action in the procedural sense" stated in the indictment. It is significant that as a result of crime re-qualification the defendant was not sentenced to more severe punishment than stated by the indictment.

[19] Compare: *Wessels J., Beulke W*., Strafrecht Allgebeiner Teil, Straftat und ihr Aufbau, 37. Auflage, Heidelberg 2007, 315.

[20] See also: *Wolter J.*, Tatidentiät und Tatumgestaltung im Strafprozeß – Zur Begründung eines normativ-funktionalen Tatbegriffs-, Wahrheit und Gerechtigkeit im Strafverfahren, Fesgabe für Karl Peters aus Anlass seines 80. Geburtstages, *Wasserburg K., Haddenhorst W*. (Hrsg.), Heidelberg 1984, 144-145.

Giorgi Dgebuadze[*]

Criminal Responsibility of the Superior for Omission in International Criminal Law

criminal responsibility of the superior for the crimes committed by their subordinates represents one of the key issues for the criminal law. For the criminalization of omission of political and military leaders, the criminal law requires the effective notion. In the article the author analysis the concept on superior (command) responsibility developed by the international criminal law, which makes it possible to punish the omission conditioned in absence of direct intention from the side of superiors. According to the author, it fills up the gap, which is not well covered or "left open" by other approbated modes of individual responsibility.

Key words: *individual responsibility, omission of superior, recklessness, negligence, international criminal law.*

I. Introduction

One of the main goals of criminal law is to criminalize omission of civilian (political) and military superiors. This issue is especially important in XXI century – development of modern technologies and their effective utilization facilitates the investigation of crimes as well as destruction of important evidences. Often, the "mechanism" useful for the criminal law is used against it and the criminal law is forced to act based on objective (material) circumstances, due to the destruction of evidences, reflecting the subjective (mental) circumstances. In the event of impossibility to prove the omission conditioned by the direct intent, for the criminal law the key issue is the punishability of "objectively existing omission".

International criminal law[1] is working comprehensively on the issue of criminal responsibility of the superiors for omission. In particular, international criminal courts apply the *superior (command) responsibility* concept for establishing the individual responsibility of superiors; The concept considers criminal prosecution over military and civilian persons, for failure to implement measures preventing international crimes, inappropriate control, authority and command. Above mentioned concept makes the punishment of omission of superiors, conditioned without direct intent.

International criminal law requires superior responsibility doctrine for achieving higher effectiveness of criminal prosecution of political and military leaders,[2] namely, in the event of high widespread and systemic crimes, where the officials consciously demonstrates omission with the purpose "not to leave some traces", in order to justify himself later and to prove that he/she was not guilty for

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[*] Assistant of Criminal Law, TSU Faculty of Law.

[1] On notion of international criminal law, see *Turava M.,* Fundamentals of International Criminal Law, Tbilisi, 2015, 1-16 (in Georgian); *Kreß C.,* International Criminal Law, Max Planck Encyclopedia of Public International Law, Vol. V, Oxford University Press, Oxford, 2013, 717-732.

[2] Compare *Olasolo H.,* The Criminal Responsibility of Senior Political and Military Leaders as Principals to International Crimes, Hart, Oxford and Portland, Oregon, 2009, 82-109.

the commission of a crime. If it is not possible to prove direct intention of superior for omission, based on perpetration (mostly of indirect perpetration) concept, superior responsibility doctrine ensures punishability of "objectively existing omission".

According to the recent cases of international criminal court (hereinafter referred to as *ICC)*, role of superior's individual responsibility concept is increasing, due to the establishment of strict standard for direct intent in the Article 30[3] of the *Rome Statute.*[4] Namely, in case of crime committed without direct intention, the notion of superior responsibility remains the "only mean" for criminal prosecution of superior.

ICC establishes material and mental elements of superior responsibility doctrine based on the case law of *ad hoc* tribunals. If the objective of the well known responsibility modes from the practice of international criminal courts, as *joint criminal enterprise* (hereinafter referred to as – *JCE*) *co-perpetration, indirect perpetration* and *indirect co-perpetration* – is mostly to prosecute individuals for commission of crimes via the action and direct intent, superior responsibility doctrine, literally, establishes punishments for crimes committed by the way of omission and without direct

[3] Article 30 of the *Rome Statute:*
"1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.
2. For the purposes of this article, a person has intent where:
(a) In relation to conduct, that person means to engage in the conduct;
(b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.
3. For the purposes of this article, "knowledge" means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. "Know" and "knowingly" shall be construed accordingly".

[4] Current case law of *ICC,* in the mental element of Article 30 of *Rome Statute* contains only *dolus directus in the first degree* [first alternative of Article 30(2)(b)] and *dolus directus in the second degree* [second alternative of Article 30(2)(b)].
Initially *ICC* Pre-Trial Chamber for *Prosecutor v. Lubanga* case attempted to read the mental element of *dolus eventualis* in the Article 30(2)(b) of the *Rome Statute,* namely, when in relation to a consequence a person has intent "that it will occur in the ordinary course of events". See *Prosecutor v. Thomas Lubanga Dyilo,* Decision on the Confirmation of Charges (ICC-01/04-01/06), Pre-Trial Chamber I, 29 January 2007, §349-365. Such interpretation is not without grounds. Compare *Jain N.,* Perpetrators and Accessories in International Criminal Law, Individual Modes of Responsibility for Collective Crimes, Hart, Oxford, 2014, 90. Later, Pre-Trial Chamber for *Prosecutor v. Bemba* case, changed the above-mentioned interpretation by the rejection of *dolus eventualis.* With the literal interpretation *consequence will occur,* in its view, means *inevitably expected.* According to the same interpretation, if we read the second part of the sentence – "in the ordinary course of events", namely, "consequence will occur in the ordinary course of events", it is clear that the necessary standard for the consequence is close to certainty. The Chamber defined this standard, as *virtual certainty* or *practical certainty,* that consequence would result in case of exclusion of unforeseen and unexpected "intervention", which would prevent the consequences. See *Prosecutor v. Jean-Pierre Bemba Gombo,* Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges (ICC-01/05-01/08), Pre-Trial Chamber II, 15 June 2009, §362, 341-371. *ICC* Trial Chamber for *Prosecutor v. Katanga* case supported the above mentioned narrow interpretation of intent via Judgment of 2014 year. See *Prosecutor v. Germain Katanga,* Judgment Pursuant to Article 74 of the Statute (ICC-01/04-01/07), Trial Chamber II, 7 March 2014, §770-779. The same approach was applied by *ICC* Appeal Chamber for *Prosecutor v. Lubanga* case, by which, at this stage, left the mental element of *dolus eventualis* outside the Article 30. See *Prosecutor v. Thomas Lubanga Dyilo,* Judgment on the Appeal of Mr. Thomas Lubanga Dyilo Against his Conviction (ICC-01/04-01/06 A5), Appeals Chamber, 1 December 2014, §441-452. On mental element in *Rome Statute,* see *Badar M., Porro S.,* 'Rethinking the Mental Elements in the Jurisprudence of the ICC', in *Stahn G.* (ed.), The Law and Practice of the International Criminal Court, Oxford University Press, Oxford, 2015, 649-668.

intent. It can be stated that it supplements the field which is not well coped or "left open" by perpetration concept.

Doctrine on superior responsibility punishes superior for committing the international crime – on the one hand, when he/she consciously "participates" and cannot be punished by means of other responsibility forms, or, secondly, "participates" with the lower mental element – according to the Georgian criminal law terminology, if not via the indirect intent then due to the conscious or unconscious negligent.

Objective of the Article is to analyze the newest concept of superior responsibility based on the *ICC* Statute. In particular, in the process of analysis of Article 28 of the *Rome Statute, ICC* practice, it is important to understand, which material and mental elements, unlike the principal and accessorial liability, shall it satisfy for qualification. Based on *ICC* court practice, namely, based on *Prosecutor v. Jean-Pierre Bemba Gombo* case and via the parallels with the case law of *ad hoc* tribunals, we shall discuss the circumstances to be satisfied and its legal evaluation.

For the achievement of set objective, the following issues shall be studied: notion of *command responsibility* or *superior responsibility*; grounds for establishing superior's responsibility in accordance with *ad hoc* tribunals; material elements considered under the *Rome Statute* for superior's responsibility, namely, groundings considered for responsibility of military and civilian superiors; who could be military commander, person effectively acting as a military commander and civilian superior; what are the differences between them; notion of effective control and elements of its existence; importance of proving the causation between the committed crime and failure to exercise control properly over the subordinates; mental elements of superior responsibility, such as knowledge, "should have known", negligence, "had reason to know", "consciously disregarded information" and recklessness[5]; standards of duty to carry out preventive, repressive and necessary and reasonable measures; and finally, based on the conducted research, the concept on superior responsibility must be summarized; in particular, in competition with the responsibilities considered for the perpetration of crime, which responsibility shall be given priority – Article 28 or Article 25(3)(a) of the *Rome Statute;* how is it different from other modes of individual responsibility and to which form of participation in crime does it belong?

II. Notion of Superior Responsibility

The concept on superior responsibility was developed in the international case law in XX century, namely after the end of Second World War.[6] The doctrine was well applied in the international criminal tribunals for the former Yugoslavia (hereinafter referred to as – *ICTY*) and Rwanda (herein-

[5] On the Georgian equivalent of *recklessness,* see *Turava M.,* The Concept of Crime, Tbilisi, 2011, 289 (in Georgian).

[6] Historical overview of development of superior responsibility, see *Meloni C.,* Command Responsibility in International Criminal Law, T.M.C. Asser Press, The Hague, 2010, 33-76; Also, see *Mettraux G.,* The Law of Command Responsibility, Cambridge University Press, Cambridge, 2009, 3-20; *Arnold R., Triffterer O.,* 'Responsibility of Commanders and other Superiors (Article 28)', in *Triffterer O.* (ed.), Commentary on the Rome Statute of the International Criminal Court, 2nd ed., C.H.Beck.hart.Nomos., München, 2008, 799 *et seq*.

after referred to as – *ICTR*)[7] and even today, attempts to establish its place in the current activities of *ICC.*

Mode of superior (command) responsibility, similar to *JCE*[8], is concept developed in an "original" manner by the international criminal law, "example" of which is not encountered in the national legal system.[9] It represents *sui generis*, separate form of individual responsibility. Despite the fact that the concept is independent from the modes of responsibility indicated in the Article 25 of the *Rome Statute* and it is provided in the Article 28,[10] form of superior responsibility is organically part of Article 25.

The Statutory and doctrinal concept of superior responsibility is simple. Doctrine considers criminal prosecution for the military and civilian persons for failure to take all preventive, repressive and necessary and reasonable measures, for inappropriate control, authority and command whereas in connection with international crimes we can often identify some type "engagement" and "silent support", omission from the side of superior.[11]

In the event of failure to carry of measures by the military and civilian superiors for the prevention of international crimes, inappropriate control, authority and command, in the view of prosecution, the superior is responsible as he/she has not prevented co-participation in the crime (for example: *aiding and abetting),* participation of subordinates in the *JCE* and etc.[12]

In order to analyze superior responsibility doctrine, it is important to discuss *Prosecutor v. Jean-Pierre Bemba Gombo* case, where *ICC* has, for the first time, interpreted Article 28 of the *Rome Statute.* Based on the above case and by making parallels with the case law of *ad hoc* tribunals, it can be stated that international law has got concept on superior responsibility matched with the new requirements.

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[7] In relation to the superior responsibility in *ad hoc* tribunals, see *Sliedregt E.*, 'Command Responsibility at the ICTY – Three Generations of Case-law and still Ambiguity', in *Swart B., Zahar A., Sluiter G.* (ed.), The Legacy of the ICTY, Oxford University Press, Oxford, 2011, 377-400; Also, see *Boas G., Bischoff J., Reid N.,* International Criminal Law Practitioner Library: Forms of Responsibility in International Criminal Law, Cambridge University Press, Cambridge, 2008, 174 *et seq*.

[8] The key concept of *JCE,* which unites all its members, is the common intention of co-perpetrators – participation in the group for the achievement of common purpose. Common plan is represented by the commission of specific or/and abstract crimes. In *ICTY* case law, namely, at the very first stage of *ad hoc* tribunal – for *Prosecutor v. Dusko Tadic*, the "key precondition" for the creation of *JCE* was "inability" of statutory notion of individual criminal responsibility and its over-abstract contents. Article 7(1) of *ICTY* Statute does not offer specific way for establishing the individual criminal responsibility at the level of specific principles, doctrine. Accordingly, focus was drawn towards the case law, in order to overcome such "inability" and abstractedness. See *Prosecutor v. Tadic,* Judgement (IT-94-1-A), Appeal Chamber, 15 July 1999, §185-232; Also, see *Cassese A., the Members of the Journal of International Criminal Justice,* Amicus Curiae Brief of Professor Antonio Cassese and Members of the Journal of International Criminal Justice on Joint Criminal Enterprise Doctrine, Criminal Law Forum, Vol. XX, 2009, 289-330.

[9] Compare *Werle G., Jessberger F.,* Principles of International Criminal Law, 3rd ed., Oxford University Press, Oxford, 2014, 221; *Ambos K.,* Treatise on International Criminal Law, Foundations and General Part, Vol. I, Oxford University Press, Oxford, 2013, 206.

[10] Compare *Schabas W.,* The International Criminal Court: A Commentary on the Rome Statute, Oxford University Press, Oxford, 2010, 457.

[11] *Arnold R., Triffterer O.,* 'Responsibility of Commanders and other Superiors (Article 28)', in *Triffterer O.* (ed.), Commentary on the Rome Statute of the International Criminal Court, 2nd ed., C.H.Beck.hart.Nomos., München, 2008, 798.

[12] Compare *O'Keefe R.,* International Criminal Law, Oxford University Press, Oxford, 2015, 201-202.

Notions of superior responsibility in the legal literature are used via the interchangeable terms.

III. Command Responsibility or Superior Responsibility?

There are two titles for superior responsibility in the international law – *"command responsibility"* and *"superior responsibility"*. Doctrine was initially directed towards the justification of criminal responsibility for only military commanders and, therefore, the title – *"command responsibility"* is the result of the above approach. Later, the concept included in itself non-military, civilian persons as well, thereafter the concept has been referred to as *"superior responsibility"* as well.[13] In the international criminal law literature, both titles are used as interchangeable terms.[14] The *Rome Statute* refers to the responsibility of the superior's in the Article 28, as the *"superior responsibility",* based on its contents, to be discussed later in the article.

The basis for the modified notion for the superior responsibility, as mentioned above, derives from the case law of *ad hoc* tribunals.

IV. Superior Responsibility in *ad hoc* Tribunals

Proceeding from the objective of the work, which is to analyze the modified notion of superior responsibility according to the *Rome Statute,* the requirements defined by *ad hoc* tribunals case law for the failure to act by commander, shall be noted.[15]

For the concept of superior responsibility *ad hoc* tribunals defined several requirements determining the responsibility; these requirements are:

- the existence of a superior-subordinate relationship;
- the superior failed to take the necessary and reasonable measures to prevent the criminal act or punish the perpetrator thereof;
- the superior knew or had reason to know[16] that the criminal act was about to be or had been committed.[17]

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[13] In relation to the terms – *command responsibility* and *superior responsibility,* see *Weigend T.,* 'Superior Responsibility: Complicity, Omission or Over-Extension of the Criminal Law?' in *Burghardt C., Triffterer O., Vogel J.* (ed.)*,* The Review Conference and the Future of the International Criminal Court, Kluwer Law International, The Hague, 2010, 67; Also, see *Meloni C.,* Command Responsibility in International Criminal Law, T.M.C. Asser Press, The Hague, 2010, 1-5.

[14] *Sliedregt E.,* Article 28 of the ICC Statute: Mode of Liability and/or Separate Offence? New Criminal Law Review, Vol. XII, 2009, 420, footnote 1.

[15] On the doctrine on superior responsibility in *ad hoc* tribunals, see *Dvalidze I.,* 'JOINT CRIMINAL ENTERPRISE in International Criminal Law', in *Nachkebia G.* (ed.), Issues of Criminalization of Modern Aspects of Organized Crime and Responsibility in the Georgian Criminal Law, Tbilisi, 119-123 (in Georgian).

[16] Two necessary requirements of *mens rea* are in place: *knew* and *had reason to know.* Above mentioned elements will be discussed in more detail later in the article.

[17] *Prosecutor v. Boskoski/Tarculovski,* Judgment (ICTY-IT-04-82-T), Trial Chamber II, 10 July 2008, §406; *Prosecutor v. Halilovic,* Judgment (ICTY-IT-01-48-T), Trial Chamber I, 16 November 2005, §56; *Prosecutor v. Limaj and others,* Judgement (ICTY-IT-03-66-T), Trial Chamber II, 30 November 2005, §520; *Prosecutor v. Kajelijeli,* Judgement (ICTR-98-44A-T), Trial Chamber II, 1 December 2003, §772; *Prosecutor v. Aleksovski,* Judgment (ICTY-IT-95-14/1-T), Trial Chamber, 25 June 1999, §69; *Prosecutor v. Delalic and others,* Judgment (ICTY-IT-96-21-T), Trial Chamber, 16 November 1998, §346.

Moreover, the fourth necessary element was defined. This element was created based on the contents of the doctrine on superior responsibility – the international crime shall be committed by the subordinate of accused person.[18]

Article 28 of the *Rome Statute* expands all four elements in the modified manner.

V. Notion of Superior Responsibility According to the Rome Statute

Doctrine on superior responsibility is defined as follows under the Article 28 of the *Rome Statute:*

> "Article 28: Responsibility of commanders and other superiors in addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court:
>
> (a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:
>
> (i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and
>
> (ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.
>
> (b) With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:
>
> (i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;
>
> (ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and
>
> (iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution."

[18] Above mentioned fourth, additional element was defined by *ICTY* for *Prosecutor v. Oric* case. See *Prosecutor v. Oric,* Judgement (ICTY-IT-03-68-T), Trial Chamber II, 30 June 2006, §294, 295-306.

The contents and structure of the above provided Article is somewhat difficult to understand[19] and complex,[20] which, based on the history of *Rome Statute*, must not be surprising. Article 28, as well as the overall Statute is the result of negotiations held between the legal advisers representing various legal systems; therefore, it is also referred to as a good example of compromise for achieving desired outcome under the condition of differing positions.[21]

1. Material Elements of Superior Responsibility

In order to determine the material elements for establishing responsibility under the superior responsibility doctrine, we, first of all, have to define – who could be *military commander-superior* or *civilian superior* and what does *effective control* notion imply, including existence of *effective command and control* over the subordinated forces, or *effective authority and control;* How necessary is it to identify causation between the committed crime and failure to implement control properly over the subordinates? All these elements are important in various contexts, depending on whether the *military commander-superior* or *civilian superior* is demonstrating omission, for the identification of the key material element for the superior responsibility main material element – omission.

1.1. Grounds for Establishing Responsibility of Military Commander-Superior and Civilian Superior

According to the Article 28 of the *Rome Statute,* the special subject of the doctrine on superior responsibility, who could be imposed the criminal responsibility, is *military commander-superior, person effectively acting as a military commander* and *civilian superior*. We shall discuss each of them separately.

1.1.1. Military Commander-Superior

ICC Pre-Trial Chamber for *Prosecutor v. Bemba* case, defined that *military commander-superior* is the person, who formally or lawfully fulfills functions of military commander, i.e. *de jure* commander, despite his/her official rank. This may include the commander, who, on the one hand, occupies high position in the military forces and large military unit is subordinated to him/her, or on the other hand, this could be person, who does not occupy high position and only few soldiers are his/her subordinates.[22] Military commander also considers the head, which "does not exclusively fulfill the functions of commander". This is a case, when head of the state is the commander-in-chief of the military forces (*de jure* commander) and despite the above, does not fulfill military functions

[19] Compare *Weigend T.,* 'Superior Responsibility: Complicity, Omission or Over-Extension of the Criminal Law?' in *Burghardt C., Triffterer O., Vogel J.* (ed.)*,* The Review Conference and the Future of the International Criminal Court, Kluwer Law International, The Hague, 2010, 71.

[20] Compare *Sliedregt E.,* Individual Criminal Responsibility in International Law, Oxford University Press, Oxford, 2012, 199.

[21] Compare *Mettraux G.,* The Law of Command Responsibility, Cambridge University Press, Cambridge, 2009, 23.

[22] *Prosecutor v. Jean-Pierre Bemba Gombo,* Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges (ICC-01/05-01/08), Pre-Trial Chamber II, 15 June 2009, §408.

assigned to him/her "exclusively" (so called. *quasi de facto* commander). In this case, he/she will be responsible for the actions carried out by subordinates.[23]

In the *ICC's* current practice, in addition to *Prosecutor v. Bemba* case, is also interesting *Prosecutor v. Ntaganda* case, relating to the situation in the *Democratic Republic of the Congo*. In this case, charges include the responsibility for crimes committed by subordinates, with reference to the responsibility of *military commander-superior* [Article 28(a)].[24]

1.1.2. Person Effectively Acting as a Military Commander

Person effectively acting as a military commander implies the "commander", who "has not been elected under the law";[25] Accordingly, the person is not legally responsible to fulfill "function of military commander",[26] or "has been illegally elected under the law".[27] He/she implements actions *de facto,* for the implementation of effective control over the group.[28]

In case of criminal responsibility of *Person effectively acting as a military commander*, same as "*military-like commanders"*[29]*,* it must be proved that he/she could implement *effective command and control,* or *effective authority and control* in relation to the subordinated forces.[30]

1.1.3. Civilian Superior. Difference Between the Military and Civil Superiors

According to the Article 28(b) of *Rome Statute*, c*ivilian superior* is a person, who does not satisfy requirements of Article 28(a), implying that paragraph (b) of Article 28 is the "subsidiary element" of superior notion considered under paragraph (a), Article 28.[31]

The two essential differences between the *military commander-superior* and *civilian superior* are the following: differing mental elements and additional (ii) sub-paragraph of Article 28(b).[32]

Article 28 of *Rome Statute* names implementation of *effective authority and control* as the common necessary requirement for both types of superiors. However, according to the additional (ii) sub-paragraph of Article 28(b), crime shall cover such activities, "that were within the effective responsibility and control of the superior". Proving of the latter element – *effective responsibility and*

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[23] Ibid, footnote 522.

[24] *Prosecutor v. Ntaganda,* Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges (ICC-01/04-02/06), Pre-Trial Chamber II, 9 June 2014, §164-175.

[25] *Prosecutor v. Jean-Pierre Bemba Gombo,* Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges (ICC-01/05-01/08), Pre-Trial Chamber II, 15 June 2009, §409.

[26] Compare *Schabas W.,* The International Criminal Court: A Commentary on the Rome Statute, O Press, Oxford, 2010, 459.

[27] Compare *Mettraux G.,* The Law of Command Responsibility, Cambridge University Press, Cambridge, 2009, 28.

[28] Here *ICC* Pre-Trial Chamber for *Prosecutor v. Jean-Pierre Bemba Gombo* case, provides as an example the superiors, who have authority to implement control over the forces subordinated to the state (police). See *Prosecutor v. Jean-Pierre Bemba Gombo,* Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges (ICC-01/05-01/08), Pre-Trial Chamber II, 15 June 2009, §410.

[29] Ibid.

[30] *Mettraux G.,* The Law of Command Responsibility, Cambridge University Press, Cambridge, 2009, 28.

[31] Compare *Meloni C.,* Command Responsibility in International Criminal Law, T.M.C. Asser Press, The Hague, 2010, 144.

[32] Compare *Schabas W.,* The International Criminal Court: A Commentary on the Rome Statute, Oxford University Press, Oxford, 2010, 460; The first differing sign will be discussed in detail below.

control – is somewhat problematic, more so, as the case law of *ad hoc* tribunals does not include any provisions regarding this issue.[33] Such a provision is not also included in the Article 28(a).

One of the main problems is the following – what is the relationship between the superior, approved under non-military context and his subordinate, based on the complexity of proving the requirement for the *effective control* under the civilian context.[34]

Both above-mentioned cases shall be evaluated based on the individual case, status, position of civilian superior.

Superiors mentioned in the Article 28 of *Rome Statute,* to state it simply, can be political leaders, heads of states, members of the government or other official persons, as well as civilian persons from the private sector, business, occupying high positions and have high authority and control in the situations, where the legally protected interests under the international criminal law are under danger.[35]

In this regard, the case *Prosecutor v. Nahimana and others,* reviewed by *ICTR* is noteworthy. *Nahimana* was professor of history and director of *Rwanda Information office – ORINFOR. Nahimana* and other accused persons*,* in addition to other accusations, were tried for commission of genocide and crimes against humanity, with the indication to the superior responsibility. In particular, *Nahimana* was superior to the personnel of private radio, who had not prevented and repressed the criminal addresses.[36]

It can be stated that Article 28(b) becomes effective, when the specific case does not satisfy the requirements of the Article 28(a). If the requirements, set for the *civilian superior* under the *Rome Statute* are not proved, superior can be punished for the co-participation (accessorial liability) in the crime.

The element of *effective control* is to be discusses, proving of which represents the necessary condition for the superior responsibility.

1.2. Existence of Effective Command and Authority in Relation to the Subordinated Forces

According to the doctrine on superior responsibility, not all the superiors are responsible for omission, non-implementation of measures for the prevention of crime, but only those superiors, who occupied special position for the protection of legal interests protected under the *Rome Statute*.[37]

Article 28 of *Rome Statute* requires that the military forces are under *de jure effective command and control* of *military commander-superior* and under the *effective authority and control* of *de facto military commander-superior*, or *non-military superior.*[38]

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[33] Compare Ibid.

[34] Compare *Meloni C.,* Command Responsibility in International Criminal Law, T.M.C. Asser Press, The Hague, 2010, 159.

[35] Ibid, 160.

[36] *Higgins G., Evans J.,* 'Nahimana and others', in *Cassese A.* (ed.), The Oxford Companion to International Justice, Oxford University Press, Oxford, 2009, 833-839; In detail, see *Prosecutor v. Nahimana and others,* Judgment (ICTR-99-52-A), Appeal Chamber, 28 November 2007.

[37] Compare *Kiss A.,* 'Command Responsibility under Article 28 of the Rome Statute', in *Stahn G.* (ed.), The Law and Practice of the International Criminal Court, Oxford University Press, Oxford, 2015, 612.

[38] *Schabas W.,* The International Criminal Court: A Commentary on the Rome Statute, Oxford University Press, Oxford, 2010, 460.

ICC Pre-Trial Chamber for the *Prosecutor v. Bemba* case noted that there is no essential, substantive difference between the *effective command* and *effective authority.*[39] According to the position of the Chamber, "command" means influence, especially within the military forces and "authority*"* means possibility to issue the order. However, "or" construction, present in the article, forces the Chamber, despite the common contents, to make differing interpretation for the *effective command* and *effective authority.*[40]

It is necessary to review the mentioned above provision based on the structure of Article 28, *Rome Statute*.

1.3. Effective Control

We shall separate notion of *effective control* from the above mentioned material elements of the concept of superior responsibility. This is the key element for the prosecutor – did the commander have opportunity to implement *effective control* over subordinates? The court defines effective control as *de jure* as well as *de facto* hierarchical relationships between the superior and his/her subordinates.[41]

Effective control shall be defined as the material possibility or authority to prevent commission of crime and possibility to implement repressive measures.[42] According to the context of Article 28, *effective control,* in addition to the preventive and repressive measures of crime commission, also refers to the opportunity to "submit the matter to the competent authorities for investigation and prosecution".[43] However, above mentioned does not mean that any low level *control,* even if it later becomes *essential*, has to be assigned to the above mentioned situation.[44]

It is important to define the signs of *effective control* necessary for the superior responsibility under the *ICC,* when are such satisfactory. These signs are: the official position of the suspect; his power to give orders; the capacity to ensure compliance with the orders issued; his position within the military structure and the actual tasks that he carried out; the capacity to order forces or units under his command; the capacity to re-subordinate units or make changes to command structure; the power to promote, replace, remove or discipline any member of the forces; the authority to send forces where hostilities take place and withdraw them at any given moment.[45]

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[39] *Prosecutor v. Jean-Pierre Bemba Gombo,* Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges (ICC-01/05-01/08), Pre-Trial Chamber II, 15 June 2009, §412.

[40] Ibid, §413.

[41] Ibid, §414. Pre-Trial Chamber in the process of definition of *effective control*, is based on *ICTR* judgments: *Prosecutor v. Bagosora and others,* Judgment and Sentence (ICTR-98-41-T) Trial Chamber, 18 December 2008, §2012; *Prosecutor v. Kajelijeli,* Judgment (ICTR-98-44A-A), Appeal Chamber, 23 May 2005, §84; *Prosecutor v. Kajelijeli,* Judgment and Sentence (ICTR-98-44A-T), Trial Chamber, 1 December 2003, §773.

[42] Ibid, §415. Pre-Trial Chamber is based on *ICTY* and *ICTR* judgments: *Prosecutor v. Bagilishema,* Judgment (ICTR-95-1A-A), Appeal Chamber, 3 July 2002, §51; *Prosecutor v. Delalic and others,* Judgment (ICTY-96-21-A), Appeal Chamber, 20 February 2001, §256; *Prosecutor v. Musema,* Judgment (ICTR-96-13-A), Appeal Chamber, 27 January 2000, §135.

[43] Ibid. Pre-Trial Chamber is based on *ICTY* judgments: *Prosecutor v. Hadzihasanovic and Kubura,* Judgment (ICTY-IT-01-47-T), Trial Chamber, 15 March 2006, §80, 795; *Prosecutor v. Kordic and Cerkez,* Judgment (ICTY-IT-95-14/2-T), Trial Chamber, 26 February 2001, §412-413.

[44] Compare Ibid.

[45] Ibid, §417. Pre-Trial Chamber is based on *ICTY* judgments.

Several signs, required for the satisfaction of existence of *effective control* are similar to the field of perpetration responsibility; however, here it is important to have element of *effective control* as well as other grounds for establishing criminal responsibility in the context of *effective control.*

Next important issue is – at which stage shall the superior have possibility for the implementation of *effective control* over his subordinates.

1.4. Effective Control and Criminal Conduct

Period of existence of *effective control* is essential for the individual responsibility of the superior. In particular, according to the case law of superior responsibility doctrine, only showing that the person had possibility for the *effective control* is not sufficient without definition of time frame required for the enforcement of such control.

International criminal law acknowledges two positions in relation to the stage at which the existence of *effective control* is required: first – is the position of *ad hoc* tribunals, according to which, *effective control* must have existed at the time of the commission of the crime;[46] second – is the different position, which existed among the minority judges of *ICTY*[47] and was shared by the Sierra-Leone's *hybrid* tribunal (hereinafter referred to as– *SCSL*).[48] Namely, "superior must have had *effective control* over the perpetrator at the time at which the superior is said to have failed to exercise his powers to prevent and repress" the commission of crime, to implement adequate measures.[49]

With the consideration of the above mentioned, *ICC*, based on the Article 28(a) of *Rome Statute* contents, is of the view that possibility for implementation of *effective control* from the side of the accused person, as minimum, shall exist at the moment when the crimes were about to be committed (prior to the commission of specific crime).[50] Above mentioned means that it is not obligatory to have *effective control* at the moment of the commission of a crime. This position was expressed by the Pre-Trial Chamber for the *Prosecutor v. Bemba* case based on the contents of Article 28(a), "a military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces". The last sentence shall be underlined – "as a result of his or her failure to exercise control properly over such forces". According to the court, contents of the Article "failure to exercise control properly" is indicating that commander was already implementing control before the commission of specific crime.[51]

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[46] Ibid, §418. Pre-Trial Chamber is based on *ICTY* and *ICTR* judgments: *Prosecutor v. Bagosora and others,* Judgment and Sentence (ICTR-98-41-T), Trial Chamber, 18 December 2008, §2012; *Prosecutor v. Halilovic,* Judgment (ICTY-IT-01-48-A), Appeal Chamber, 16 October 2007, §59.

[47] Ibid. In detail, see *Prosecutor v. Oric,* Judgment (ICTY-IT-03-68-A) Appeal Chamber, 3 July 2008, §65-85.

[48] Ibid. In detail, see *Prosecutor v. Sesay and others,* Judgment (SCSL-04-15-T), Trial Chamber, 2 March 2009, §299.

[49] Ibid, §418.

[50] Ibid, §419.

[51] Ibid. In detail, see *Kiss A.,* 'Command Responsibility under Article 28 of the Rome Statute', in *Stahn G.* (ed.), The Law and Practice of the International Criminal Court, Oxford University Press, Oxford, 2015, 618-622.

1.5. Existence of Causality Between the Crime and Failure to Exercise Control Properly over the Subordinates

According to the Article 28 of *Rome Statute,* superior will be responsible for the committed crime, if it was "result" of his failure to exercise control properly over the subordinates. The above can be considered as a new causal requirement.[52]

It must be noted that case law of *ad hoc* tribunals did not define the need to prove the causal element for the superior responsibility doctrine, as the *sui generis* form of responsibility.[53] Accordingly, prosecutor did not have to prove that crime committed by the subordinates was the result of failure to exercise control properly.[54]

It is necessary to separate *failure to exercise control properly* context in relation to the element of *effective control*. According to *ICC*, *effective control* element shall precede element of *exercise control properly,* as without demonstration of the first the existence of the second is impossible.[55] Accordingly, *failure to exercise control properly* by the superior within the Article 28(a) is possible only after the existence of *effective control* over his/her subordinates is proved – case considered under the Article 28(a)(ii).[56]

Need for the causal relationship between the crime and *failure to exercise control properly* is directly proceeding from the notion of superior according to the Statute, namely, based on the construction "as a result of" from the Article 28(a),[57] as the independent material element composing the Article.[58]

Proving of causality does not cover the failure to implement all three necessary obligations defined under the Article 28(a)(ii) of *Rome Statute,* namely: *the duty to prevent crimes, the duty to repress crimes* and *the duty to submit the matter to the competent authorities for investigation and prosecution.* Proving the element of causation is possible only for the first element of *prevention of the crime,* as remaining two elements are in place in the process of or after the commission of crime.[59] According to Pre-Trial Chamber, proving the above is illogical.[60]

In order for a *military commander-superior* or *person effectively acting as a military commander* be criminally responsible, prosecution office shall prove, whether his failure to implement

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[52] Compare *Cryer R.,* Prosecuting International Crimes, Selectivity and the International Criminal Law Regime, Cambridge University Press, Cambridge, 2005, 323; *Mettraux G.,* The Law of Command Responsibility, Cambridge University Press, Cambridge, 2009, 33.

[53] *Prosecutor v. Hadzihasanovic and Kubura,* Judgment (ICTY-IT-01-47-A), Appeal Chamber, 22 April 2008, §39; *Prosecutor v. Halilovic,* Judgment (ICTY-IT-01-48-T), Trial Chamber, 16 November 2005, §78.

[54] *Schabas W.,* The International Criminal Court: A Commentary on the Rome Statute, Oxford University Press, Oxford, 2010, 461.

[55] *Prosecutor v. Jean-Pierre Bemba Gombo,* Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges (ICC-01/05-01/08), Pre-Trial Chamber II, 15 June 2009, §422.

[56] Ibid, §421-422.

[57] Ibid, §423.

[58] *Triffterer O.,* Causality, a Separate Element of the Doctrine of Superior Responsibility as Expressed in Article 28 Rome Statute? Leiden Journal of International Law, Vol. XV, 2002, 197-198.

[59] *Prosecutor v. Jean-Pierre Bemba Gombo,* Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges (ICC-01/05-01/08), Pre-Trial Chamber II, 15 June 2009, §424.

[60] Ibid. On the differing position, see *O'Keefe R.,* International Criminal Law, Oxford University Press, Oxford, 2015, 205.

the obligation to prevent the crime increased the risk of committing the crime by subordinates,[61] whether his omission increased the danger for a risk.[62]

2. Mental Elements of Superior Responsibility

After the element of omission, the "exclusive" establishing ground for criminal responsibility of superior responsibility doctrine is its mental element.

Underlining the fact that *Rome Statute* does not recognize principle of *strict liability,* imposing criminal responsibility for any crime depends on the mental element of relevant mode of responsibility.[63] Only the superior is responsible for the crimes committed by his/her subordinates if he/she:

a) *knew*;
b) *should have known*; *had reason to know*;
g) *consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes*.

Article 30 of *Rome Statute* defines three necessary mental element requirements in relation to any crime: 1) element of *unless otherwise provided;* 2) intent; and 3) knowledge.[64] Mental elements of superior responsibility doctrine, discussed below, shall be defined within the element of *unless otherwise provided,*[65] which by its contents is not covered under the intent and knowledge. Mental element standard under the Article 28 of *Rome Statute,* is evidently lower, compared with the general approach considered for Article 30 (intent and knowledge).[66]

2.1. Knowledge

Mental element of *knew* is mandatory for the responsibility of *military commander-superior* as well as *civilian superior*. Superior shall have full information about what are his/her subordinates

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[61] Ibid, §426.

[62] Ibid, §425. On causal relationship, see *Kiss A.,* 'Command Responsibility under Article 28 of the Rome Statute', in *Stahn G.* (ed.), The Law and Practice of the International Criminal Court, Oxford University Press, Oxford, 2015, 634-638.

[63] Compare *Prosecutor v. Jean-Pierre Bemba Gombo,* Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges (ICC-01/05-01/08), Pre-Trial Chamber II, 15 June 2009, §427.

[64] Article 30 of the *Rome Statute,* see footnote 4.

[65] According to the contents of the element – *Unless otherwise provided* – objective elements of the crime, according to the Article 30(2)(3) of the *Rome Statute,* where *ICC* considers *conduct, consequence* and *contextual elements,* are committed with the *intent* and *knowledge*, if not otherwise provided under the *Rome Statute* and *Elements of Crime* for the specific crime. *Recklessness* and *negligence* could be covered within the framework of this element. See *Prosecutor v. Jean-Pierre Bemba Gombo,* Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges (ICC-01/05-01/08), Pre-Trial Chamber II, 15 June 2009, §353-354; Also, see *Schabas W.,* The International Criminal Court: A Commentary on the Rome Statute, Oxford University Press, Oxford, 2010, 474-475; In relation to the element of *Unless otherwise provided,* see *Werle G., Jessberger F.,* Unless Otherwise Provided: Article 30 of the ICC and the Mental Elements of Crimes under International Criminal Law, Journal of International Criminal Justice, Vol. V, 2005, 35-55; On the objective (material) and subjective (mental) elements of the crime, see *Turava M.,* Fundamentals of International Criminal Law, Tbilisi, 2015, 163-171 (in Georgian).

[66] Compare *Werle G., Jessberger F.,* Principles of International Criminal Law, 3rd ed., Oxford University Press, Oxford, 2014, 229, §595, 599.

carrying out or do they intend to commit the crimes considered under the Statute, and, despite such information, superior does not implement necessary and reasonable measures in order to prevent or repress the results. According to the case law of *ICC* and *ad hoc* tribunals, element of *knew* shall not be "presumed",[67] but must be drawn from the direct and detailed evidences, such as: number of illegal acts, their scope, whether their occurrence is widespread, the time during which the prohibited acts took place, the type and number of forces involved, the scope and nature of the superior's position and responsibility in the hierarchal structure, the location of the commander at the time and the geographical location of the acts.[68]

2.2. Should Have Known

Mental element of *should have known* is considered only for the responsibility of *military commander-superior*, which makes the process of proving the elements for establishing criminal responsibility easier for the prosecution.[69] *Should have known* standard requires to prove, whether the superior had possibility to know about the commission of crime considered under the Statute.

ICC Pre-Trial Chamber rightly notes for the *Prosecutor v. Bemba* case, that *should have known* mental element standard contains the signs of *negligence*.[70]

2.2.1. Negligence

Negligence is the mental element conditioning the lowest individual responsibility. It can be stated that it plays the role of additional, excluding mental element.[71] If the higher mental element standard is excluded, such as, with the exception of intent, the *recklessness*, then the above standard can be applied.

We can distinguish *culpa levis* and *culpa gravis negligence.* In the event of first one, the person is not aware of the "risk" that could be caused by the commission of crime. As for the second one, unlike the *recklessness,* it is mental element of lower level; person is convinced that the heavy criminal outcome will not happen based on the measures, he has implemented or is going to implement.[72]

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[67] *Prosecutor v. Jean-Pierre Bemba Gombo,* Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges (ICC-01/05-01/08), Pre-Trial Chamber II, 15 June 2009, §430; *Prosecutor v. Delic,* Judgment (ICTY-IT-04-83-T), Trial Chamber, 15 September 2008, §64.

[68] Ibid, §431; *Prosecutor v. Bagosora and others,* Judgment and Sentence (ICTR-98-41-T), Trial Chamber, 18 December 2008, §2014; *Prosecutor v. Oric,* Judgment (ICTY-IT-03-68-A), Appeal Chamber, 3 July 2008, §319; *Prosecutor v. Hadzihasanovic and Kubura,* Judgment (ICTY-IT-01-47-T), Trial Chamber, 15 March 2006, §94; *Prosecutor v. Delalic and others,* Judgment (ICTY-IT-96-21-T), Trial Chamber, 16 November 1998, §386.

[69] Compare *Mettraux G.,* The Law of Command Responsibility, Cambridge University Press, Cambridge, 2009, 31.

[70] Compare *Prosecutor v. Jean-Pierre Bemba Gombo,* Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges (ICC-01/05-01/08), Pre-Trial Chamber II, 15 June 2009, §429.

[71] Compare *Gargani A.,* 'Negligence', in *Cassese A*. (ed.), The Oxford Companion to International Criminal Justice, Oxford University Press, Oxford, 2009, 433.

[72] About *negligence,* see *Gargani A.,* 'Negligence', in *Cassese A.* (ed.), The Oxford Companion to International Criminal Justice, Oxford University Press, Oxford, 2009, 433-434.

The standard of *should have known,* based on the contents of Article 28 of *Rome Statute,* considers *culpa gravis negligence.* In particular, *should have known* standard implies commander's *negligence* for the received information on the illegal actions implemented by his subordinates.[73]

Element of *should have known* requires from the superior the "active obligation", development of required measures for provision of information on the actions of his subordinates. Statute "authors" desired to set stricter approach for *military commander-superiors* and *persons effectively acting as military commanders,* compared with the approach defined for *other superiors* considered under the Article 28(b). Lower mental element standard was decided based on the nature of responsibility imposed for the above-mentioned category superiors.[74]

2.2.2. Should Have Known

Standard of *Should have known,* defined under the Article 28(a) of *Rome Statute* by *ICC* for the superior responsibility differs from standard of *had reason to know*, defined for the same mode of responsibility by *ad hoc* tribunals and *SCSL*,[75] namely in relation to the mental element of *negligence.*[76]

Mental element standard – *had reason to know* – fluctuates between *dolus eventualis* (or *recklessness*) and *negligence,* as for the mental element standard *Should have known*, it implies more the form of *negligence*.[77] Despite the mentioned difference, *ICC* Pre-Trial Chamber for the *Prosecutor v. Bemba* case notes, that the mental element standard defined by the case law of *ad hoc* and *SCSL* tribunals*,* could be useful for *Should have known* element as well.[78] However, in case of *dolus eventualis,* according to the *ICC's* case law, it is expedient to at first check the modes of responsibility considered under the Article 25[79] and then to focus on the Article 28.

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[73] Compare *Prosecutor v. Jean-Pierre Bemba Gombo,* Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges (ICC-01/05-01/08), Pre-Trial Chamber II, 15 June 2009, §432.

[74] Ibid, §433.

[75] Ibid, §434.

[76] *ICTY* Appeal Chamber for *Prosecutor v. Blaskic* case was based on the formulation presented by *ICTR* Appeal Chamber for *Prosecutor v. Bagilishema* case regarding the following – there is no element of *negligence* existing in the context of superior responsibility. Its contents would cause differing views in the practice of tribunals. See *Prosecutor v. Blaskic,* Judgment (ICTY-IT-95-14-A), Appeal Chamber, 29 July 2004, §63; *Prosecutor v. Bagilishema,* Judgment (ICTR-95-1A-A), Appeal Chamber, 3 July 2002, §34-36; Also, see *Schabas W.,* The International Criminal Court: A Commentary on the Rome Statute, Oxford University Press, Oxford, 2010, 463; *O'Keefe R.,* International Criminal Law, Oxford University Press, Oxford, 2015, 205-206.

[77] On differentiating signs, see *Meloni C.,* Command Responsibility in International Criminal Law, T.M.C. Asser Press, The Hague, 2010, 183-186.

[78] In detail, see *Prosecutor v. Jean-Pierre Bemba Gombo,* Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges (ICC-01/05-01/08), Pre-Trial Chamber II, 15 June 2009, §434.

[79] *Dgebuadze G.,* 'Perpetration in International Criminal Law', in *Turava M.* (ed.), Criminal Law Science in the Process of European Development, Tbilisi, 2013, 325-354 (in Georgian); *Ambos K.,* A Workshop, a Symposium and the *Katanga* Trial Judgment of 7 March 2014, Journal of International Criminal Justice, Vol. II, 2014, 219-229; *Vest H.,* Problems of Participation — Unitarian, Differentiated Approach, or Something Else?, Journal of International Criminal Justice, Vol. II, 2014, 295-309; *Ohlin J., Sliedregt E., Weigend T.,* Assessing the Control-Theory, Leiden Journal of International Law, Vol. XXVI, 2013, 725-746.

2.2.3. Light Mental Element for the Military Superior's Responsibility

Accordingly, Article 28(a) of the *Rome Statute* defines responsibility for a *military commander-superior* or *person effectively acting as a military commander*, if they based on the circumstances in place for the time *knew* or *should have known,* that their subordinated forces were committing or intended to commit crimes considered under the *Rome Statute*,[80] via the application of two mental elements: *knew,* which implies "active knowledge" and *should have known* element, which implies *negligence*.[81] This is a lower element compared with the one considered for the *civilian superior.*

2.3. Consciously Disregarded Information

According to the Article 28(b)(i) of the *Rome Statute,* for the *civilian superior* it must be demonstrated that "the superior either knew, or consciously disregarded information, which clearly indicated, that the subordinates were committing or about to commit such crimes".

Mentioned criterion is more "demanding"[82] for *military commander-superior,* compared with the mental element mentioned above. According to the mental element of Article 28(b)(i), information shall "clearly" contain note on the commission of crime.[83] *ICC* sets higher mental element for the *civilian superior.*[84] Namely, unlike the *negligence* standard set for the *military commander-superior,* the standard of *recklessness* or *dolus eventualis* is valid for the *civilian superior. Schabas* considered the construction provided in the Article 28(a)(i) – "consciously disregarded information" as the form of *recklessness*,[85] unlike the mental element considered for the *military commander-superiors*, which at some level includes the form of *negligence*. In this case *Schabas* relies on the mental element of *ad hoc* tribunals – *had reason to know*, in which superior had to have a reason to know about criminal risk, intention of his subordinates to commit international crime, about the process of committing the crime or about already committed crime. Mentioned information about the crime that could be committed by his subordinates must be available for the superior.[86]

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[80] *Prosecutor v. Jean-Pierre Bemba Gombo,* Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges (ICC-01/05-01/08), Pre-Trial Chamber II, 15 June 2009, §428.

[81] Ibid, §429.

[82] Compare *Schabas W.,* The International Criminal Court: A Commentary on the Rome Statute, Oxford University Press, Oxford, 2010, 463.

[83] Compare *Kiss A.,* 'Command Responsibility under Article 28 of the Rome Statute', in *Stahn G.* (ed.), The Law and Practice of the International Criminal Court, Oxford University Press, Oxford, 2015, 647.

[84] Compare *Cryer R., Friman H., Robinson D., Wilmshurst E.,* An Introduction to International Criminal Law and Procedure, 2nd ed., Cambridge University Press, Cambridge, 2010, 394; Also, see *Meloni C.,* Command Responsibility in International Criminal Law, T.M.C. Asser Press, The Hague, 2010, 186.

[85] *Schabas W.,* The International Criminal Court: A Commentary on the Rome Statute, Oxford University Press, Oxford, 2010, 463; Also, see *Meloni C.,* Command Responsibility in International Criminal Law, T.M.C. Asser Press, The Hague, 2010, 184-185; *Werle G., Jessberger F.,* Principles of International Criminal Law, 3rd ed., Oxford University Press, Oxford, 2014, 229, §595, 599.

[86] Ibid. 463; Also, see *Prosecutor v. Milutinovic and others,* Judgment (ICTY-IT-05-87-T), Trial Chamber, 26 February 2009, Vol. 1 of 4, §120; *Prosecutor v. Strugar,* Judgment (ICTY-IT-01-42-A), Appeal Chamber, 17 July 2008, §298, 304; *Prosecutor v. Blaskic,* Judgment (ICTY-IT-95-14-A), Appeal Chamber, 29 July 2004, §62.

2.3.1. Recklessness

For the *civilian superiors, Schabas* thoroughly considers, the mental element of *recklessness*, as the exceptional element of the Article 30, *Rome Statute*.[87]

The notion of *recklessness* is not directly defined by the international criminal courts statutes and case law. According to the simple formulation, the term shall be defined as person's inattentive attitude towards the "risk" and possible outcomes;[88] in other words, when the anticipated result is perceived by the offender but neglected.[89] This is a main difference between the *recklessness* and *negligence*, when person *should have known* about the "risk" conditioned by the realization of material elements.[90]

The Article 28(a)(i) of *Rome Statute,* "consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes", also implies inattentive, reckless attitude of the person ("consciously disregarded information which clearly indicated") towards the "risk" and possible outcomes ("that the subordinates were committing or about to commit such crimes").

2.3.2. Stricter Mental Element for the Civilian Superior's Responsibility

Existence of higher mental element, considered for the *civilian superior,* the same possible to say for material element, is based on specific subordination existing between the *civilian superior* and subordinate, compared with the subordination between the *military commander-superior* and his/her subordinate. The latter is more structured; there is a system for strict punishment in place, requiring possibility for the strict control over the subordinates. Based on the fact that there is no such system in case of *civilian superior, Rome Statute* exercises "stronger control" over the *civilian superior.*[91]

VI. Failure to Fulfil the Duties by the Superior

There are three duties to be fulfilled by the superior to be distinguished, considered under the Article 28(a)(ii) and (iii), such duties are: implementation of *preventive, repressive* and *necessary and reasonable measures*.

1. Preventive Duty

Failure to fulfil the duty to *prevent* implies the case, when crime has not been committed yet, and the superior, who *knew* or *should have known* about the anticipated threat, is not implementing

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87 Compare Ibid.

88 Compare *Martino A.,* 'Recklessness', in *Cassese A.* (ed.), The Oxford Companion to International Criminal Justice, Oxford University Press, Oxford, 2009, 479. About the notion of *recklessness,* see Ibid, 479-482.

89 Compare *Meloni C.,* Command Responsibility in International Criminal Law, T.M.C. Asser Press, The Hague, 2010, 185, footnote 226.

90 Compare Ibid.

91 Compare *Kiss A.,* 'Command Responsibility under Article 28 of the Rome Statute', in *Stahn G.* (ed.), The Law and Practice of the International Criminal Court, Oxford University Press, Oxford, 2015, 613.

preventive measures.[92] For example, superior shall make sure that subordinates are adequately trained with the international humanitarian law; how the military actions were carried out in accordance with international law; is there sufficient discipline in order to *prevent* the commission of atrocities by the troops under the superior's command and etc.[93]

2. Repressive Duty

Failure to fulfil the duty to *repress* implies three factors: on the one hand, a duty to stop ongoing crimes from continuing to be committed;[94] on the other hand a duty to punish forces after the commission of crimes;[95] and thirdly, failure to transfer information to the relevant bodies for the commencement of investigation and prosecution.[96]

3. Duty to Take all Necessary and Reasonable Measures

Failure to fulfil the duty to take all *necessary and reasonable measures* refers to *preventive* as well as *repressive* duties, considering that if it was not possible to take all *necessary and reasonable measures,* superior cannot be punished for failure to fulfill *preventive* and *repressive* duties.[97] This element is subject for the definition by the international humanitarian law. The above considers "material possibility" to take all measures.[98] Taking *necessary* measures implies taking all measures to be implemented by the superior, which altogether would ensure fulfillment of *preventive* and *repressive* duties. As for the *reasonable* measures, it must be proportionate, namely, it must consider probability for the commission of crime and any circumstances created in the conflict situation.[99]

VII. Conclusion

Following the review of the necessary grounds for establishing individual criminal responsibility of superior by *ICC,* it is possible to summarize the newest concept of superior responsibility.

1. "Special subject" of superior responsibility

Subject of superior responsibility doctrine could be only the superior – the high level official with the high authority, as well as the lower title or rank superior, controlling several persons.[100] For qualification purposes, it is not necessary to identify the direct offender.[101]

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[92] *Prosecutor v. Jean-Pierre Bemba Gombo,* Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges (ICC-01/05-01/08), Pre-Trial Chamber II, 15 June 2009, §437.
[93] Ibid, §438.
[94] Ibid, §439-441.
[95] Ibid, §439.
[96] Ibid, §442.
[97] Compare *Werle G., Jessberger F.,* Principles of International Criminal Law, 3rd ed., Oxford University Press, Oxford, 2014, 231.
[98] *Prosecutor v. Jean-Pierre Bemba Gombo,* Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges (ICC-01/05-01/08), Pre-Trial Chamber II, 15 June 2009, §443.
[99] *Kiss A.,* 'Command Responsibility under Article 28 of the Rome Statute', in *Stahn G.* (ed.), The Law and Practice of the International Criminal Court, Oxford University Press, Oxford, 2015, 631-632.
[100] Compare Ibid, 614-615.
[101] Compare Ibid, 615.

2. Material and Mental Elements of Omission

Article 28 of the *Rome Statute* contains two material elements of omission: first, this is a general omission – when superior is punished for *failure to exercise control properly,* which resulted in commission of crime; Second – case of special omission, considered under Article 28(a)(ii) and (b)(ii) – when the superior *failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.*[102] Attitude of *military commander-superior* as well as *civilian superior* towards the both types of material elements of omission shall be limited with the general mental element of *knowledge*, based on the interpretation of Article 30 *(default rule).*

Superior responsibility doctrine defines new mental element standard in the *Rome Statute*, outside the literal meaning of Article 30. In particular, via the application of *negligence, recklessness* and other mental elements, "*it remains the only means"* for the prosecution in case of commission of crime with no direct intention.

Based on the element of omission, superior responsibility concept punishes omission of superior for failure to exercise control, to take preventive and repressive measures and to submit the matter to the competent authorities. In this way, it differs from *JCE.*

3. Superior Responsibility and *JCE*

Research of superior responsibility doctrine demonstrates that it fundamentally differs from *JCE*.[103] In wider sense, both of them create the impression of similar modes of responsibility. In particular, similar to the co-perpetration considered under *extended JCE*[104], superior obediently "takes the risk", that the crime will not be committed. However, the key difference is still in omission and mental element.

In relation to the element of omission – *JCE* requires more "positive act"[105], or contribution to the enterprise, when the omission is sufficient for the superior responsibility. It is necessary for the superior responsibility to have hierarchal, "vertical" relationship among the persons, out of which obligation of one is to implement supervision, surveillance, and for the other person – to commit the crime. Unlike this formula, *JCE* members, specifically, *basic JCE* co-perpetrators, generally depend on one and the same hierarchal level and act in the "horizontal" form. Inside the *JCE,* it is not neces-

[102] Compare *Sliedregt E.,* Individual Criminal Responsibility in International Law, Oxford University Press, Oxford, 2012, 199.

[103] Compare *Ambos K.,* 'Command Responsibility and *Organisationsherrschaft:* Ways of Attributing International Crimes to the 'Most Responsible'', in *Nollkaemper A., Wilt H.* (ed.), System Criminality in International Law, Cambridge University Press, Cambridge, 2009, 138.

[104] According to the *extended JCE* notion, within the common plan, group of people carries out actions not considered under the plan. For the individual responsibility, it must be identified: whether one of the group members contemplated the commission of crime and one of the members of the group, with the knowledge about the crime, voluntarily, obediently "has taken risk". See *Prosecutor v. Tadic,* Judgement (IT-94-1-A), Appeal Chamber, 15 July 1999, §204, 220, 228; *Prosecutor v. Stakic,* Judgement (ICTY-IT-97-24-T), Trial Chamber, 31 July 2003, §436.

[105] Compare *Ambos K.,* 'Command Responsibility and *Organisationsherrschaft:* Ways of Attributing International Crimes to the 'Most Responsible'', in *Nollkaemper A., Wilt H.* (ed.), System Criminality in International Law, Cambridge University Press, Cambridge, 2009, 139.

sary to show the responsibilities of the superior, position of the political leader. *JCE* concept requires minimal coordination, represented as "the horizontal manifestation of will", which unites perpetrators. Unlike the concept of superior responsibility, its key weapon is the informal union and simple relationship of co-perpetrators.[106]

Essential difference is also felt in the mental elements. In case of *basic JCE,* perpetrator shares the intention of other co-perpetrators, where the common *mens rea* is directed towards the commission of specific crime and overall purpose of enterprise. In case of other categories of *JCE,* especially in the event of *extended JCE,* offenders must have the common purpose considered and must be characterized with the foreseeability element. In the case of superior responsibility, unlike the above mentioned, material element is demonstrated via failure to exercise proper leadership by the superior and accordingly, the element of mental element shall cover non-implementation of leadership, however, not for the crimes committed by subordinates.[107]

Despite the discussed differences, the above-mentioned doctrines also have common characteristic features. Due to the above, it is possible to use them simultaneously, when the accused persons occupy certain positions in the hierarchy and there is a hierarchic difference between the perpetrators.[108]

Superior responsibility doctrine differs from the forms of principal responsibility.

4. Superior Responsibility and Perpetration

Despite the fact that Article 25(3) defines modes of individual responsibilities, the *Rome Statute* separates the superior responsibility in the Article 28, as the additional, *sui generis* form of individual responsibility.[109] Accordingly, based on its nature, the responsibility shall be lighter in comparison with the perpetration.[110] For the qualification of omission, it is important, which article is to be given preference, when there is competition between the articles and it is possible to impose criminal prosecution over the person by means of both articles.

In the process of qualification of specific crime, when there is competition between the perpetration (Article 25(3)(a) of the *Rome Statute*) and superior responsibility (Article 28 of the *Rome Statute*), preference is given to the first one. *ICC* Pre-Trial Chamber for the *Prosecutor v. Bemba* defined, that imposing criminal responsibility in the international criminal law, based on the superior responsibility doctrine is possible only in case, when there is no reasonable ground that accused person is responsible as the perpetrator of the crime within the framework of Article 25(3)(a).[111] In par-

[106] Compare Ibid, 138-139.
[107] Compare Ibid, 139.
[108] Compare Ibid. On the differing and common signs, see Ibid, 138-142; Also, see *Ambos K.,* Joint Criminal Enterprise and Command Responsibility, 5 Journal of International Criminal Justice, 2007, 159-183.
[109] Compare *Schabas W.,* The International Criminal Court: A Commentary on the Rome Statute, Oxford University Press, Oxford, 2010, 457.
[110] Compare *Burghardt B.,* 'Modes of Participation and their Role in a General Concept of Crimes under International Law', in *Burghardt C, Triffterer O., Vogel J.,* The Review Conference and the Future of the ICC, Kluwer Law International, London, 2010, 90-91.
[111] *Prosecutor v. Jean-Pierre Bemba Gombo,* Decision Adjourning the Hearing Pursuant to Article 61(7)(c)(ii) of the Rome Statute (ICC-01/05-01/08), Pre-Trial Chamber III, 3 March 2009, §342.

ticular, when based on the available evidences for the specific case, there is "active perpetration" as well as "passive perpetration" – superior responsibility, the preference is given to the perpetration.[112]

It must be noted that for the *Prosecutor v. Bemba* case, prosecution was initially requesting to impose responsibility within the Article 25(3)(a) of the *Rome Statute;* however, later it was replaced by Article 28. Pre-Trial Chamber was reassured that imposing criminal responsibility upon the accused person was impossible within the Article 25(3)(a), in the form of co-perpetration and moved to the form of responsibility envisaged under the Article 28, as the alternative mean.[113]

Accordingly, in the process of crime investigation, when based on the obtained "evidences", prosecutor "doubts" that specific person, might have *essential contribution* to the crime, prosecutor can initially start prosecution in accordance with the doctrine of perpetration. If the *essential contribution* of accused person to the crime is excluded, then in case of existence of *effective control* from the side of offender, criminal prosecution will be continued based on the doctrine of superior responsibility.

In relation to the issue on "competition of modes of individual responsibility", the *ICC's* case – *Prosecutor v. Al Bashir* is also noteworthy – Why did not the prosecution apply concept on superior responsibility?

Actually, application of superior responsibility concept on *Prosecutor v. Al Bashir* was not without basis;[114] namely, imposing criminal responsibility upon *Al Bashir,* within the framework of Article 28(b) of the *Rome Statute*, as for the *civilian superior*, "for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates".[115] In the legal literature this position is supported by the argument that existence of "control" element, which is required by the theory – *perpetrator behind the perpetrator, Täter hinter dem Täter*[116], in relation to the rape, is difficult to prove.[117] Within the superior responsibility concept, prosecution shall only prove omission of *Al Bashir,* by means of element of his *effective authority and control* over the "organization". *Al Bashir's* official position would make this process easier. To prove publicly that rape has taken place

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[112] Compare *Schabas W.,* The International Criminal Court: A Commentary on the Rome Statute, Oxford University Press, Oxford, 2010, 458.

[113] Compare *Prosecutor v. Jean-Pierre Bemba Gombo,* Decision Adjourning the Hearing Pursuant to Article 61(7)(c)(ii) of the Rome Statute (ICC-01/05-01/08), Pre-Trial Chamber III, 3 March 2009, §40-49**.**

[114] *Jessberger F., Geneuss J.,* On the Application of a Theory of Indirect Perpetration in *Al Bashir*, Journal of International Criminal Justice, Vol. VI, 2008, 865-866, who consider the superior responsibility for *Prosecutor v. Al Bashir* case, as the most adequate mode of individual responsibility.

[115] Article 28(b) of the *Rome Statute.*

[116] *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui,* Decision on the Confirmation of Charges (ICC-01/04-01/07), Pre-Trial Chamber I, 30 September 2008, §496-497. *ICC* Pre-Trial Chamber quotes *Roxin C.,* Straftaten im Rahmen organisatorischer Machtapparate, Goltdammer's Archiv für Srafrecht, 1963; English version, see *Roxin C.,* Crimes as Part of Organized Power Structures, Journal of International Criminal Justice, Vol. IX, 2011, 193-205. Following the above, *Claus Roxin's* theory was recognized by the Federal Court of Justice of Germany *(Bundesgerichtshof)*. In relation to the above, see *Weigend T.,* Perpetration through an Organization, The Unexpected Career of a German Legal Concept, Journal of International Criminal Justice, Vol. IX, 2011, 94-99; In relation to the critics of the doctrine, see Ibid, 99-101.

[117] *Giamanco T.,* The Perpetrator Behind the Perpetrator: A Critical Analysis of the Theory of Prosecution Against Omar Al-Bashir, Temple International and Comparative Law Journal, Vol. XXV, 2011, 239, 242-243.

in *Darfur,* could be used as a good evidence for the fact that he *failed to take all necessary and reasonable measures prevent or repress commission of crime.*[118]

However, the main argument, which at this stage excludes the application of superior responsibility concept for *Prosecutor v. Al Bashir* case, is the formula adopted at *Prosecutor v. Bemba case* – preference of Article 25(3) of *Rome Statute* over the Article 28.[119] Based on the evidences obtained for the case, when there is a grounded suspicion that there was "active commission" as well as superior responsibility in place, the preference is given to the first.[120] If prosecution was not able to prove the above mode of responsibility for *Prosecutor v. Al Bashir* case, prosecution's moving to the doctrine on superior responsibility would not be ruled out.[121]

5. Superior Responsibility and Accessorial Liability

Despite the fact that superior responsibility and accessorial liability have number of common signs, the first cannot be considered among the modes of criminal responsibility of the latter.[122] According to the doctrine, imposing responsibility upon the superior for the crime committed by his subordinates is made not as for the accessories, but due to his omission and for inappropriate leadership; on the other hand, accessorial liability considers moral or practical support to the *principal* by the *accessory*,[123] namely, *substantial contribution*.[124]

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[118] Ibid, 234; Also, see Article 28(b)(iii) of the *Rome Statute.*

[119] *Prosecutor v. Jean-Pierre Bemba Gombo,* Decision Adjourning the Hearing Pursuant to Article 61(7)(c)(ii) of the Rome Statute (ICC-01/05-01/08), Pre-Trial Chamber III, 3 March 2009, §342.

[120] *Schabas W.,* The International Criminal Court: A Commentary on the Rome Statute, Oxford University Press, Oxford, 2010, 458.

[121] As for the application of other modes of individual responsibility: *ICC* would not be able to use *JCE's* doctrine for *Prosecutor v. Lubanga* case, due to its rejection; Concept of co-perpetration, proceeding form the position of *Al Bashir*, due to his participation in the "vertical direction", would not be productive. Co-perpetration develops criminal responsibility in the "horizontal direction"; As for the individual responsibility for the accessorial liability in the crime, its forms do not contain elements of *control over the commission of crime* – elements of *domination of the act.* Accessory, who is "second level" participant of the crime, does not have possibility for the *control over the crime,* implements not *essential contribution* to the crime, but the *substsantial contribution.* This is the key difference between principal and accessorial liability, which was underlined in the *Prosecutor v. Lubanga* case; The same is valid for the form of individual responsibility under the Article 25(3)(d) of the *Rome Statute,* which requires *significant contribution* standard. See *Prosecutor v. Callixte Mbarushimana,* Decision on the Confirmation of Charges (ICC-01/04-01/10), Pre-Trial Chamber I, 16 December 2011, §283; *Prosecutor v. Germain Katanga,* Judgment Pursuant to Article 74 of the Statute (ICC-01/04-01/07), Trial Chamber II, 7 March 2014, §1620, 1632-1636. As mentioned above, according to the prosecutor's office, *Al Bashir* had full control over the persons, directly committing the crimes, namely, control over the direct perpetrators. Article 25(3)(d) of the *Rome Statute,* which is considered as the form related to *JCE*, is carrying the residual nature, excluding its application. See *Giamanco T.,* The Perpetrator Behind the Perpetrator: A Critical Analysis of the Theory of Prosecution Against Omar Al-Bashir, Temple International and Comparative Law Journal, Vol. XXV, 2011, 239, 242-243; *Dgebuadze G.,* Indirect (Co)Perpetration Doctrine in the International Criminal Law (analysis of the case *Prosecutor v. Al Bashir*), Justice and law, 3(34), 2012, 91-101 (in Georgian).

[122] Compare *Bonafe B.,* 'Command Responsibility', in *Cassese A.* (ed.), The Oxford Companion to International Justice, Oxford University Press, Oxford, 2009, 270; Also, see *Mettraux G.,* The Law of Command Responsibility, Cambridge University Press, Cambridge, 2009, 38. For opposite position, see *Prosecutor v. Halilovic,* Judgement (ICTY-IT-01-48-T), Trial Chamber, 16 November 2005, §43.

[123] Compare *Mettraux G.,* The Law of Command Responsibility, Cambridge University Press, Cambridge, 2009, 40.

[124] On accessorial liability standard, see *Olasolo H., Rojo E.,* 'Forms of Accessorial Liability under Article 25(3)(b) and (c)', in *Stahn G.* (ed.), The Law and Practice of the International Criminal Court, Oxford University Press, Oxford, 2015, 557-591.

Omission is punishable, as the international law defines the superior's liability, which is demonstrated via the prevention and repression of commission of crime by subordinates. Superior does not share the responsibility together with the subordinate, who committed the crime. Superior is responsible for inappropriate leadership.[125]

It must be noted that the Grand Chamber under the European Court of Human Rights for the *Koronov v. Latvia* case, understood the superior responsibility for non-implementation of measures preventing the crime as "*dereliction of a superior's duty to control"* and not as the responsibility for the actions of others.[126] Above mentioned position does not correspond to the case law for the superior responsibility, which considers it as the type of first level responsibility.

When the criminal law gives the question to the superior – "what happened?" and receives the response – "I did not know and how would I know, what was happening", superior responsibility concept is the ideal mean for checking such response (omission).

The above-mentioned notion of superior responsibility is not final. Definition of material and mental grounds for establishing criminal responsibility could change in future, based on the different views in relation to the mentioned circumstances, existing in the practice and theory. The reason for the above is that it contains aspects, which are important and fundamental for the general part of criminal law,[127] which has also been confirmed by the present work.

[125] *Prosecutor v. Halilovic,* Judgement (ICTY-IT-01-48-T), Trial Chamber, 16 November 2005, §54; On the differentiating signs for superior responsibility and accessorial liability, see *Mettraux G.,* The Law of Command Responsibility, Cambridge University Press, Cambridge, 2009, 37-44.

[126] *Koronov v. Latvia,* Judgment (ECHR-36376/04), Grand Chamber, 17 May 2010, §156, 211, 213, 223; *O'Keefe R.,* International Criminal Law, Oxford University Press, Oxford, 2015, 207.

[127] Compare *Kiss A.,* 'Command Responsibility under Article 28 of the Rome Statute', in *Stahn G.* (ed.), The Law and Practice of the International Criminal Court, Oxford University Press, Oxford, 2015, 648.

Kakha Tsikarishvili *

Causation in Complicity in a Crime According to Georgian and Anglo-American Law

According to Georgian law, causation is an objective ground for liability for complicity. Anglo American Law does not require causation for complicity. Person may be liable as accomplice if his conduct has contributed to the commission of the offence by the principle. However, some Anglo American legal scholars recognize causation in complicity, though they think that in every case we should distinguish between causal and non causal accomplices.

Key words: *Complicity, principle, aider, objective side of the crime, risk creating offence, civil agent doctrine, concealment of the crime, causation, result, freewill, condicio sine qua non, "but for test".*

1. Introduction

Complicity in a crime is one of the interesting and complex issues of the general part of criminal law. Despite the fact that the mentioned institution is comprehensively examined in Georgian legal literature, there are still lots of important issues under discussion even today.

Study of experience of foreign countries shows that despite the reconciliation and harmonization of legal systems, advanced countries maintain different approaches to the institutions of general part of criminal law, one of which is complicity in a crime.

In modern legal systems there is a diversity of opinions about the grounds for liability for complicity, forms of its manifestation, objective and subjective connection between the act of a culpable accomplice in crime and the outcome, the difference between principle offender and an accomplice in crime and so on.

The present paper deals with one of important themes – a causation between the act of a culpable accomplice in crime and the result. It should be noted that the common law doctrine and case-law does not require causation between the act and the result. However, a question arises, - if not on a causation, then on what ground the liability for complicity should be based. On the other hand, the objective ground of liability for complicity is firmly established in Georgian criminal law, though its certain aspects are subject different views.

2. Causation in Complicity in Georgian Criminal Law

Causation in Georgian criminal law is part of objective side of the crime expressly required by written law[1]. According to par. 1, of Article 8 of Criminal Code: "If a crime is deemed completed

* Doctoral Student, TSU Faculty of Law.

1 *Turava M.,* Criminal Law, Review of General Part, Tbilisi, 20, 13, 90 (in Georgian).

only when an act has caused an unlawful result or created a specific threat of the occurrence of such result, it shall be necessary to establish causation between this act and the result or threat." Part two of the same article for establishing causation uses hypothetical elimination method (but for test) "Causation shall exist when an act constituted a necessary condition for the unlawful result or specific threat provided for under the relevant article of this Code, without which this time the result or such threat would not have occurred"[2].

In Georgian criminal law it is firmly established that complicity implies the existence of casual link between an act of the accomplice in crime and the result.

In opinion of Professor *Otar Gamkrelidze* causation in complicity has double meaning: firstly, it functions as some kind of guarantee; it is the limit, beyond which responsibility can't be spread for complicity in a crime. Secondly, the object of encroachment of a principal and accomplice in the crime is one and the same. [3]

In the Soviet criminal law the necessity of establishing causation in complicity was disputed by A. Vishinsky, who shared the approach of English criminal law of that time and considered that any connection of a person with a crime was sufficient for complicity. According to this approach, concealment of a crime is one of the forms of complicity[4]. T. Tsereteli correctly states that the concept "any connection'' is so broad and infinitive, that it may trigger criminal responsibility on persons, who not only had not participated in the crime, had not even known anything about it"[5].

According to *T. Tsereteli, "*The unity of objective side of the participants' act first of all is expressed in such a way that each participant's conduct must be in causative connection with the criminal result. So this result must be a product of their common activity[6].

T. Tsereteli criticizes the approach of some Western Criminal jurisdictions, which deny the existence of causative connection between the participant's act and the result of a crime to such extent that "a perpetrator, which decides "freely" to commit a crime, always starts a chain of a new and independent causation"[7].

She states: "A special nature of psychological regularity allows us to substantiate the causative character not only of the principal's act, but also of the instigator's and helper's acts. Humans are able to influence the environment by means of volitional act, to submit its regularities to the consciously set goal. But at the same time a human's will is conditioned not by his will itself, not from emptiness, but by the human's environment. As far as the person's will is determined by the human

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[2] In modern Georgian criminal literature there is a consideration that this legislative formula of causative connection has to be replaced by unwritten formula of "regular condition" and complemented by unwritten element of crime – category of objective imputation. *Turava M.,* Criminal Law, Review of General Part, Tbilisi, 2013, 90 (in Georgian). This formula of causation is constructed only on result crimes, though in complicity it logically includes objective connection of the participant's act with the conduct crime committed by the perpetrator.

[3] *Gamkrelidze O.,* Criminal Law Problems, Vol. II, Tbilisi, 2010, 236 (in Georgian).

[4] *Isereteli T.,* Criminal Law Problems, Vol. II, Tbilisi, 2007, 19 (in Georgian).

[5] Ibid, 20. The necessity of causation in complicity was also rejected by *Mishunin P.,* according to him causal connection between participants' act and the result of the delict committed by the perpetrator of crime is not a theoretical base for the construction of complicity and for the concept of complicity minimal subjective connection between participants is necessary. See *Tsereteli T.,* Criminal Law Problems, Vol. II, Tbilisi, 2007, 27 (in Georgian).

[6] *Isereteli T.,* Criminal Law Problems, Vol. II, Tbilisi, 2007, 12 (in Georgian).

[7] Ibid, 14.

environment, the person by his any act does not start a new chain of causation, which terminates the chain existed before, but he continues it, adding new rings to it"[8].

According to *T. Tsereteli,* it is not hard to establish causative connection between the act and the bad result, when an assisting offender physically participates in committing a crime, for example, when a person handed a firearm to the perpetrator to commit murder or brought him a ladder to get into a storage house in order to rob it. T. Tsereteli concludes, that "in these cases a physical helper creates the necessary condition, without which a criminal result would not have been carried out"[9], but more complicated is a causative connection between a psychical accomplice in crime and a criminal result. The influence of a psychical accomplice in crime will pass through the mind of the perpetrator, will become a motive of his volitional act and so he will be involved in the chain of the causative connection"[10].

The opinion that the participants' act must be in causal connection with the criminal result was recognized in the theory of the Soviet Criminal Law and it was also shared by courts[11]. The evidence of it is the judgment of the Criminal Panel of Supreme Court of the Soviet Union dated on the 15th of July, 1942, on the case of Kosenkov and Iakushin, whose wives upon instructions of their husbands put dry wheat into sacks and kept them in the pantry, by which act, according to prosecution, they encouraged their husbands not to return the wheat. As it was remarked in the court decision these acts had not encouraged their husbands in not returning the wheat. Husbands were obliged to return the wheat in any case regardless of the place where the wheat was kept. [12]

This case cited by *T. Tsereteli* is very interesting from the causation point of view and it has a certain analogue in the court practice of the common Law. There is a question whether the responsibility of the wives could have been established from the point of view not of physical, but from psychological assistance.

In the Soviet Law the necessity of the causative connection in complicity was conditioning the difference between the previously promised and not promised concealment. The previously promised concealment was perceived as complicity, but previously not promised concealment was qualified as an independent crime (see above).

Professor *Otar Gamkrelidze* thinks, that "responsibility in complicity might be based on physical, as well as on psychical causation"[13]. At the same time, he admits, that "a psychical phenomenon is a fact of social life, which must be subjected to causation regularity. If we recognize the point of view that causative connection exists only in the material world, then we must admit the complete arbitrariness in the social sphere and the complete freedom of human will[14]".

The opinion that the act of an accomplice in crime must be in causative connection with the criminal result is shared by many authors in modern Georgian criminal Law. For example, *Adam Makharadze* in connection writes: "Modern criminal legislation, practice and theory firmly defend

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[8] *Isereteli T.,* Criminal Law Problems, Vol. II, Tbilisi, 2007, 16 (in Georgian).
[9] Ibid.
[10] Ibid, 17.
[11] Ibid.
[12] *Isereteli T.,* Criminal Law Problems, Vol. II, Tbilisi, 2007, 18 (in Georgian).
[13] *Gamkrelidze O.,* Criminal Law Problems, Vol. II, Tbilisi, 2010, 224 (in Georgian)
[14] Ibid, 222.

the opinion that the act of the accomplice in crime together with the act of the perpetrator must cause the criminal result. It is a firm guarantee to fend the principle, according to which responsibility might be charged on the culprit only for the result which was caused by his act; besides, on the basis of the causative connection between the participant's act and the criminal result caused by the perpetrator we can conclude that an accomplice in crime encroaches and damages the same legal interest, which is encroached and damaged by the perpetrator of the crime"[15].

A different opinion connected with the necessity of causative connection in complicity in a crime is developed by *K. Mchedlishvili-Hedrikh*. Basing on the modern doctrine of German Criminal Law she concludes, that the existence of the causative connection between the aider's act and the crime committed by the perpetrator is necessary, though "there is no requirement for the aider's act to be inevitable condition *,,condicio sine qua non"* of the committed crime. The assisting accomplice in crime will be responsible even when the perpetrator commits a crime without his act. For qualifying the act as assistance it is decisive that the assistant's act is involved in certain causation, facilitates commitment of the crime and increases the chance of producing the result"[16]. In order to confirm this statement *K. Mchedlishvili is citing following example*: "When the person assists the robber by lighting a torch for him and is only facilitating searching for jewelry or is helping a housebreaker by carrying a ladder for him, he is only facilitating the commitment of the crime and is not the necessary condition for carrying out the crime"[17].

This opinion of *K. Mchedlishvili* on the one hand stands in interesting correlation with the opinion of contemporary American authors, according to which complicity in a crime requires not necessary, but possible causative connection, though on the other hand this opinion needs more justification because according to Georgian Criminal Code the concept of causative connection is based on *condicio sine qua non* formula.

3. Causation in Complicity in a Crime According to Anglo-American Criminal Law

Anglo-American law maintains an approach, according to which the complicity in a crime does not require the participant's act being in causative connection with the principal's act and the criminal result[18]. One of the supporters of this opinion is *Stanford Kadish.* In his work "Complicity,

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[15] *Makharadze A..,* Criminal Responsibility for Assisting in the Commission of a crime, Tbilisi, 2006, 41 (in Georgian). The significance of the causative connection in complicity is also emphasized by Prof. *Nachkepia G.,* according to which at this time a causative connection is peculiar and the theory of equivalency of conditions is unable to distinguish the organizer's act from the assistant's act, which would have made possible individualization of responsibility, General Part of Criminal Law, group of authors, Tbilisi, 2007, 191 (in Georgian).

[16] *Mchedlishvili Q.,* Criminal Law, Individual Forms of Manifestation of a Crime, Tbilisi, 2011, 233 (in Georgian); on the other hand, when a case concerns an instigator Prof. *Mchedlishvili K.,* says The instigator's case must be causatively connected with commitment of a crime. He must persuade the perpetrator to commit a crime, i.e. incite him to make decision of committing a crime. *Mchedlishvili K.,* Criminal Law, Individual Forms of Crime Manifestation, Tbilisi, 2011, 219 (in Georgian).

[17] *Mchedlishvili K.,* Criminal Law, Individual Forms of Crime Manifestation, Tbilisi, 2011, 233 (in Georgian).

[18] It is interesting that in American criminal trial proceedings the accusation party is not obliged to prove that the accomplice's share was essential in producing a criminal result. The accusation is not obliged either to prove by which form of complicity was acting the accused. Furthermore on giving a verdict complicity is not pointed to. The accomplice is announced to be guilty by the same form as the principal. The same rule is acting in England.

Cause and Blame: a Study in the Interpretation of Doctrine"[19], he remarks that complicity, as other forms of crime commitment, is closely connected with the concept of "blame", which includes judgment on the person's responsibility and is connected with freedom of choice. We are not only evaluating the person's act negatively, we are also blaming the person for making such a choice[20].

On the other hand, according to Kadish, one is blamed for harmful result only when this result is imputed to him. For this purpose criminal Law developed two doctrines of attaching liability for a harmful result. One is causative connection and the other is complicity[21]. Kadish admits that if we consider the accomplice's act as a cause of the principal's act, then we are in contradiction with the concept of blame[22].

In relation to causation and free will he states following: We perceive human actions as differing from other events in the world. Things happen and events occur. They do not occur anarchically and haphazardly, but in sequences and associations that have a necessary quality about them. We express this quality in terms of causation and we understand it in terms of laws of nature that are beyond our power to alter. Human actions stand on an entirely different footing. While man is total subject under the laws of the natural world, he is total sovereign over his own actions. Except in special circumstances, he possesses volition through which he is free to choose his actions. He may be influenced in his choices, but influences do not work like wind upon a straw; rather, they are considerations on the basis of which he chooses to act. He may

also be the object of influence in the larger sense that he is the product of the forces that shaped him. But his actions are his and his alone, not those of his genes or his rearing, because if he had so desired he could have chosen to do otherwise. This is the perception that underlies the conception of responsibility which, in turn, is central to the conception of blame".[23].

According to *Kadish* a human's free acts have two meanings for the doctrine of complicity. "First, when we examine a sequence of events that follows a person's action, the presence in the sequence of a subsequent human action precludes assigning causal responsibility to the first actor. What results from the second actor's action is something the second actor causes, and no one else can be said to have caused it through him. This is expressed in the familiar doctrine of *novus actus interveniens.* Second, when we seek to determine the responsibility of one person for the volitional actions of another, the concept of cause is not available to determine the answer. For whatever the relation of one person's acts to those of another, it cannot be described in terms of that sense of cause

Lippman M., Contemporary Criminal Law, Concepts, Cases and Controversies, Sage Publications, 2007, 158; *Dressler J.,* Reforming Complicity Law, Trivial Assistance as Lesser Offence, Ohaio State Journal of Criminal Law, Vol. 5:427, 448; *Ashworth A.,* Principles of Criminal Law, 5th ed., 2006, 415. For example, in the verdict on *Gianetto (1977)* case court alleged that the accused either killed his wife himself or hired somebody to kill her. So far this rule spread in common law has endured the filter of Article 6(3) of the European Human Rights Convention, according to which the accused must be informed in details the point and ground of the prosecution against him, *Ashworth A.,* Principles of Criminal Law, 5th ed., 2006, 412.

[19] *Kadish S.H.*, Complicity, Cause and Blame, Study in the Interpretation Doctrine, California Law Review, Vol. 73, Issue 2, 1985.

[20] Ibid, 331.

[21] Ibid, 333.

[22] Ibid.

[23] Ibid, 330.

and effect appropriate to the occurrence of natural events without doing violence to our conception of a human action as freely chosen"[24].

Accordingly, K*adish* concludes that the role of the accomplice in committing a crime is expressed not in terms of causation but in terms of influence or assistance[25]:

Kadish says: "Responsibility of the accomplice for his influence on the principal's decision completely corresponds to the given fact that his acts are conditioned by his own choice. Recognizing that a person is influenced by what other people say and do, ... does not imply that volitional acts are caused, in the physical sense, the way natural events are determined by antecedent conditions. The choice of the principal is what ultimately determines the effectiveness of the influence[26]".

In the opinion of *Kadish* the influence of the accomplice on the principal to some extent is like causality: the accomplice's liability depends on his success. Unsuccessful assistance or incitement (for example, if an individual shouts encouragement to another to attack a third person and the attacker is deaf or otherwise unaware of the encouragement, also when a person unlocks the door of a building in order to facilitate a burglar's entrance. Unaware of this, the burglar breaks and enters through a window) must not be complicity, but might be some other independent crime, though in complicity the formula "*condicio sine qua non"* is not used[27]. Complicity as well as causality is excluded by a distant, unanticipated, abnormal or coincidental connection (for example, if I told someone involved in a quarrel in Hindu language that he could find a knife in the drawer, but he could not understand, as he did not speak that language; and quite by chance another bystander, who understood Hindu conveyed the information to him and the quarrelsome used the knife[28]).

Kadish concludes that complicity and causation are related concepts, though complicity requires weaker connection with the crime, than causation. Namely, complicity does not require *condicio sine qua non*, but requires successful complicity. According to Kadish complicity is successful, if it assisted the principal to carry out the intended act".[29].

The position of *Kadish* that for complicity it is not necessary to prove causative connection with the principal's act is quite firmly established in contemporary American Law. Michael Moore substantiates this position in the following way:

"A very standard view of why accomplice liability is noncausal contains two premises.15 It first asserts that the criminal law's causal requirements include a "necessary condition" (a "sine qua non", or counterfactual element): for an act *A* to cause a harm *B, A* must be necessary for *B* (i.e., if *A* had not happened, then *B* would not have occurred either). So if accomplice liability had a causal structure, then the act of an accomplice would have to be a necessary condition for the prohibited harm to occur. To be an accomplice to murder, for example, one would have to have done something necessary to the death occurring. The second premise is that there are many cases of accomplice lia-

[24] Ibid, 332.
[25] *S. Kadish* thinks that opposite to complicity a person is acting causally in the process of mediation.
[26] Ibid, 343.
[27] Ibid, 357.
[28] Ibid, 368.
[29] Ibid, 359.

bility in which the act of the accomplice is not necessary to the occurrence of the harm. Ergo, the conclusion: accomplice liability is noncausal in its structure"[30].

The opinion that in complicity prosecution is not obliged to prove causative connection is also shared by English authors. Basing on court practice Ashworth says that it is sufficient to prove that the accomplice somehow assisted or might have assisted the principal[31].

Rejecting the necessity of causative connection in complicity some authors conclude that complicity is a risk creating form of committing delict and not a form of creating a crime with result. According to this opinion each accomplice could be liable for a danger creating act committed only by him regardless of the occurrence of the result.[32] This approach is criticized by Professor *J. Dressler*. According to him hardly few will share the opinion that the accomplice will not be liable for harmful result caused by crime[33].

Interesting considerations on the issue of complicity are expressed by American scholar *Jacob Kreutzer*. Reviewing the theory and court practice he affirms that if the prosecution had duty to prove causation in complicity, it would be n very hard for prosecutor's office to indict an accomplice[34]. He agrees with Kadish and says that judging on causation can be only in physical world, but in psychical world we are never sure how a free human will behave[35]. Accordingly in complicity it is enough to prove that the acts of the accomplice have influenced the commitment of a crime. The court practice confirms that this influence might be even minimal, for example, such as presence and applauding the concert conducted in violation of the law[36], or preparing meal for the perpetrator of a crime.[37] *Kreutzer* says, that attempt of a crime and complicity in a crime somehow are alike, in some probability rate both are connected with a criminal result (or presumable result), accordingly in case of complicity, as well as in case of attempt we demand a high degree of guilt - intention[38].

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[30] *Moore M.,* Causing, Aiding and Superfluity of Accomplice Liability, 156 U. PA. L. REV., 395, 2007, 55.

[31] *Ashworth A.,* Principles of Criminal Law, 5th ed., 2006, 415.

[32] *Dressler J.*, Reforming Complicity Law, Trivial Assistance as Lesser Offence, Ohaio State Journal of Criminal Law, Vocril. 5:427, 2008, 444. Authors who don't recognize causality of complicity, are basing liability on different grounds. According to the civil agency doctrine the accomplice agrees with the acts of the perpetrator's, as his agent's, and he personally liable for these acts, i.e. the accomplice allows the perpetrator to act and takes his acts on his responsibility; according to *forfeited personal identity doctrine* a person who chooses to aid in a crime forfeits his/her own personal identity and that his/her identity becomes bound up in that of the principal; see *Courtreau C.,* The Mental Element Required for Accomplice Liability, Luiziana Law Review, Vol. 59, 1998, 327. According to the theory of *Kadish S.,* about the complicity in a crime committed by another, the accomplice is punished because he/she aids the perpetrator in violation of a law (see *Kadish S.H.*, Complicity, Cause and Blame, Study in the Interpretation Doctrine, California Law Review, Vol. 73, Issue 2, 1985); according to the theory of *complicity as omission* because of specific connection of the accomplice with the crime we are separating the accomplice from all the persons who did not obstruct committing the crime and charging him/her criminal liability. *Kreutzer J.,* Complicity and Repentance, Reexamining Complicity in the Light of Attempt Doctrine, NY Journal of Law and Liberty, Vol. 3:155, 2008, 5.

[33] *Kreutzer J.,* Complicity and Repentance, Reexamining Complicity in the Light of Attempt Doctrine, NY Journal of Law and Liberty, Vol. 3:155, 2008, 6.

[34] Ibid, 11.

[35] Ibid, 12.

[36] Ibid.

[37] Ibid.

[38] Ibid, 10.

After discussing the above mentioned opinions it is very interesting to consider the opinions of those scholars, which recognize causation in complicity. Among them is American Professor *J. Dressler*.

Professor *Dressler* thinks that causality is very important in criminal law. "First of all" – he says, it connects a culprit with a criminal result"[39]. "From two hunters, who shoot a man carelessly and independently from each other, criminally liable will be the one, whose act is in causative connection with the occurred result"[40]. According to Professor *Dressler* the second important role of causative connection is that it enables to accuse the accomplice according to his/her deserts and imposes punishment just proportional to the result, caused by him/her[41]. He admits that just this fundamental principle of criminal law is rejected by complicity law, which does not require the necessity of establishing the causative connection and allows us to make the person having a slight role in the crime answer like the perpetrator[42].

Professor Dressler agrees with *Kadish* on the issue that processes in human mind differ from processes in physical world, though in his opinion it does not give ground to reject factual, as well as normative causation in complicity[43]. "Its true", he says " voluntary human conduct *is* less predictable than, say, the laws of gravity, the proposition that voluntary human conduct is invariably less predictable than some natural events, for example, the direction a tornado will take, is false"[44].

The same opinion is shared by Professor Gardner, who says the following:

"Many say that... humans, as responsible subjects, have a free will and they can resist causation. Accordingly, their conducts are not causative connection chains. They are saying that if we subject the perpetrator's act to causation, we don't perceive him/her as a responsible subject. This statement is obviously wrong to me. When I pay money hitman to kill my adversary, the result of my act will be that he will kill my adversary, i.e. he will die. Accordingly, I am inciting and assisting the hired killer and am causing the death by his assistance. It is a simple causative explanation of the previous and next acts. It does not depreciate the role of the hired killer, as a responsible agent[45]".

Professor Dressler separates causal and non-causal accomplices, also substantial and insubstantial participant accomplices and concludes the following:

"A person is not accountable for the actions of the perpetrator unless her assistance not only satisfies the causation requirement but there is evidence that the accomplice was a substantial participant, not a bit player, in the multi-party crime. Conceptually, an accomplice who satisfies both the causation and substantial-participant standards would be accountable for the conduct of the primary party and subject to the same punishment. The causal-but-minor accomplice would also derive her guilt from the principal (since she satisfies the but-for standard) and thus be guilty of the same offense as the principal, but she should be entitled as a matter of right to a reduced sentence because

[39] *Dressler J.*, Reforming Complicity Law, Trivial Assistance as Lesser Offence, Ohaio State Journal of Criminal Law, Vol. 5:427, 2008, 448.
[40] Ibid.
[41] Ibid.
[42] Ibid, 437.
[43] Ibid, 439.
[44] Ibid, 439.
[45] *Gardner J.,* Complicity and Causality, 1 Crim. L. and Phil. 127, 2007, 14.

of her minor assistance. The *non*-causal participant would not derive liability for the completed offense but would instead be guilty of a lesser crime and, thus, be punished less severely for that reason alone" [46]".

The idea of differentiating between accomplices according to the causal connection to the result is also shared by *Jacob Kreutzer*. He thinks that had not an accomplice influenced on the perpetrator's act, punishment of the accomplice would be pointless, because we would not have avoided the criminal result anyway[47]. As an example he gives different forms of participation in crime and differentiates them according to causative roles:

a) Client

Ali hires Peter, who is a professional killer, to kill his wife – Violet. Peter takes money and kills Violet.

Jacob thinks that here is obviously the causative connection and Ali must be punished for murder.

b) Specialist

Abe is very good at disabling security systems. In fact, he's one of the best in the business. That's why Paul contacts Abe when he wants to rob a bank that uses a very sophisticated security system. It's a rush job they'll be robbing the bank the day after Paul contacts Abe. Abe takes the system offline, allowing Paul and his other henchmen to enter the bank and steal various valuables from the vault.

Jacob thinks that here is also evidently the casual connection, because without the Abe's assistance Ali would not have been able to rob the bank.

c) Superfluous helper

Paul is a professional burglar. His wife, Alice is aware of this fact and approves of his endeavors. In fact, she prepares for him a boxed meal that he can eat between burglaries, so that he does not get hungry and quit early.

Kreutzer thinks that by the current law Alice will be liable for the crime committed by Paul but by the proposed reform proposal Alice is a non-causal accomplice and must be held less liability. The mere supposition that maybe these crimes would not have happened without Alice does not justify recognition her as an accomplice[48].

d) Easily replaceable helper

Anthony has no particular skills that he can bring to bear to further a criminal enterprise. Rather, Paul simply asks him to act as a lookout for Paul while Paul robs a bank, and pays Anthony for his time. While Paul would not have robbed the bank without having somebody act as a lookout, there was no pressing need for Anthony to be the person acting as a lookout. Others were readily available and willing to help, and would have done an equally good job.

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[46] *Dressler J.,* Reforming Complicity Law, Trivial Assistance as Lesser Offence, Ohaio State Journal of Criminal Law, Vol. 5:427, 2008, 447.

[47] *Kreutzer J.,* Causation and Repentence, Reexamining Complicity in the Light of Attempt Doctrine, NY Journal of Law and Liberty, Vol. 3:155, 2008, 4.

[48] Ibid, 15.

According to *Kreutzer* it is a quite tricky case. According to current Law Anton is an accomplice in robbing, but by the proposed solution it is disputable whether he is causatively connected with robbery. By deduction method he does not act causatively, because Paul could have received the assistance from others as well. Kreutzer leaves this question open for the assessment by juries[49].

Anglo-American approach in connection of causality of complicity arises many questions, though gives many interesting leading signs.

In the first place it should be noted that breaking of causative connection by a free will of the perpetrator is not in conformity with the contemporary scientific and non-scientific (general) understanding of causation. If the perpetrator's free will had broken causal chain the causality, there would not have been the expression existed in many languages of the world "to have something done"[50] and also the historical truth "David Agmashenebeli (Builder)" built Gelati (because from the point of view of Criminal Law David Agmashenebeli presumably had not put even a single stone in building of Gelati, He was only an "organizer" of construction"[51])

Though the second issue concerns the deduction method, legalized by Article 8 of Georgian Criminal Code. It does not always explain the accomplice's connection with the criminal result. Accordingly Professor Dressler's opinions on differentiating causal and non-causal accomplices will be interesting for Georgian criminal law.

4. Conclusion

Research shows that accomplice liability in Georgian and Anglo-American law is based on different objective grounds. According to Georgian criminal law the objective ground of liability is causation, while the doctrine dominated in Anglo-American criminal law and court practice doesn't require establishing of causal link.

By moving away from causation, Anglo-American theory of complicity in crime loses the objective basis of imputation of the result and is forced to search for other theories of liability, the scientific and practical value of which is disputable.

On the other hand the doctrine of Georgian law has defects, as there are cases, when causative connection between the accomplice's acts and the criminal result is disputable. In case of complicity the substitution of formula *condicion sine qua non* by other formula of increasing risk, offered by K. Mchedlishvili is not based on legislation, because it goes beyond the limits of causative connection stated by Article 8 of Criminal Code.

On this background, opinions of *Professor Dressler* and *Professor Kreutzer* on differentiating causal and non-causal (substantial and insubstantial) accomplices seem to be interesting. We think that in Continental, as well as in Anglo-American criminal law research must be continued in this direction in order to improve the complicity law and harmonize legal systems.

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[49] Ibid, 18.

[50] In English: *make somebody do something,* In French: *faire faire,* in Spanish: *hacer hacer algo* and others, for example, have coffee boiled, have the bread brought and so on.

[51] American author Daniel *Yager* remarks the same. He says: "Lue XIV built Versailles, though he did not build it himself"–*Yager D.,* Helping, Doing and the Grammer of Complicity, 15 Crim. Just. Ethics, 1996. 25.

David Tsulaia[*]

Crime and Criminality, as Manifestation Forms of Sin

(Normative Aspect Analysis)

The present article is only the part of the research, which based on the normative analysis, describes crime and criminality as forms of sin.

According to the research, sin is violation of norm. Ontology of state and law indicates that sin is violation of norm of law too. Hence, sin meets criteria both of general concept of norm and norm of positive law, meaning that normative concept is common feature of crime, criminality and sin.

In conclusion part of the article, division of wide and narrow notions of sin are presented, according to which, wide notion implies violation of all types (informal and formal) of norms and narrow notion implies only violation of norms of positive law. Consequently, based on normative aspect, crime and criminality are forms of sin.

Key words: *sin, crime, criminality, norm, state and law.*

1. Introduction

Criminality compared with the last centuries has been quantitatively, as well as qualitatively represented in a different way. Its scopes are getting more and more, creating more danger to mankind that speaks of the fact that scientific theories are not able to explain thoroughly the matter point and phenomenon of criminality. This situation makes us think of the necessity of paying special attention to studying such a fundamental category, which would show a general ground for all the negative phenomena.

The above mentioned circumstances are dictating that the answer to the issue under investigation should be found in the Orthodox Christian doctrine, as a source of all the negative phenomena, immoral, antisocial or criminal conduct is considered to be as a sin.

The present article is only a part of the research, the purpose of which is to show a sin, as having the nature of crime and criminality, by analyzing a normative aspect of sin, which on its own is a precondition of comprehensive research of other criminological aspects.

2. The Normative Nature of the First Sin

Study of the normative nature of sin requires starting of research with analyzing the warning given to Adam by the LORD God, because if the warning of the LORD God had not been violated, there would not have been a sin. In the Bible, in the Book of Genesis we can read the following:

[*] Doctoral Student, TSU Faculty of Law.

"The LORD God commanded Adam saying: From any tree of the garden you may eat freely; but from the tree of the knowledge of good and evil you shall not eat, for in the day you eat from it, you will surely die" (Genesis, 2, 16-17).

First of all it should be noted that the word "norm" (in Latin *norma*) is interpreted as: 1. "an obligatory rule or standard; 2. conduct standards or ethical value: maxima; principle of right conduct; especially imperative declaration, which confirms or denies that something must be done or something has some value; 3. an ideal standard, which is obligatory for group members and serves to control or regulate the right and acceptable conduct behavior. "[1]

The founder of normativism Hans Kelzen remarks that under the word "norm" we mean something, which must be or must happen, especially that man must conduct definitely[2], that "norm" is the contents of action, by which a certain conduct is commanded, defined or permitted.[3] In other words norm implies an action, which does not exist yet, like norm conception "legal norm only if it denotes regulation of human behavior and if it regulates human behavior by taking forced measures, such as sanction"".[4]

Accordingly based upon the norm conception it is clear that by warning of Adam a norm was set by God, as the warning "*from the tree of the knowledge of good and evil you shall not eat"* expresses a concrete rule of behavior, setting a rule of behavior and the first sin expresses the infringement of this norm, behavior deviated from this norm.

Even at this stage of research, when we ascertain that a sin is the infringement of the norm and considering that both crime and criminality imply the infringement of the norm,[5] we will be able to make the primary previous conclusion, that sin is a crime and criminality too. In other words normativeness is a common characteristic feature of sin, crime and criminality.

From the above mentioned it was cleared up that: 1. for studying the normative nature of the sin the most important is to define the rule of behavior, as a sign of the norm and 2. Normativeness is a common characteristic feature of sin, crime and criminality.

If course research should be continued, as it is still to be cleared up to what extent it is justified the identification of a sin with crime and criminality only by ascertaining the rule of behavior, because as it is known: 1. According to the typology of norms existed in science the first warning of the God belongs to the informal oral category of legal and not positive norms, which is established by the state and what is the most important – 2. According to Thomas Hobbs: "authorities and not

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1 Webster's Third New International Dictionary of the English Language Unabrudged, (Editor in Chief Philip Babcock Gove Ph.D and the Mariam Webster Editoria staff), Sringfield, Massachusetts, USA, 1981, 1540; 2, < *www.britannica.com/dictionary/norm*> [01.06.2015].

2 *Kelsen H.,* Pure Theory of Law, 2nd edition, (*M.Knight tr.),* University of California Press, Berkeley, Los Angeles, London, 1978, 4.

3 *Kelsen H.,* Pure Theory of Law, 2nd edition, (*M.Knight tr.),* University of California Press, Berkeley, Los Angeles, London, 1978, 5.

4 *Kelsen H.,* General Theory of Law and State, 3rd Printing, *(A. Wedberg tr.),* Cambridge, Massachusetts, U.S.A, 2009, 123.

5 Crime as a legal institution implying contempt of criminal law, but criminality, as a legal phenomenon, means a non-normative act.

the truth defines law) ("*auctoritas, non veritas facit legem*").[6] But law is a collection of norms established by the state[7] and consists only of norms.[8]

Accordingly in order to understand the main point of the issue we should clear up what the Orthodox Christian teaching thinks of the state and its law. It is reasonable to analyze the issue in chronological sequence by the Old and the New Testaments.

3. Legal Nature of the sin

3.1. State and Law by the Old Testament

In the Bible a talk about the state government form is even in the Book of Genesis, when the God revealed to Abraham he made a promise to him about the existence of kings among his descendents: *"I will give you a lot of descendants, and in the future they will become great nations. Some of them will even be kings"* (Genesis, 17, 6).[9] The same *"Be fruitful and multiply; a nation and an assembly of nations will come from you and kings will emerge from your lions"* (Genesis, 35, 9-12).

It is the appearance by which the secret of patriarchal theocracy is explained.[10] Besides Jacob on Prophetic blessing of Judah is also talking of kings, who will be originated from Judah's tribes until Christ, "the hope of people", comes (Genesis 49.10). Moses sees beforehand starting of king government in Israel and therefore gives people instructions connected with choosing a king. He also gives instructions to a future king connected with his life and behavior rules.[11]

A real stage of formation of ruling of the state by a king is described in the book of "the first kings", when the Israelites coming to Samuel expressed their desire to have a king, saying: "Put a king to us" (I King, 8, 5), because they believed that a strong hand of a sole king would be enough guarantee for restraining malefaction of many secondary governments.[12]

In the commentaries on the Bible it is explained that "The form of public government of that time had the theocracy character (i.e. the LORD reigning) with the full meaning of this word. God of heavens and of all the peoples (theocracy with broad meaning) for his chosen peoples was also an earthly king. He was stating laws, resolutions, orders not only of pure religious, but at the same time of public and political character. As a sovereign at the same time he was a main leader of the military force of his people. A divine tent, as a special dwelling place of the LORD, at the same time was a residence of the Israelites' ruler; here during religious, political, public or family important

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6 Pluralism and Law: State, Nation, Community, Civil Society, Vol.2, (*ed. Soetemen A.),* Proceedings of the 20th World Congress, Amsterdam 2001, 10; *Khubua G.,* Theory of Law, Tbilisi, 2004, 137 (in Georgian).

7 *Khubua G.,* Theory of Law, Tbilisi, 2004, 43 (in Georgian).

8 *Rohl K.,* Allgemeine Rechtslehre, 191, cited: *Khubua G.,* Theory of Law, Tbilisi, 2004, 50.

9 In connection with this detail St. Ephrem Asori declares that under these kings are meant kings of tribes of Judah, Ephrem and the Idumiels, Ephrem Asori, Explanatory on Genesis, Tbilisi, 2014, 102; Gvasalia G., Explanatory on Genesis, series "Exegetical Collection", vol. I, Tbilisi, 2014, 271; *Lapukhin A.P.,* Explanatory on the Bible I, (published under the editorship of Z. Dzindzibadze, translated by *T. Metreveli*) 2000, 197

10 *Gvasalia G*., Explanatory on Genesis, series "Exegetical Collection", vol. I, Tbilisi, 2014, 582 (in Georgian).

11 *Lopukhin A.P.,* Explanatory on the Bible III, (published under the editorship of *Z. Dzindzibadze*, translated by *T. Metreveli*) 2000, 54 (in Russian).

12 *Lopukhin A.P.,* Explanatory on the Bible IV, (published under the editorship of *Z. Dzindzibadze*, translated by *T. Metreveli*) 2000, 159 (in Russian).

events people were announced their celestial and terrestrial ruler's will. Prophets, bishops, leaders, judges only obey the celestial ruler's orders".[13]

In the book of "The I Kings" there are described phenomena, which concern a request of giving a king to lead them. The LORD is saying to Samuel:

> *"Listen to all that the people are saying to you; it is not you they have rejected, but they have rejected me as their king. As they have done from the day I brought them up out of Egypt until this day, forsaking me and serving other gods, so they are doing to you.* "(The I Kings, 8, 7-8)

Later we can see that Samuel thought that fulfillment of this wish did not contradict the form of the LORD's reigning established in the Israelites, as the terrestrial king of the theocratic state of the Israelites is not and must not be more than a performer of the celestial king's laws among the people under his reigning (Deuteronomy, 17, 14-20).[14] The LORD told Samuel:

> *"Now listen to them; but warn them solemnly and let them know what the king who will reign over them will claim as his rights. Samuel told all the words of the LORD to the people who were asking him for a king"* (The I Kings, 8, 9-10).

Samuel outlined not the ascendancy of the Israelites' kings (The I Kings, 8, 11-18),[15] but described the behavior of eastern kings of that time, the strict hues of which somehow were warning the Israelites to be precautious with the measure thought by them.[16] But the people refused to listen to Samuel.

> *"No! We want a king over us. Then we will be like all the other nations, with a king to lead us and to go out before us and fight our battles".* (The I Kings, 8, 9-10).

The LORD chooses Saul from the tribe of Benjamin, who was anointed by Samuel as a king: *"The LORD has appointed you to be the ruler over his special possession"* (The First Kings, 10, 1). Samuel announced the Israelites that they by demanding king had been rejecting the God, who had saved them in hard times from the Egyptians and all the realms, which were oppressing them and that the LORD chose Saul as a king, after that "*Samuel announced the rights of reign before the nation, wrote them down in the book and put it before the LORD"* (The I Kings, 10, 25).

"The rights of reign" – written down and put before the ark of the LORD must be differentiated from those, which Samuel produces to people, as the behavior of the eastern kings of that time (The First Kings, 10, 11-18). On the opposite of the above mentioned according to Deuteronomy, Chapter 17, Articles14-20, Samuel (as it is seen) expressed an ideal, from the point of view of theocracy (The First Kings, 8, 6 commentary) of desirable king, which would be to be taken after by the Israelites' king, though the contents of this document has not reached us.[17]

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[13] *Lopukhin A.P.,* Explanatory on the Bible IV, (published under the editorship of *Z. Dzindzibadze*, translated by *T. Metreveli*) 2000, 159-160 (in Russian).

[14] <www.orthodoxy.ge/tserili/biblia/2rjuli/2rjuli-17.htm>, [01.08.2015].

[15] <www.orthodoxy.ge/tserili/biblia/2rjuli/2rjuli-17.htm> [01.08.2015].

[16] *Lopukhin A.,* Explanatory on the Bible III, (published under the editorship of *Z. Dzindzibadze,* translated by *T. Metreveli*) 2000, 161 (in Russian).

[17] *Lopukhin A.P,* Explanatory on the Bible III, (published under the editorship of *Z. Dzindzibadze,* translated by *T. Metreveli*) 2000, 173, (in Russian).

In the other books of the Old Testament there are many other examples of the information, which confirm the existence of king government and its laws.[18] Among them should be noted the book "Solomon's Proverbs", where we read: *"Kings are reigning by me and rulers are setting laws by me. By me are reigning rulers and dignities – all the judges of the country"* (Proverbs 8, 15-16).

3.2. State and Law by the New Testament

In the New Testament the talk about state and law is mainly in the Gospel of Matthew and John, Catholic Epistles, – the First Epistles of Peter and Paul – referred to the Romans, Colossians and I Timothy.

Gospel of Matthew describes the obedience to the rules set by the state. In answer to the examining question of the Pharisees – was it possible to pay a tribute to Caesar – Jesus answers: *"Render therefore unto Caesar the things which are Caesar's; and unto God the things that are God's"* (Gospel of Matthew, 22: 21). In connection with this episode in the commentary on Mathew's Gospel it is also remarked that by this answer the LORD showed the connection between two concepts, namely the duty before Caesar and the God, imperfection of the first one without the second one. It is not difficult to see that the second half of the phrase "*render unto God the things that are God's" is wider, as God's authority is superior compared to the authority of Caesar's kings.*[19]

According to V. Tsipin Jesus Christ accepted rules of the world. The LORD in Jerusalem told Rome procurator crucifying him: "*You would have no power over me if it were not given to you from above"* (John, 19, 11). By these words the Lord meant celestial source of all kinds of terrestrial power.

Expanding Christ's doctrine about the right attitude to the state government V. Tsipin applies to the letters of Peter and Paul Apostles:

> *"Submit yourselves for the Lord's sake to every human authority: whether to the emperor, as the supreme authority, or to governors, who are sent by him to punish those who do wrong and to commend those who do right. For it is God's will that by doing good you should silence the ignorant talk of foolish people"* (Epistle 1. Peter, 2, 13-16).[20]
>
> *"Let everyone be subject to the governing authorities, for there is no authority except that which God has established. The authorities that exist have been established by God. Consequently, whoever rebels against the authority is rebelling against what God has instituted, and those who do so will bring judgment on themselves, for rulers hold no terror for those who do right, but for those who do wrong. Do you want to be free from fear of the one in authority? Then do what is right and you will be commended. For the one in authority is God's servant for your good. But if you do*

[18] For example: Giving a king to the Israelites by the God in anger (OS. 13, 11); the right of the God to choose a king (Justice, 17, 14-15. 1. King 9.16-17; 16, 12; 1 rel. 28, 4-6); rule of becoming a king (1 Kings. 12,13. 13,13-14. 15,28-29; 16,12; 2 Kings. 12,7); the issue of non-heritability of kingship (Justice, 17, 20. 1 Kings 13, 13-14; 15, 28-29); becoming a king by hereditary after king David (2 Kings. 7, 12-16. Psalms, 88, 36-38) and others.

[19] <www.orthodoxy.ge/tserili/zosime/22_15-22.htm>, [01.08.2015].

[20] <www.orthodoxy.ge/tserili/akhali_agtqma/1petre-2.htm>, [01.08.2015].

wrong, be afraid, for rulers do not bear the sword for no reason. They are God's servants, agents of wrath to bring punishment on the wrongdoer. Therefore, it is necessary to submit to the authorities, not only because of possible punishment but also as a matter of conscience. This is also why you pay taxes, for the authorities are God's servants, who give their full time to governing. Give to everyone what you owe them: If you owe taxes, pay taxes; if revenue, then revenue; if respect, then respect; if honor, then honor". (Epistle to Romans 13, 1-7)[21]

By it the Apostles were teaching Christians to be subjected to the governing authorities in spite of the kind of attitude of authorities themselves to church. The analogous commentary is made by A. Lapukhin, the researcher of the Holy Letter, according to which in civil life a Christian must show respect to the governing authorities established by God.[22]

In order to understand the issue better V. Tsipin differentiates church from state. He remarks that church is established by Jesus Christ, but the LORD's ordinance of governing authorities is done by means of the historic process, which is performed by the will of the creator God that the objective of church is eternal saving of human, but the objective of state is terrestrial wellbeing.[23] Discussing the issue of interrelation of church and state V. Tsipin notes that Orthodox church eternally thinks that all the governing authorities must be in service to Christianity, as *"For in him all things were created: things in heaven and on earth, visible and invisible, whether thrones or powers or rulers or authorities; all things have been created through him and for him"* (Epistle to the Colossians, 1, 16).

Besides according to V. Tsipin church is not only instructing its sons to be subjected to the state government – regardless the opinions and religious belief of their representatives, – but is also praying for them so that "*to live quietly and peacefully with piety and clearness*" (Epistle to Timothy 1, 2, 2)".[24]

3.3. Analysis of State and Law Issues by the Old and New Testaments

In the Old Testament the following aspects might be distinguished:

1. King institution existed informally in the Israelites, before asking for a king by them;
2. King institution existed formally in other peoples, before asking for a king by the Israelites;
3. King institution and its law existed formally in the Israelites.
4. Before asking for a king by the Israelites there were existed both unwritten and written norm.

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[21] <www.orthodoxy.ge/tserili/biblia_sruli/akhali/romaelta/romaelta-13.htm#sthash.NZye1zGY.dpuf>, [01.08.2015].

[22] *Лопухина А. П.,* Толковая Библия или комментарий на все книги Священного Писания Ветхого и Нового Заветов, [10.06.2013], <www.bible.in.ua/underl/Lop/>, <www.bible.in.ua/underl/Lop/index.htm>, [17.11.2014].

[23] For additional information see V. Tsipin (archpriest), Church Law, Scientific Anthology of Theology "Transfiguration", Publishing house "Antimoz Iverieli" №1, Tbilisi, 2010, 123-131 (in Russian).

[24] *Tsipin V.* (Archpriest), Church Law, Scientific Anthology of Theology "Transfiguration", Publishing house "Antimoz Iverieli" №1, Tbilisi, 2010 (in Russian). 124; see also. <.www.orthodoxy.ge/tserili/akhali_agtqma/1timote-2.htm#sthash.Kx7g3adX.dpuf>, [01.07.2015].

In connection with the first issue from the Book of the "I Kings" it is clear that the Israelites' king is the LORD, their God. The LORD tells Samuel*: "They have rejected me that I should not reign over them".* (I Kings, 8, 7-8) and "..".*.your king is the LORD, your God*" (I Kings, 12-12). Except this the divine history of the Old Testament says that after the death of Adam the family was governed by the eldest member of the posterity, which was called patriarch or father-governor. All the members of the family were subjected to him. He was settling disputable matters, was punishing offenders, protecting innocents. He was teaching the family members about God, the future Savior, sacrificed to the God. So father-governor was their king, priest and teacher at the same time.[25] The leader of the Israelites coming out from Egypt, or a king is Moses, which by the God's will defines the Ten Commandments, norms or laws to the Israelites.

In connection with the second issue in the Old Testament the existence of the formal institute of king has been fixed since the period of building the tower of Babel, when people scattered in different parts of the earth, forgot the true God, belief and among them false belief was spread. Disbelieving people paid attention to natural phenomena and objects, such as the sun, the moon, stars, sea, rivers, and thunder-storms and so on. They will think that they are Gods. Instead of one true and invisible God they will have a lot of false gods; they will make their icons from stone, wood and metal and begin to worship and sacrificing them.[26] So heathenism is arisen. Heathen kings of that time were issuing the proper norms.[27] In the Bible there is lots of information about idolater kings. For example, there is described how king of Elam and his allied kings conquered Sodom-Gomorrah, Segori and their neighboring places. After that people of Sodom and Gomorrah and their neighbors had been subjecting to king of Elam for 12 years[28]. Besides the existence of heathen kings is confirmed by the Book of "The I Kings", according to which the Israelites were asking for king like other idolater people (The I Kings, 8, 5, 19-20). When idolatry became stronger and spread among peoples, the God desired to separate one people from the other peoples and the true belief to be followed in one people and the people chosen by the LORD were the Israelites.[29]

In relation to the third issue, it should be mentioned that history of formal king's authority and law begins from the king Saul. Samuel anoints Saul as king *"The LORD has appointed you to be the ruler over his special possession"* (The First Kings, 10, 1) and announces to nation the rights of the king *"wrote them down in the book and put it before the LORD"* (The I Kings, 10, 25), that is different from the from the rules of the eastern kings of that time (The First Kings, 10, 11-18).

With regard to the forth issue it should be noted that the Old Testament differentiates inner divine laws from outer divine laws by means of Commandments. Inner laws are oral norms, but outer laws include written and oral norms. To the outer oral norms belong all the Commandments stated

[25] See *Kubaneishvili N.,* The Divine History of the Old Testament, Tbilisi, 1990, 11 (in Georgian).

[26] For example, the Egyptians were worshiping a river, ox, cat and etc. See *N. Kubaneishvili,* The Divine History of the Old Testament, Tbilisi, 1990, 40 (in Georgian).

[27] For example, decree issued by the king of Egypt, according to which the Israelites had to throw their newborn sons into water. This trouble reminded them God and they asked him fervently to save them from this trouble and then God sent Moses them as a savoir (Mark 1, 16,22; 2, 1-25; 3, 1-22).

[28] For example, the King of Egypt, (Genesis 40, 1-23; Mark 1, 8); the king of Babylon Sec. Add., 36. 5); the king of Qamoni (1 Kings 12, 12) and others.

[29] *Kubaneishvili N.,* The divine History of the Old Testament, Tbilisi, 1990, 15-16 (in Georgian).

by God for the Israelites until God gave Moses the Ten Commandments at Mount Sinai, and authority rights, which the LORD states for "*Samuel announced the rights of reign before the nation, wrote them down in the book and put it before the LORD"* (The First Kings, 10, 25). Apart from it in the Old Testament there are notes about existing written and oral norms among heathen people.

In conclusion of the above mentioned it should be noted that the Old Testament describes state and law on theocratic basis, according to which a king or a monarch is a performer of the God's will on the earth. Here it is very important that at first God chooses (Deut, 17, 15. 1 Chron. 28, 4-6) and appoints kings (Rom. 13, 1), but after king David appointing of kings became hereditary (2 Kings, 7, 12-16, Psalm 88, 36-38).

In his research Archpriest V. Tsipin notes that by teaching a Holy Letter the state is an institute established by God and presents the words of Bishop Nikodim (Milas):

> "*In order to direct human laws to the aim, set by the Lord's Providence, God granted state authority, as well as the head of the family, with power to run humans in the name of God for doing kind actions"* and in the same place he adds, that *"from the Old Testament three supreme services are known: bishop, prophet and royal services. By saying this He consecrated all kinds of state authorities, regardless of a governing form"*.[30]

The New Testament more clearly shows the nature of the state set by the Lord and the obedience obligation to the justice norms created by the state, which is described in Articles of Matthew's and John's gospels and Catholic epistles.

Although it is true that Christ differentiated political and theological systems, *"My Kingdom is not of this world"* (John 18, 36), but celestial ruler does not exempt us from obligations to the ruler of this world, as he recognizes them himself and obligates us to perform them, which is confirmed by the following Articles: (Matthew 22, 21), (John 19, 11), (Epistle 1 of Peter, 2, 13-16), (Epistle to the Romans 13, 1-7), (Epistle to Colossians, 1, 16), (Epistle to 1 Timothy, 2, 2), The New Testament, Rom. 13, 1).[31] These Articles indicate that the Orthodox Christianity is not against non-theocratic reigning and can be coexisted with the other religions.

And finally it should be noted that in juridical science among the theories about the origin of state and justice the earliest is a theological theory, which appeared from the first religious-mythological imaginations. As the world was created by God, both state and law are of divine origin.[32]

4. God's First Warning from the Point of View of the Legal Norm

As it became clear that a sin is violation of law, for the better illustration of the normative nature of the sin it is reasonable to characterize the first warning of God from the viewpoint of legal norm.

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[30] *Tsipin V.* (Archpriest), Church Law, Scientific Anthology of Theology "Transfiguration", Publishing house "Antimoz Iverieli" №1, Tbilisi, 2010, 123 (in Georgian).

[31] See also the Old Testament, Proverbs 8, 15

[32] Fundamentals of Georgian Law, (authors' group, edited by *R. Shengelia*), Tbilisi, 2000, 23 (in Georgian).

In the first warning of the God it is possible to separate such elements characteristic for the **legal norm structure**, as disposition and sanction..

Disposition should be the following**:** *"From any tree of the garden you may eat freely; but from the tree of the knowledge of good and evil you shall not eat",* as it implies a behavior rule defining the norm contents.

Sanction or killing as a punishment, because it shows what kind of result will be expected in case of non-fulfillment of the norm, violation of the demand remarked in his disposition.

Considering that the given sanction precisely defines the extent of the influence, which would have been used in case of the violation of the norm, it can be said that there is the **absolutely defined sanction**.

From Articles 16-17 of Chapter three of the book of Genesis it becomes clear that together with killing, sufferings will be also considered to be as a punishment, as because of the first sin God first says to the woman:*"I will make your pains in childbearing very severe; with painful labor you will give birth to children. Your desire will be for your husband, and he will rule over you".(Genesis 3, 16),* and then He says: *"Because you listened to your wife and ate fruit from the tree about which I commanded you, 'You must not eat from it,' and cursed is the ground because of you; through painful toil you will eat food from it all the days of your life".(Genesis 3, 17).*

In the first warning of God the demand: "*but from the tree of the knowledge of good and evil you shall not eat",* is given precisely and concretely, according to which Adam did not have the right to change or expend it in his own way. So the first warning set by God can be thought as a **norm** of **imperative** character.

The demand in the first warning of God implicitly, as well as explicitly confirms that the disposition of the norm is of prohibiting character, as the demand is formulated in kind of direct prohibition *"don't eat"*. The prohibiting character is also confirmed in the following Articles of the Book of Genesis, when God himself tells Adam about the prohibition: *"Have you eaten from the tree that I commanded you not to eat from?"* (Genesis 3, 11), and "*... have eaten from the tree of which I commanded you, saying, 'You shall not eat of it'"* (Genesis. 3, 17).

In addition, in God's warning the fulfillment of the demand is obligatory for Adam without any preconditions. It means that the first warning of God can be considered to be an **unconditional norm**.

Since the God's warning is directed to the concretely defined person, *"the Lord God commanded Adam.".*. (Genesis 2, 16) the God's command can be considered as setting an individual norm, though in the next Article of the chapter of Genesis we read that the warning concerned Eve too. The serpent said to the woman, *"Did God really say, 'You must not eat from any tree in the garden'?" The woman said to the serpent, "We may eat fruit from the trees in the garden, but God did say, 'You must not eat fruit from the tree that is in the middle of the garden, and you must not touch it, or you will die.'"* (Genesis 3, 1-3). The punishment is extended not only to Adam and Eve, but to their descendants too.

"I will make your pains in childbearing very severe; with painful labor you will give birth to children. Your desire will be for your husband, and he will rule over you".(Genesis 3, 16), and then He says: "Because you listened to your wife and ate fruit from the tree about which I commanded

you, 'You must not eat from it,' and cursed is the ground because of you; through painful toil you will eat food from it all the days of your life"(Genesis 3, 17).

Taking into account the above mentioned facts, the first warning of God must be discussed as setting of an **individual**, as well as **general norm**.

God by His first and single command, "*from the tree of the knowledge of good and evil you shall not eat",* demands from Adam not to execute or use a norm, but to observe it. From the viewpoint of execution of law norm, the observance of the norm is thought to be the easiest form and the most minimal demand, as the observance of the norm means to refrain from violation of the prohibition set by the norm, "*don't eat*", but execution and usage means active action.

As it is seen this characteristics covered such aspects as: 1. norm structure (disposition and sanction); 2. norm typology – imperative, prohibiting, unconditional, individual and general and 3. norm relation.

Despite lots of definition of the norm of Law in juridical literature [33] it is cleared up that the norm of law: 1. must be set by the state; 2. must express human behavior for regulation of social living together; 3. must have general, obligatory and developing nature and 4. the violation of it must be followed by penal measures.

According to Christian doctrine state and law are the institutes set by the LORD and for the issue of violation of the norm by a sin it does not matter which category of violation is, formal or informal. For this reason the demand of the norm of law connected with setting the norm by the state loses its actuality. The first warning of God obliged Adam, Eve and the whole mankind to observe the norm. By this fact it is clear that the God's warning expresses humans' behavior for regulating their social living together and the God's first warning has general, obligatory and developing nature. And finally the violation of the God's first warning foresees punishment, killing and suffering.

5. Conclusion

By the research it is proved that the normative nature of the sin foresees demands of generally the norm concept, as well as of the norm of law. The remarked evidence is based on our research. Particularly it was cleared up that the God's warning generally answers positively to the norm concept, as the warning expresses stating the rule of behavior. In other words, the first warning of God is stating the norm, but the first sin is the violation of the norm. Accordingly on the basis of the norm concept it is possible to judge on the normative nature of the sin.

On the next stage of the research it is stated that the state and law have divine ontology and the violation of the norm of law is a sin. It means that for the research of the normative nature of the

[33] See *Kelsen H.,* General Theory of Law and State, third printing, (*A. Wedberg tr.*), Cambridge, Massachusetts, U.S.A, 2009, 123; Fundamentals of Georgian Law, (authors' group, edited by *R. Shengelia*), Tbilisi, 2000, 46; *G. Khubua*, Law Theory, Tbilisi, 2004, 50-51 (in Georgian).

sin it does not matter which category of violation is, formal or informal and by which it is set "state or truth", as the violation of the norm is always considered as a sin.

Generally identification of the divine origin of the norm provides wide and narrow comprehension of the sin, namely:

1**. Wide comprehension of the sin** includes violation of all kinds of norm, formal or informal (positive).

2. **Narrow comprehension of the sin** includes violation of the norm of Law only set by the state, including the violation of the norm of criminal law.

From the above mentioned it can be concluded that in the nature of the sin identification of the norm concept generally including the aspect of the norm of law and differentiation of the wide and narrow comprehensions of the sin is the basis of the conclusion according to which a sin is crime and criminality, because the three concepts express the violation of the norm.

Tamar Ghvamichava[*]

Objectives and Scopes of Cassation in the Administration Process

In an administrative process it is very important an institute of cassation appeal, stating its admissibility grounds, a purpose, tasks and scopes of appeal.

To provide protection of individual and public interests within the scopes of the cassation appeal the following issues are very important, such as functional competence of cassation, review of legal elements of a disputed decision, checking the legal grounds of the disputed decision, restriction of power of review, confining to the cassation decision, constraining the admissibility of a cassation appeal and obligation of the cassation court to consider in essence all cassation appeals of special importance.

A procedural institute of lodging a complaint in the appeals instance has several purposes: protection of interests of a party and provision of unified justice; consideration of a case in the appeals instance and establish homogeneous court practice on analogous cases.

Key words: *the essence, purpose, tasks, scopes of cassation, constraining of cassation, individual and public interests, unified justice, law development, homogeneous court practice.*

1. Introduction

The essence and objective of cassation in professional literature is discussed as an obligatory and partly as an inevitable issue. A particular dispute concerns whether cassation must serve only or mostly general interests of developing of universal court practice or in a concrete case individual interest of taking right decisions. This issue is really important for a legislator, but less important (though not insignificant) for a user of Law.[1]

The precondition for making a cassation decision is a procedural action being always carried out by an appropriately authorized person. In spite of the fact that cassation from the pure language viewpoint is revision, review, or a decision to be taken on the subject of revision, here a talk is about a final means of making appeal by a party of the process, which cannot be made by the third person even if the latter has legal, economic (financial) or the other kind of interest to revise this decision. The party of the process in relation to which the court judgment of the previous instance is not appealed, is forbidden to participate in the proceedings of cassation court.

The other opportunity, for example, a constitutional complain, which allows to revise the conformity of the cassation decision to the constitution, is not an appealing, but a mechanism of constitutional control, which is granted, for example to the Federal Constitutional Court of Germany in relation to all the democratic agencies of the state government.[2]

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[*] Doctoral Student, TSU Faculty of Law.

[1] *May A.,* Die Revision in den zivil-und verwaltungsgerichtlichen Verfahren (ZPO, ArbGG, VwGo, SGG, FGO) Eine systemastische Darstellung unter besonderer Berücksichtigung der höchstrichterlichen Rechtsprechung, von Artur May 2, ünberarbeitete und erweiterte Auflage – Köln; Berlin; Bonn; München: Heymanns, 1997, 16.

[2] Ibid, 16.

2. Restriction, Main Point and Tasks of Cassation Court

Cassation appeal is restricted as by admissibility, as well as by size and scope of revision. This restriction and the difference coming from it in relation to the other possibilities of appealing is a main essence and objective of the cassation appeal. The objective of any judicial procedure is to accept the equitable decision on the concrete subject of litigation, which is corresponding to current Law and which must accomplish and exhaust the dispute between the participants of the process. To it belong investigation and stating considerable factual circumstances, choosing legal regulations and defining the contents (explanation) and also ascertainment of legal results expected from the factual circumstances of the case (subsumption qualification).[3]

For accepting the decision all these individual aspects are important. At the same time legislation is confined by legal review of the decision appealed by the cassation rule, using norms of current Law properly. From this it is clear that the talk is about the fair decision for a concrete case, otherwise the cassation court must be given the authority to reconsider and investigate factual circumstances without restriction. In such a case the cassation review would have been like the cassation consideration.

Checking up legality of the appeal court decision (judgment) means checking up the infraction of substantive-legal and procedural-legal norms. But by the Georgian model of the appeal court checking up the legality of the judgment has its scope, beyond which a judge cannot act, namely according to the first part of Article 404 of the Criminal Code of Georgia[4] an appeal court is checking up the judgment within the scopes of the appeal appeal. An appeal court cannot check up procedural infractions voluntarily with the exception of facts given in paragraph "f" [5] of part one of Article 396, which indicate procedural infractions.[6]

The above mentioned shows that the appeal court of the Georgian model is not a court stating facts and is checking up only the legality of the appealed judgment. The existence of such a model of cassation is conditioned by many factors, but the main characteristic of it is those objectives and tasks which are put before the appeal court.

Raising an issue on legality of the cassation court decision is the right of the party of court proceedings, but the judgment connected with the accepted decision is the prerogative of the Supreme Court.[7] The main task (objective) of cassation procedure is not the solution (discussion) of case in essence, but review of legality of the decision accepted by an inferior court.[8]

The legal function of review is one of the elements defining tasks and objectives of court of cassation.[9]

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[3] *May A.,* Die Revision in den zivil-und verwaltungsgerichtlichen Verfahren (ZPO, ArbGG, VwGo, SGG, FGO) Eine systemastische Darstellung unter besonderer Berücksichtigung der höchstrichterlichen Rechtsprechung, von Artur May 2, ünberarbeitete und erweiterte Auflage – Köln; Berlin; Bonn; München: Heymanns, 1997, 17.

[4] Civil Procedural Code of Georgia, Article 404, The Parliament of Georgia, № 1106, 14.11.1997, <https:/matsne.gov.ge/ka/document/view/29962>.

[5] Civil Procedural Code of Georgia, Article 396, The Parliament of Georgia, №1106, 14.11.1997, <https:/matsne.gov.ge/ka/document/view/29962>.

[6] *Todria, T.,* Importance of Factual Circumstances in Cassation Court, Tbilisi, 2011, 25-26 (in Georgian).

[7] *Mamaiashvili T.,* Conference Devoted to Homogenous Court Practice, Decision of Cassation Court, Journal Justice, 2008, № 1, 104 (in Georgian).

[8] *Qurdadze Sh.,* Proceedings in the Highest Court of Appeal, Tbilisi, 2006, 94 (in Georgian).

[9] *Mamaiashvili T.,* Conference devoted to homogenous court practice, Decision of Cassation Court, Journal Justice, 2008, № 1, 105 (in Georgian).

Cassation is basically protecting the united system of justice, which on its own supports strengthening of legal safety, as well as development of individual issues of justice in restrained quantity.[10]

It should be noted that according to French legislation the objective of the cassation appeal is review of the conformity of the decision to the law, carried out by the court of cassation. Hence it only discusses the legal side of the decision. It does not review factual circumstances of case and cannot carry out investigative activities. It does not either discuss new evidence or check up repeatedly evidence, which were represented to the court issuing the appealed decision.[11]

Restriction of using of law enforcement of certain legal regulations and not revising and preconditions for very strict admissibility of court of cassation shows that accepting of a fair decision in a concrete case is not the only objective of cassation review. The united court practice (legal safety) and public interest of law development precondition the objective of cassation. At the same time factual circumstances stated by inferior court are not often excluded in reconsidering by cassational rule, which are not often foreseen sufficiently. Revision of factual circumstances is necessary for the conformity with current law, though it requires a special protest, the argumentation of which exempts the court of cassation from restrictions. The main essence of cassation is influenced not by conditional restriction of court of cassation by factual circumstances stated by inferior court, but prohibition, it must investigate and state itself circumstances important for taking decision, which in case of the grounded protest is generally causing disaffirm the appealed decision and sending it for reconsideration to the inferior court, which will state factual circumstances of case.[12]

The most important task before the cassation court is to check up the juridical side of case, to what extent it is conformed to the legal norm and whether the main point and content of the norm used by court is understood properly in deciding the matter.[13] The above mentioned is the peculiarity of cassation. The system of legal means defining peculiarities of cassation is a legal regulative mechanism.[14]

According to the French legislation court of cassation does not consider for the second time the case, in relation to which the cassation appeal was lodged. To it only legal issues, connected with the case, might be submitted. It is impermissible to submit new evidence to court of cassation.[15]

According to the legislation of Austria the objective of legal proceeding of cassation is provision of united justice, to comprehend similarly the contents of material, as well as procedural norms, legal safety, development of law. Court of cassation must not admit evasion of the united system of justice provided by the Supreme Court when such united justice has not existed or exists but not in kind of the united justice.[16]

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[10] Zivil prozessordnung, Kommentar von *Prof. Dr. Heinz Thomas, Dr. Klaus Reichold, Prof. Dr. Hans Putzo, Dr. Rainer Hüsstege*, 24., neubearbeitete Auflage, Vergal C.H. Beck, München, 2002, 895-896.

[11] *Ginchard S., Raynaud P.,* Nouveau Code de Procedure civile, Dalloz, ed., 2002, 334-339.

[12] *May A.,* Die Revision in den zivil-und verwaltungsgerichtlichen Verfahren (ZPO, ArbGG, VwGo, SGG, FGO) Eine systemastische Darstellung unter besonderer Berücksichtigung der höchstrichterlichen Rechtsprechung, von Artur May 2, ünberarbeitete und erweiterte Auflage – Köln; Berlin; Bonn; München: Heymanns, 1997, 17.

[13] *Liluashvili T.,* Civil Procedural Issues in Court Practice of Georgia, Part 1, Tbilisi, 2002, 165 (in Georgian).

[14] *Алесеев С.С.,* Общая теориа права. Т. 2, М., 1982, 9.

[15] *Couchez G.,* Procedure Civile, Dalloz, 9[e] ed., 1996, 387-389.

[16] Jurisdiktionsnorm und Zivilprozessordnung, Herausgegeben von *Dr. Rudolf Stohanzl.* 15., Auflage. Wien 2002, 1399-1416.

All the decisions of the court of appeal are not appealable by the rule of cassation, because according to legislation the admissibility of the cassation appeal depends on certain preconditions. The objective is to discharge of courts of cassation from insignificant legal controversies and maintain their vitality, choosing these preconditions of admissibility by a legislator. For deciding the priority issue of the cassation objective very important is individual, as well as general interest.

So the admissibility principle is more and more established (beside the dependence of the cassation appeal on property-legal value), especially when the matter is concerned with special importance and divergence. By this approach the cassation appeal is admissible only when a legal controversy is of high financial interest and legal importance. Though accessibility restrictions, especially the necessity of admissibility because of special importance and divergence, considers public interests avoiding cases of court of cassation, which are not to be reconsidered, maintaining its high functional capacity, an individual interest of accepting a proper and fair decision does not go to the background and in cassation legal proceeding it remains as a cassation objective. [17]

It should be noted that the aim of creating a court of cassation is provision of homogeneousness of court practice, comprehension of laws similarly. The main purpose of cassation is protection of the rights of parties according to legislation of Georgia, correction of court mistakes, which might be made by them while using this legislation.[18]

When provision of creation of the united court practice has significant influence on cassation, at the same time it is not either the only or the preferential objective of the cassation. A legislator would have reached this objective, if he beyond the legal issues within the scope of concrete case had made possible to give restrained answer to legal questions that are to be stated and cleared up. Except legal homogeneousness and law development in spite of its constraints cassation must provide an equitable decision on a concrete case. It makes us think that decision of inferior court is reviewable not by own initiative, but only basing on petition of one of the participants of the process. A legislator has granted the participants of the process the final (though restrained) authority of appeal, to protect individual rights, not turning them into protectors of legal homogeneousness.[19]

So its objective does not differ greatly from the others' objective, to provide proper decision on legal controversy and favor accomplishing finally the controversy between the parties of the process.

Te existed restrictions of admissibility preconditions on the one hand must provide averting matters less significant for court of cassation and on the other hand must restrict the volume of the decision under review. A legislator tried to accomplish this objective in civil proceeding first of all by restricting the value of the subject of controversy and later partly in parallel by setting the admissibility preconditions. In administrative proceeding opposite to civil process a cassation appeal is

[17] *May A.,* Die Revision in den zivil-und verwaltungsgerichtlichen Verfahren (ZPO, ArbGG, VwGo, SGG, FGO) Eine systemastische Darstellung unter besonderer Berücksichtigung der höchstrichterlichen Rechtsprechung, von Artur May 2, ünberarbeitete und erweiterte Auflage – Köln; Berlin; Bonn; München: Heymanns, 1997, 17-18.

[18] *Khrustali V.,* Objectives of Cassation and Preconditions for Accepting (admissibility) Cassation Appeal for Consideration, Collected Works: *Liluashvili T.,* Festschrift of 75 , Tbilisi, 2003, 188 (in Georgian).

[19] *May A.,* Die Revision in den zivil-und verwaltungsgerichtlichen Verfahren (ZPO, ArbGG, VwGo, SGG, FGO) Eine systemastische Darstellung unter besonderer Berücksichtigung der höchstrichterlichen Rechtsprechung, von Artur May 2, ünberarbeitete und erweiterte Auflage – Köln; Berlin; Bonn; München: Heymanns, 1997, 18.

admitted regardless of the appeal value. In this case there are not used requirements of II part of Article 365 and Article 391 of Criminal Code of Georgia[20] (Code of Administrative Offences, Article 34[21]). In discussing the objective of cassation is not always sufficiently envisaged the difference between the admissibility of cassation and the volume of review.

The tendency is obviously to setting the narrower preconditions of admissibility, maintaining functional capability of the court of cassation for the purpose of discharging the court, and to highlight general interest for development of legal homogeneousness..[22]

3. Provision of Protection of Individual and Public Interests within the Scope of Cassational Appeal

Within the scope of admissibility preconditions of the cassation appeal a legislator gives the priority to protection public interests of legal homogeneousness and puts it before an individual interest of settling a concrete matter fairly. In spite of it the cassation appeal remains as a means of protection and carrying out individual rights of each participant of the process. After overcoming the admissibility raised for protecting public interests, the court of appeal must accept a legally right decision on a concrete matter, which will not have any straight or direct legal influence on other persons not participating in the process or other subjects of controversy, even if there is any similar subject of controversy and legal issues. At the same time it is obvious that legal issues solved by court of appeal, as weighted ones of the highest court instance, have influence on using of enforcement of laws of inferior court instance and legal behavior of population.[23]

First of all the court of Appeal must foresee any offence and use all legal norms, which are not defined by this or that procedural code, as a statute not under review. An appellant is obliged to point to a concrete offence, which at the same time is not excluding the disaffirmance of the inferior court decision by court of appeal in spite of not pointing to the offence by the appellant. The other regulation is extended only on procedural issues, especially on the procedure of stating factual circumstances, which is really reviewable in the cassation instance only within the scopes of procedural protest of (pointing) violation of laws, though there are exceptions especially on hard procedural deficiencies, which should be considered by own initiative.[24]

Legislation puts in foreground the violation of reviewable legal norms as a precondition of revision of the inferior court decision. In fact the matter is less concerned with displaying law violation; it is mostly concerned with accepting the final right decision on the matter of cassation constraining

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[20] Civil Procedural Code of Georgia, Part 2 of Articles 365 and 391, The Parliament of Georgia, №1106, 14.11.1997, <https:/matsne.gov.ge/ka/document/view/29962>.

[21] Administrative Procedural Code of Georgia, Part 1 of Article 34, the Parliament of Georgia, №2352, 23.07.1999, <https://matsne.gov.ge/ka/dokument/view/16492>.

[22] *May A.,* Die Revision in den zivil-und verwaltungsgerichtlichen Verfahren (ZPO, ArbGG, VwGo, SGG, FGO) Eine systemastische Darstellung unter besonderer Berücksichtigung der höchstrichterlichen Rechtsprechung, von Artur May 2, ünberarbeitete und erweiterte Auflage – Köln; Berlin; Bonn; München: Heymanns, 1997, 18.

[23] *May A.,* Die Revision in den zivil-und verwaltungsgerichtlichen Verfahren (ZPO, ArbGG, VwGo, SGG, FGO) Eine systemastische Darstellung unter besonderer Berücksichtigung der höchstrichterlichen Rechtsprechung, von Artur May 2, ünberarbeitete und erweiterte Auflage – Köln; Berlin; Bonn; München: Heymanns, 1997, 19.

[24] Ibid, 20.

the use of using reviewable legal norms. Hence cassation can be grounded without violation of law, for example, in case when after having been accepted the appealed decision a legal norm to be used in this concrete matter came into force, which would not have been used and violated by inferior court.[25]

It should be noted that according to German legislation the existence of law violation is not justification of a cassation appeal and does not cause reversing of the appealed decision, if violation is not causal-investigatory or is annulled by the other law violation and compensated in such a way, that ultimately the decision is sound. According to the Federal Constitutional Court of Germany the first-rate task of the court of cassation is legal homogeneousness. In other decisions court somehow mitigated this phrase and raised on the one hand arguments of legal safety and legal development, on the other hand interest of the party in getting fair decision.[26]

Arguments of protection party's interests are: formation of cassation appeal, as a real means of appealing, which is possible only by the party's solicitation and expenses, also only when the decision is taken not on legal, abstract issue, but on concrete legal controversy, Also prohibition of reformatio in pejus (change for worse) and a legal force acting between the participants of the process. So changing of the decision for worse, changing it against the appellant, the force of decision of court of cassation is spread only on participants of the process.

In favor of the united court practice and general interest in law development talks functional competence of cassation, review of legal elements of the appealed decision, checking up the legal ground of the appealed decision, restriction of reviewable right, confining with the decision appealed by cassation rule, restriction of admissibility of a cassation appeal and obligation of the court of cassation to investigate all the cassation appeal of special importance.[27]

Federal Constitutional Court of Germany thinks that cassation is "a procedural formation developed in regard to legislative advisability. Its functional define comes from current law". By this constellation cassation is "means of appealing, which must serve general interest, as well as party's interests".[28] It is true that the authority of revising a case by a court of appeal is confined, but when it appears, its objective is to take legally right decision. This objective comes directly from legal regulations, namely from the above described form of cassation, as a form for taking the right decision on case from the party's appeal.

From the point of accessibility to the court of appeal objectives don't exclude each others; on the contrary, they support and expand each other. From the viewpoint of an individual case the objective is establishment of the united court practice, development of law and existence of controlling function over the inferior court. The way to this objective is taking legal and right decision on individual case by lawful regulation.[29] In fact the Federal Constitutional Court of Germany denied the opinion about

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[25] Ibid, 20.

[26] Ibid, 20-21.

[27] *May A.,* Die Revision in den zivil-und verwaltungsgerichtlichen Verfahren (ZPO, ArbGG, VwGo, SGG, FGO) Eine systemastische Darstellung unter besonderer Berücksichtigung der höchstrichterlichen Rechtsprechung, von Artur May 2, ünberarbeitete und erweiterte Auflage – Köln; Berlin; Bonn; München: Heymanns, 1997, 21.

[28] Decision of Federal Constitutional Court of Germany, dated 09 September, 1978, 2, 831/76. BV erfG, Beshchl. V. 9.9. 1978 – 2 BvR 831/76 – Bverf GE 49, 148 ff.

[29] Decision of the plenary session of Federal Constitutional Court of Germany dated on June 11, 1980, 1/79; Decisions of Federal Constitutional Court of Germany, 54, 277, 289. BVerfG, Beschl.des Plenums v. 11.6.1980 – IP-BvU 1/79 – BverfGE 54, 277, 289.

the priority of common interest expressed in professional literature and explained that cassation compared with its other objectives, not only in the second place, serves the interest of protection of deciding an individual case.[30] There are emphasized two tasks of the court of cassation: on the one hand protection of the united system of justice and public interest in development of law and on the other hand protection of parties' interest on individual fair decisions.

Tasks and objectives are inseparable and it can be said that each concrete task is an objective itself.[31]

Court of appeal is obliged, if there are all the preconditions of accepting and admissibility of a cassation appeal, to investigate the cassation appeal in essence and take a proper decision in relation to the appeal, namely regardless of the investigation results to satisfy the appellant or reject a cassation; at the same time the opportunity of appealing of the decision by cassation rule and the existence of a court of appeal itself is a real legal means for checking up the rightness of the decision once again from the point of view of legal validity, which gives hope that if a mistake is really made in legal validity, it can be corrected, so the decision can be corrected. Based on the above one objective of cassation is cleared up: protection of parties' rights and interests, which in other words is called protection of individual interests.[32]

Differences of admissibility preconditions and unreviewable legal norms are only qualitative and not general. Thus they don't concern the objective of cassation. It really spreads, for example, over the difference, which characterizes the principle of compatibility in civil legal proceedings and the inquisition principle in administrative legal proceedings, which in the cassation instance is expressed only in the issue whether the lack of evidence is a procedural defect.

Interest of accepting a decision and development of Law in view of preconditions of admissibility by a legislator and also before the judge of court of cassation, which by virtue of law is obliged to protect, satisfy and bring in balance the two interests according to the concrete procedural legislation.

The objective of cassation cannot be other than protection of rights of parties' according to the legislation of Georgia, correcting court mistakes, which can be made by them in using this legislation.[33] The function of the court of cassation must be provision of using laws homogeneously on the whole territory of Georgia.[34]

The court of cassation must check up and consider requirements of protection rights necessary for the admissibility of the appeal, though only within the scope of admissible cassation.[35]

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[30] *May A.,* Die Revision in den zivil-und verwaltungsgerichtlichen Verfahren (ZPO, ArbGG, VwGo, SGG, FGO) Eine systemastische Darstellung unter besonderer Berücksichtigung der höchstrichterlichen Rechtsprechung, von Artur May 2, ünberarbeitete und erweiterte Auflage – Köln; Berlin; Bonn; München: Heymanns, 1997, 21-22.

[31] *Алиескеров М.А.*, Кассационное рпоизводство по гражданским делам: вопросы теории и практики. Изд. „норма", 2005,42.

[32] *Liluashvili T.,* Civil Matters Proceeding in Court, Practical Guide, 2nd ed., 2005, 494 (in Georgian).

[33] *Liluashvili T.,* Civil Matters Proceeding in Court, Practical Guide, 2nd ed., 2003, 303 (in Georgian).

[34] *Kiria G.,* Peculiarities of Appealing of Court Decisions on Civil Matters , Journal "Justice", 1997, № 9-10, 76-78 (in Georgian).

[35] *May A.,* Die Revision in den zivil-und verwaltungsgerichtlichen Verfahren (ZPO, ArbGG, VwGo, SGG, FGO) Eine systemastische Darstellung unter besonderer Berücksichtigung der höchstrichterlichen Rechtsprechung, von Artur May 2, ünberarbeitete und erweiterte Auflage – Köln; Berlin; Bonn; München: Heymanns, 1997, 13.

The proper usage of procedural means is of crucial importance for accomplishing the definite objectives before the court of cassation. It can be said that by means of the whole system of legal means is regulated those procedural-legal relations which are created by lodging a cassation appeal.[36]

Besides it is doubtless that one of the objectives of creating cassation in Georgia was the understanding of laws homogeneously and provision of the united justice. Such an objective is before courts of cassation of almost all countries, which in other words is called protection of public interests.[37]

In the activities of cassation the protection of individual and public interests is equally important.[38]

4. Conclusion

Just court of cassation must be a guarantee of fair court in a state. In discussing measures connected with a court of cassation there should be taken into account a fact that the matter has been already investigated in two court instances.[39]

The Supreme Court, the concrete objective of which is provision of dynamical, progressive and unifying definition of law, plays an important role in strengthening legal safety. In general supreme courts are providing that citizens' legal status must be guaranteed in relation to other citizens or governing agencies. The supreme courts must provide direct usage of constitutional norms and definition of laws by using these norms.[40] In spite of the fact that supreme courts don't have legislative authority, they must play a dynamical role of law definition and supervise using laws by courts and in this way provide homogeneousness of court practice. As defenders of law, they favor maintenance and protection of juridical safety of freedoms and fundamental rights.[41]

The Supreme Court has the most significant legal mission.[42]

All this finally will support not only effective protection of freedoms and fundamental rights of citizens, but will also provide brushing up of Georgian administrative law and for the future its development from the scientific, as well as practical point of view.

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[36] *Todria T.,* Importance of Factual Circumstances in Court of Cassation, Tbilisi, 2011, 28-29 (in Georgian).
[37] *Liluashvili T.,* Civil Matters Proceeding in Court, Practical Guide, 2nd ed., 2005, 494 (in Georgian).
[38] *Khrustali V.,* Cassation in Civil Proceedings, see Abstract of Thesis, 2004, 9-10 (in Georgian).
[39] *Qetsbaia E.,* Admissibility Conditions of Cassation Appeal in Civil Proceedings, Journal "Justice", 2007, №2, 158 (in Georgian).
[40] Authority of Fair Trial, Tbilisi, 2001, 162; Resolution Accepted at the Meeting of Chairmen and Judges of Supreme Courts of Central and East Europe on Strengthening Judicial Authority in Central and East European Countries, theme: Supreme Court and Constitutional Court: Interrelations Between a Role, Authority and Function, Prague and Brno, 21-23 October, 1988 (in Georgian).
[41] Fair Trial Right, Tbilisi, 2001, 157 (in Georgian).
[42] Ibid, 165.

Liana Giorgadze*

Construction-Legal Status of the Land

Purpose of the article is to clarify and define the land construction-legal status as one of the most significant issues of the construction law. The article provides discussion of the substance and significance of land, as the object, conditions of its use for performing of the construction activities and provides separate discussion of the land status in planning and construction, as well as the preconditions for adding legal status to the land.

Key words: *construction law, construction planning, Land as an object, legal status of the land, zoning, Conditions of land use.*

1. Introduction

Construction law is one of the sub-areas of administrative law. Regarding its nature, it is associated with the other areas of law as well, though as the states intervenes actively into this sphere and regulates number of relations the construction law is of more of public law nature.

In the construction sphere the main object is a land where construction activities are performed. While the main product of these activities is a completed building and/or structure used for various purposes and providing certain benefits, with respect of legal regulation the legal status of land is no less significant. Goal of this work is to clarify and determine the construction-law status of the land as one of the significant issues of the construction law.

Work will provide discussion of the substance and significance of the land as an object, terms and conditions of its use for performing of construction activities, also examine separately the legal status of land with respect of planning and with respect of construction, as well as the preconditions of awarding of the legal status to the land.

Work applies the methods of analysis, deduction and comparative-legal research methods.

2. Land as an Object

2.1. Land – Object for Strategic Purposes

Land is the unique resource. People are interested in it for a long time. From the ancient period, ownership of the land was regarded as the guarantee of power and stability. Those, having their own land took advantage of relatively high social status in the society.

High interest to the land is not characteristic for the private persons only. It is an object of the state significance. Historically, mankind's way to recognition of private property was not either sort or easy. As a rule, the state was regarded as an unconditional and sole owner of the land.

One of the main signs of the state is existence of the territory. Though the territory is clearly regarded as the state's possession, this does not limit private property rights. There is the opinion in

* Doctoral Student, TSU Faculty of Law.

the theory that the state is in charge of making decisions related to the land use issues of global significance. In addition, private ownership of land is derived from the state ownership[1]. Though, the state interest is regarded as superior over the private interests in many cases and irrespective of liberal approach, the state reserves the right to determine the key directions of land use independently from the private owners and this may result in restriction of the owners' interests[2].

Land purpose and significance has dramatically changed after so called industrial revolution[3], when the companies emerged and started to use the land for various private entrepreneurship purposes. This was one of the causes of regulation of the land use at legal level.

The land cannot be propagated and it is unchanged[4]. There is as much land as is and such as is and this property causes the necessity of introduction of its special regulation.

There are various definitions of the land substance. The land is a natural formation with certain physical data, comprising the part of Earth. Though, there are wider definitions, for example, the land is all in touch with and attached/ related to the land (the house and its fundament, plants etc.) [5]. According to the other view, not only closely related things should be regarded as the land, but rather all lawful property and interest in the land could be regarded as the „land" in legal respect[6].

Overall, the land is the object whereon all processes take place and which is the subject of special regulation, regarding its special significance.

2.2. Land: Object of Special Legal Regulation

In legal respect, the land is the subject of civil turnover, implying that the agreements related to it can be concluded freely and it can be subjected to different legal regimes. Though, naturally, the land is not a subject of civil legal turnover only. Number of law sectors and spheres are applicable to it.

In this respect, the approach accepted in Germany is of interest. In relation to one of the cases, German Federal Constitutional Court provided explanation: The fact that the land is not replaceable and it cannot be replicated, prohibits its full entrusting to the unpredictable play of the free powers and views of certain individuals; fair legal and social system requires, in relation to the land, that more emphasis was made on taking into consideration and expression of the public interests than in case of the other properties. The land cannot be automatically equalized with the other properties and values, either from the economic point of view or regarding its social significance; and it cannot be regarded and accepted into legal turnover as movable goods[7].

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1 *Tsiklauri B.,* Urban Construction (Construction Planning) in the Construction Law, Journal Sarchevi, №1(2), Tbilisi, 2011, 34, Citation: *Turabelidze N.,* Land Law of Georgia, Tbilisi, 2002, 58 (in Georgian).

2 *Tsiklauri B.,* Urban Construction (Construction Planning) in the Construction Law, Journal "Sarchevi", №1(2), Tbilisi, 2011, 34 (in Georgian).

3 *McFarlane B., Hopkins N., Nield S.,* Land Law: Text, Cases, and Materials, Oxford University Press, 2012, 5.

4 *Tsiklauri B.,* Urban Construction (Construction Planning) in the Construction Law, Journal "Sarchevi", №1(2), Tbilisi, 2011, 34, Citation: *Brenner M.,* Baurecht, 2. Neu Bearbeitete Auflage, Heidelberg, 2006, 14 (in Georgian).

5 *MacKenzie J.A., Phillips M.,* Textbook on Land Law, Oxford University Press, 2014, 10.

6 Ibid, It is Interesting that in the Monarchies (e.g. in UK) only Monarch is Regarded as the Land Owner and the other Landowners are Regarded as the Holders of the Specific Estates or Persons with Private Interests in the Land. See *MacKenzie J.A., Phillips M.,* Textbook on Land Law, Oxford University Press, 2014, 10.

7 *Schvabe I.*, Decisions of German Federal Constitution Court, (GIZ), 2011, 252, <http://lawlibrary.info/ge/books/giz2011-ge-BVerfGE.pdf>.

As the land is a multifunctional asset, the issue of its legal use covers various social relations. As the land is the source of various natural resources, it is subject to the regulation of their distribution. The land is a part of environment and therefore, environmental law is applicable to it. This is expressed in issuance of the environmental permits and generally, environment protection control via various legal mechanisms.

The land is a single object for construction activities and it cannot be replaced by anything else. This is the nature of land that causes existence of various construction regulations. As mentioned, the land is non-renewable resource of quite limited quantity and therefore, it is necessary to state the conditions for its legal and logical use and this is provided by the construction law.

Concept of the real property established by the civil legislation implies the land together with the fossils therein and buildings and structures attached thereto[8]. Using grammar definition of this norm, only land should be regarded as the immovable property, as the buildings and structures thereon and the fossils therein could be regarded as the immovable property only provided that they are immovably attached to the land. In case of their separation from the land, they lose the status of „immovable". Civil legislation provides much stricter and more precise regulations for the immovable properties than for the movable ones. A person can be regarded as an owner of the immovable property (land) only after his/her registration with the Public Registry. In addition, registration with the Public Registry entitles a person to dispose of the immovable property. The rights and obligations associated to the land and other immovable property are registered here as well. All this evidences particular interest of the state to legal regulation of the land issues.

The land, regarding its functional purpose, is awarded different legal statuses. At the legislative level, separate law regulates the issues of agricultural land disposal and other related legal issues. Agricultural land, similar to any land, is an object of strategic significance for the state as economic development of the country heavily depends thereon. Naturally, regarding such significance, special legal regulations are adopted in relation to disposal of the land. Constitutional Court of Georgia has discussed this issue at a time of consideration of the constitutional claim stating that imposition of additional obligations on the foreign citizens and legal entities in case of sale of the agricultural land to them does not comply with the Constitution. Detailed discussion of this decision is not within our interest[9] though it is significant to note that the defendant (Parliament of Georgia) relied on the argument that „agricultural lands are of strategic significance for the country's security, environment protection, economics and health care" [10]. The Constitutional Court has upheld the claim in part and now the agricultural lands may be sold to the foreigners without any additional obligations. This is not reasonable, as the land should not be regarded as a subject of free turnover and it should not be freely sold / disposed off where this results in „unsound distribution of the land"[11].

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[8] See Georgian Law Civil Code of Georgia, Georgian Legislation Bulletin, Adopted on 26 June 11997, Article 149 (in Georgian).

[9] Constitutional Claim Demanded Recognition of the Words "Foreigner And" in sections 1^1 and 1^2, Section 1^3, Article 4, as Unconstitutional in the Law of Georgia on Agricultural Land Ownership, as the Discriminating Term, in Relation with the Property Rights/ Constitutional Court has Upheld the Mentioned Claim in Relation with Article 21.

[10] Decision of the Constitutional Court of Georgia №3/1/512, 26 June 2012, §12 (in Georgian).

[11] *Schvabe I.*, Decisions of German Federal Constitution Court, (GIZ), Tbilisi, 2011, 250, <http://lawlibrary.info/ge/books/giz2011-ge-BVerfGE.pdf>.

3. Preconditions for Determination of the Land Construction-Legal Status

3.1 General Definition of the Land Legal Status

We have already mentioned that the land is subject to special legal regulation. As the issue in question is associated with determination of the land status in the context of construction law, significance of land use for the construction purposes should be distinguished from its legal regime in the construction law.

There are number of views with respect of whether the construction law belongs to the private law or public law. This issue could be discussed and relevant arguments could be sought but one thing is undoubted: construction law has the signs characteristic for both sectors. In Germany there are distinguished „private construction law" and „public construction law"[12]. Each of them provides different regulation of the land.

a) Private Law Regulation

Subject of private construction law covers the private law relations emerged in the construction process and balancing of the private interests of the neighbors[13]. Private interests can imply wide range of issues, from personal economic interests of the parties[14] to any other interests that can be related to construction.

Possibility of making agreements between private persons in the process of construction on the land plot expresses private interests[15].

In relation with the land status, in the private law context, the land should be regarded as the subject of civil legal turnover. Any civil law agreements could be made in relation to the land, provided that the rules established by the law are complied with. Regarding the purposes of the construction law, at a time of construction permit issuance, the legal regime applicable to the land shall be identified, in particular, whether the subject seeking construction permit is direct owner of the land or a holder only (based on the lease or any other agreement).

Construction law, as such, includes the entire spectrum of the neighborhood relations, regulated by the civil norms, in addition to the construction regulations. Relations between the neighbors are related to mutual respect to the different private interests, obligations of tolerance to the neighbors etc. Clearly, construction law attempts to avoid any risks but in case of collision of the private interests the dispute shall be resolved based on the civil law.

Though construction permit is issued to the specific person, this does not prevent him/her to dispose off the land parcel together with the building under construction thereon. Naturally, in such case all responsibilities and risks are transferred to the new owner, whose interests include studying and getting familiarized with the existing situation. In such cases, the legislator sees the state interests only where the issue is, e.g., who should improve the defects and pay the penalty. Here the issue

[12] *Turava P.,* Key Concepts and Institutes of the Construction Law, Faculty of Law, TSU, "Journal of Law",, №2, 2009, 121 (in Georgian).
[13] Ibid.
[14] *Gegenava D.*, Construction Law and Legal Nature, Journal "Sarchevi", 2011, 29 (in Georgian).
[15] Ibid.

is solved very easily: the penalty shall be paid by the old owner and the defects shall be eliminated by the new one[16]. All other relations between the parties shall be regulated within the contract law.

b) Public Law Regulation

Public construction law, as the specific part of administrative law, is the set of norms, regulating the issues of land parcel use for construction purposes, taking into consideration the public interests, in particular whether construction of the structures and buildings is acceptable, the construction process, necessary characteristics of the buildings and structures, legal regime for their use, modification and demolition, as well as public order regulations in the construction sector and scopes of land use for construction purposes[17].

Public construction law is divided into two parts – public planning and public order law[18]. Such dividing is conditional but provides for substantially different regulations. Construction planning law regulates the land planning issues, its functional allocation and awarding of the specific legal status. While for the construction order law, land is of more private interest, as expressed by issuance of the construction permits to private persons, as well as exercising of state supervision over the ongoing constructions.

Particular state interest in the construction planning area is conditioned by its strategic significance. Country's economic, social, cultural, agricultural, touristic development etc. depends on the adequate and effective planning of the country's entire territory, as well as of the districts and specific cities (settlements/villages). Further we shall examine this issue more carefully.

Within the construction order law, the land acquires specific significance, in particular, giving the specific status (zone) to one or another land parcel determines the type of construction acceptable on this land and hence, the type of the construction permit.

In any case, active intervention of the state, as an administrative authority takes place. It participates in the relations as a regulating subject and, based on the subordination principle, it is at the highest level of the hierarchy. Any actions of the administrative authority, as such, is dictated by the high public interest and this makes any actions of the state even more significant[19].

3.2 Determination of the Construction Legal Status

To determine the land construction legal status the construction planning and the construction activities should be considered separately, as the parts of construction order.

a) Land as the Planning Object

Planning is a significant process. It determines the future prospects of the land use from the outset. Adequate area planning is of great significance as the land is not an inexhaustible resource and its purposeless planning and use may result in negative outcomes.

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[16] Georgian Law Code of Products Safety and Free Circulation, Georgian Legislation Bulletin, adopted on 8 May 2012, Section 5, Article 26 (in Georgian).

[17] *Turava P.,* Key Concepts and Institutes of the Construction Law, Faculty of Law, TSU, "Journal of Law" №2, 2009, 121 (in Georgian).

[18] *Gegenava D.*, Construction Law and Legal Nature, Journal "Sarchevi", 2011, 30 (in Georgian).

[19] Ibid, 31.

Georgian Law on Space Management and Urban Construction Principles is applicable to planning. This Law provides definitions of such concepts as space-territorial planning. According to the Law, „space-territorial planning – activity regulating use of the settlements' territories, land use, construction and development, protection of environment and immovable cultural heritage, space-territorial conditions of recreation, transport, engineering and social infrastructure, as well as spatial aspects of economic development and territorial issues of renovation" [20]. The same Article provides definitions of the other terms related with the planning, e.g. land use plan, development regulation plan etc. Analyzing of the substance of any of them clarifies the fact that construction planning allows influencing the land in various ways.

With respect of territories' planning the land is classified as the planned land, for which the planning document is developed and specific legal status thereof is set and the land beyond planning, i.e. unplanned territory where no relevant legal document is adopted.

Planned land implies awarding of the specific status. In accordance with the Law, planning determines the structure of territories including, for example, the urbanized territory, village territory, natural-landscape territory, special territories. In addition, the recreation and health resort territories, protected territories, agricultural development territories, forest conservation and development territories, the territories intended for national defense and the territories intended for the other public purposes etc. are distinguished[21].

Awarding of one or another status is not provided randomly but rather in compliance with the strict criteria that are established as a result of scientific researches where the knowledge of the professionals of the relevant field is invaluable. Planning exercise relies on these researches to provide planning of the territories. Though, in addition to the scientific reasonability, there is also the strategic development policy that can make significant corrections at the planning stage. If certain territory is of significance for economic, social or cultural development of any segment, planning is influenced by these interests and this is finally reflected in the main plans.

Territories planning and awarding of the specific status to the land is such a significant process that in some countries, to modify the plans and change the land status, the whole set of procedures shall be performed. For example, in the USA, to make amendment or change to the planning map, modifying the land use regime, local negotiations shall be conducted with local population and in some cases even the referendum shall be arranged[22].

As planning is provided by the state, at central and local levels, it acts based on the state and public interests and in many cases this is for the detriment of the private interests. A land may be private property of a person but construction-legal (planning) status of this land is determined independently from such person. Thus, it is possible that status of e.g. agricultural land owned by the person was unilaterally changed by the state and it was included into some other category of land. In such cases, according to the law, the natural persons and legal entities, whose lawful interests were

[20] Georgian Law on Spatial Arrangement and Urban Construction adopted on 2 June 2005, As of January 2005, Section "c", Article 2 (in Georgian).

[21] Ibid, Section 4, Article 18 (in Georgian).

[22] *Selmi D.P.,* Reconsidering the Use of Direct Democracy in Making Land Use Decisions, Journal of Environmental Law, Vol. 19:293, 2002, 303.

prejudiced within the scopes of planning activities, shall be entitled to apply to the court[23]. Here we imply repayment or compensation of damages. It is unlikely that the interests of private person have impacted the planning as a whole.

Finally, at the construction planning stage, the issue of awarding status to the land shall be resolved so that the main goals were achieved: creation of healthy and safe living and working environment for the population, improvement of the country's competitiveness and economic growth, protection and improvement of cultural heritage and natural resources, proper integration into Caucasian, European and global systems and structures[24].

As for the **unplanned land**, this is the territory not covered by the planning activities and no plans were developed for such territories[25]. Usually, such lands are called the lands beyond the development. No any specific status was awarded to them and the terms and conditions of use of such lands are specified. Thus, use of such lands and implementation of any construction activities thereupon shall be provided through individual regulation or on the basis of some relevant document.

b) Land as the Object of Construction Activities

Land is the main object of construction activities. Everything, related to the construction is simultaneously related to the land as well. Moreover, land condition and status determine the type of construction activities.

At the stage of construction activities, land use conditions and issues shall be as per the Resolution of the government of Georgia, Primarily, the definition of the term „land parcel" shall be provided. For the purposes of the said Resolution, this term could be defined as the „object of the property right, limited by single uninterrupted line, being the cadastre unit and could be used for construction activities in accordance with this Resolution"[26].

With respect of possibility of land use for the construction activities the parcels are classified as: construction land parcel, land parcel of the limited use for construction activities and land parcel unsuitable for construction activities[27]. Each of these types is determined with due consideration of both, the natural characteristics of the land and certain priorities.

Construction land parcel is the main type intended for construction purposes. Such land parcels are separated from one another by zoning. We shall discuss it below in details. Determination that the land parcel is suitable for construction implies that it is allowed to perform construction activities on such land, in general. For the zone of each category specific construction terms and conditions are provided, based on the characteristics of the land parcel and construction types, allowed for the certain zones.

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[23] Georgian Law on Spatial Arrangement and Urban Construction adopted on 2 June 2005, As of January 2005, Section 5, Article 27 (in Georgian).

[24] Ibid, Section 1, Article 4 (in Georgian).

[25] Such Things Occur where Planning of the Country's Territory is Provided Inconsistently, Partially.

[26] Resolution № 57 of 24 March 2009 of the Government of Georgia on Issiance of Construction Permits and Permit Conditions, Section 33, Article 3 (in Georgian).

[27] Ibid, Section 3, Article 5.

Land parcel intended for construction shall be provided with the engineering and transport infrastructure, minimal condition is presence of at least one access to the site after completion of construction, among them, via servitude[28].

Status of the **land parcels for limited construction** is determined based on the specific zone characteristics. In some cases the construction may be limited in certain territories, e.g. in the landscape-recreation zones. In such cases it is implied that construction types allowed for such land parcels are strictly determined.

Land parcels may become **unsuitable for construction** in cases specified by the law[29]. No specific explanation is provided of what term ,,unsuitable" implies. This may include any natural conditions, permanent or temporary unsuitability, actually preventing any type of construction activities on such land parcels.

Development of the land parcels with the mentioned status is possible only after elimination of unsuitability[30].

3.3. Zoning of the Land Parcels as the Instrument for Determination of the Construction-Law Status

Land zoning implies dividing of the specific settled territory in the functional zones, in the process of urban development. Each of the land parcels is within certain zone, determining the terms and conditions for its use and development.

Zoning is of critical significance in the process of performing of the construction activities. The type of zone dictates to the subject seeking construction the types of construction activities allowed in such territory. In addition, zoning ensures adequate and purposeful development of the settled territory, ensuring more or less uniform development of the entire country.

According to the effective legal regulations, currently, the land parcel intended for construction may be within fifteen main zones[31]. In addition, the zones may be divided into the sub-zones. These issues are regulated by the Resolution of the Government of Georgia on Approval of Technical Regulations – Key Provisions for Regulation of the Use and Development of the Territories of Settlements[32].

This Resolution covers both, general and specific functional zones (sub-zones). For example, general functional zone is the housing zone, further divided into six types of the housing sub-zones. Transport zone is divided into two sub-zones etc. This Resolution provides description of the substance of each zone/sub-zone and specifies the categories of buildings and structures allowed for them.

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[28] Ibid, Section 2, Article 6.
[29] Ibid, Section 1, Article 9.
[30] Ibid, Section 2, Article 9.
[31] Ibid, Section 1, Article 6.
[32] Resolution of the Government of Georgia № 59, 15 January 2014, on Approval of the Key Provisions of Technical Regulations – Regulation of Use of the Settlements Territories and Development (in Georgian).

a) Zoning Preconditions

As zoning is a significance process, the zoning preconditions shall be clearly stated.

Awarding of the specific zone status to the land parcel depends on the number of factors. Primarily, the natural properties of the land parcel shall be taken into consideration. Landscape-recreation zone, logically covers the territory, where the climatic conditions allow adding of such functional load to the land. The same could be said about the agricultural land and any other land.

As the term „functional zone" is used in zoning, this implies adding of certain function to the land parcel, showing the purpose for which such land may be used. Of the settled territory requires detailed urban development, the territory is divided into more zones regarding the functional purposes required for the said territory. For example, if there is clearly determined housing zone, necessity of identification of the transport zone, zone for public activities and other zones is associated with it. Thus, in many cases, the zoning map depends on the functional load of the territory in question.

In addition, the zoning structure clarifies the state policies and strategic development priorities, with respect of the land use. Zoning of the territory heavily depends on the country's economic, cultural and other priorities. Where attention is focused on agriculture development, at the planning stage, the state attempts to load as much territory as possible and award the status of agricultural land to it. If the development priority is support to industry, in zoning, the industrial zones are give preference etc. Thus, planning policy is basic precondition for zoning.

Based on the needs the zones may be changed. In such cases the zone changes are accomplished through amendment of the urban development documents and this requires performing of the procedures similar to those performed for their approval[33]. It is significant that the zones were changed upon necessity, with relevant justification. In addition, the Resolution imposes limitations on transformation of one type of zone into the other type[34].

b) Parameters for Establishment of the Land Use Conditions

Zoning implies setting of the land use conditions in the specific zone, regarding its functional purpose.

The document of specific rights' zoning document should state: a) key parameters of regulation of construction land parcels development in zone territory and their acceptable characteristics; b) for the zone territories the list of sites unacceptable for placing there may be developed[35]. Hence, for any construction land, within the relevant zone, the following parameters shall be set: maximal percentage of the land parcel development, maximal percentage of development intensity, minimal percentage of green plantations[36]. More detailed parameters may be stated as well, like maximal number of floors / height, max. volume, min and max dimensions of the land parcels, so called red and blue

[33] Ibid, Section 1, Article 14.
[34] See ibid, Sections 2 and 3, Article 14.
[35] Ibid. Section 1, Article 7.
[36] Here so Called K-1, K-2 and K3 Coefficients are Implied.

lines, number of parking areas, as well as spatial-planning conditions of development and any other parameters that may be significant for certain zone[37].

In addition to these parameters, for each of the zones the types of acceptable and unacceptable buildings/structures are stated. Usually, the functional purpose of such buildings / structures shall correspond to the functional load of the zone. For example, in the housing zone, construction of the dwelling shall be allowed, as well as construction of the public buildings[38] (schools, kindergartens, medical facilities etc.); in the health resort/recreation zones the health facilities, buildings and structures intended for sports, leisure may be constructed[39] etc.

Land use conditions and development parameters shall be set with due regard to the natural environment, as well as the functional purposes. It is possible that the geological conditions in the land parcel prevented construction of the high buildings or the objects with certain functions. Consequently, the relevant coefficients are stated to limit the unsuitable constructions and protect human life and health.

c) Effective Zoning Problem

Zoning is an all-embracing process requiring consideration of various aspects. In many cases, the problem of effective zoning arises. How adequate and reasonable is functional zoning? What should be taken into consideration by the relevant authorities for awarding of certain zone status to a land parcel?

Primarily, it should be taken into consideration that the land is a limited natural resource, implying that any plan and strategy should be tailored to it. Zoning is effective where, based on the available data, regarding scarcity of the land, all resources are used fully and reasonably. Functional zones should be distributed so that to maximally correspond to the state and public interests, allow maximal development of the territory, with no harm to the ecology and natural environment, maintaining the cultural and historical heritage and at the same time, provide healthy and safe environment for the population (including the future residents)[40]. It is quite hard to achieve this goal but it is achievable only in case of accomplishment of the adequately planned process. For this, in addition to the professional competences, the adequate legal basis is required.

Zone types shall be reasonably planned. Lack of the types may result in the problems for placing of the number of significant sites as there are no functional zones suitable for them. On the other hand, excessive detailing of the zones may cause absolutely useless land parcels and restrictions that would prevent development and urbanization of the territories. According to the currently effective legislation, we face the latter problem. For example, if there are six sub-zones of the housing zone, not actually different from one another with their parameters and acceptable types, their dividing is artificial. As a result, some of them are not actually used. At the same time, construction of certain

[37] Resolution of the Government of Georgia № 59, 15 January 2014, on Approval of the Key Provisions of Technical Regulations – Regulation of Use of the Settlements Territories and Development, Sections 2 and 3, Article 7 (in Georgian).
[38] Ibid Sections 7 and 12, Article 12.
[39] Ibid Sections 4 and 5, Article 12.
[40] See also *Bobrowski M.,* Handbook of Massachusetts Land Use and Planning Law, Aspen Publishers, 2002, 31.

buildings is prohibited in such zones by the only reason that they are not legally within the category of the given zone. Such approach could be explained by the fact that currently, in Georgia, the available planning documents and construction approaches, in general, are relatively conservative and do not correspond to the current European standards. The substance of modern approach is that the territories should be developed in simple and effective way, based on the economy principle, with environment protection and adjusted to the public needs to maximal extent possible. Thus, land zoning issue requires further improvement.

No less significant aspect, in the effectiveness context, is the issue of determining of the types of buildings and structures acceptable for the zone. The acceptable types shall functionally correspond to the zone function. For example, the industrial buildings shall not be placed in the housing or recreation zone. Though, on the other hand, the list should not be so limited that it prevented construction of a building in the zone by the only reason that it is not on the list while functionally it does not contradict to the zone type. Current legislation accepts existence of such exclusions in some form.

Effective zoning is a significant issue that must be taken into consideration by the state at the planning stage. It directly impacts determination of the reasonable legal status of land and prospects of its further use.

4. Conclusion

Work offers discussion of the land legal status in different aspects – both, generally and specifically, in the construction law context. The land legal regimes for the stage of construction planning and stage of implementation of construction activities were discussed separately.

Most significant issues of land zoning were discussed and related problems were formulated. Necessity of effective zoning is conditioned by limited land resources and their reasonable use. As the land is limited resource, its legal regulation shall be such that it finally ensured lawful, reasonable and effective use of the territories.

Considerations provided in the work showed that one and the same land parcel may be subjected to different legal regimes. At this point its natural characteristics, functional load, public interest, as well as the state strategic development policies are taken into consideration. Though, in this process, attention should be paid to the fact that the land is the part of the environment where the people live. Hence, they must deal with it with great care and attention and use it for different purposes to prevent any irreversible outcomes due to improper and thoughtless actions. And this proportionally impacts the life quality of both, current and future generations.

David Makaridze*

Legal Nature of Individual Administrative – Legal Act

The article relates to the legal nature of individual administrative-legal act and its significance in administrative law science. The following issues are considered in the paper: brief background of origination of individual administrative-legal act; definition of the notion of individual administrative-legal act in Georgian and German legislation, their similarities and differences; problems of inter-delimitation of individual and normative administrative-legal acts and the need of introduction of terminological difference in regard to them; promotion of the institution of the judge, as the subject, authorized for issuance of individual administrative-legal act and expedience of its existence.

Key words: *general administrative code of georgia, individual administrative-legal act, normative administrative-legal act, terminological difference, administrative justice.*

1. Introduction

Actuality of the studied topic is conditioned by the circumstance that administrative-legal act is one of the most important instruments of implementation on power by administrative body. Consideration of the issued act as individual by the administrative body is of decisive importance for the interested person, whose interests are directly touched by it. Origination of certain right or liability of the person, as well as enforcement of mechanism for protection of such right is related to it, if the person has the feeling that his/her right is encroached by this act. Administrative act is one of the most important legal forms of implementation of public governance.[1] Thus, following from the principles of legal state, one of the most important components, guiding the activities of administrative bodies is important – legislative basis, regulating issuance of individual- administrative legal acts shall be as well-formulated, clear and unequivocal as possible; it will also allow the stakeholders to protect their rights and interests, if they are damaged by these acts.

Problematic issues, related to the individual administrative legal act are discussed in the paper; the mechanism of operation of similar instruments of foreign countries (basically those of German Federative Republic, as Georgian institutions of administrative law are mostly regulated like German legal system)[2] and the methods of resolution of problems are offered.

2. General Characteristics of Administrative – Legal Acts

2.1. Origination of Administrative Legal Act

The purpose of the field of administrative law is to regulate legal bases of administration, subjects, equipped with governmental functions and their relation with the parties, involved in this proc-

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* Doctoral Student, TSU Faculty of Law.

1 *Adeishvili Z., Vardiashvili K., Izoria L., Kalandadze N., Kopaleishvili M., Skhirtladze N., Turava P., Kitoshvili D.,* Handbook of General Administrative Law, Tbilisi, 2005, 99-100 (in Georgian).

2 *Winter G.,* Development of Administrative Law and Legal Consulting on the Example of Georgia, as Transitional Country, Magazine Administrative Law, 1, 2013, Tbilisi, 2013, 70.

ess; and implementation of this function mainly depends on implementation of administrative action, which is expressed in issuance of administrative legal acts. Administrative legal doctrine of foreign countries is based on the concept, that administrative act is the manifestation of the will of public administration; legal acts of public administration represent manifestation of the will of the relevant bodies in the process of implementation of the functions, assigned to them. They, as a rule, aim at introduction of certain change in administrative legal relations.[3] The group of authors present administrative act as one of the forms of manifestation of the will of administrative body.[4]

In different law doctrines implementation of functions, governance measures by administrative organs and other subjects, equipped with public powers[5] in relation to other persons is regarded as the key function of administrative legal acts. Obviously, it is a justified approach, nevertheless, the function of administrative acts cannot be exhausted by only this attitude. As the practice shows, in some cases the purpose of administrative acts is also to regulation the action of the administration itself, its procedures and form of relation with citizens and/or other parties. Thus, the function of administrative acts shall also be ensuring of proper operation of public administration and shall be directed towards rising of efficiency and perfection of its activities.

The problem of mutual relation of internal and external acts has special place in the doctrine on administrative acts. Administrative legal science of foreign countries identify the acts, issued by administrative body on the basis of public power, assigned to them and the acts, which refer only to internal relation of the administrative body. The formers are referred to as external acts, and the latter- as internal. External acts are considered to be the acts, which have impact on the relations of the persons, who are not involved in the implementation of public administration. Such acts can be directed towards the defined, as well as undefined circle of persons. Internal acts, primarily, have impact inside the mechanisms of state (public) governance itself. The acts, which refer only to internal relations of administrative bodies (internal acts), are not considered by foreign administrative legal scientists as the administrative acts in the exact meaning of this word. Nevertheless, recently, administrative legal science of the west pays more attention to the research of internal acts.[6]

2.2. The Notion of Individual Administrative Legal Act

As it was already mentioned in the Introduction, the main topic of the study is individual administrative legal acts. Thus special attention is paid to its definition and clarification – what is means under this term in different systems of law.

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[3] *Kozirin A., Shmamina M., Zenentsov A., Bogdanovskaya I.S., Danilov, Sazhina V., Raytelmayer K., Shaikh K., Nikerov G., translators: Kharchiladze I., Ovsyanikova N.,* Administrative Law of Foreign Countries, Tbilisi, 2014, 195 (in Georgian).

[4] *Adeishvili Z., Vardiashvili K., Izoria L., Kalandadze N., Kopaleishvili M., Skhirtladze N., Turava P., Kitoshvili D.,* Handbook of General Administrative Law, Tbilisi, 2005, 99 (in Georgian).

[5] *Makaridze D., Khazaradze G.,* Responsibility of Administrative Body Responsibility of Administrative Body in Health Protection Law, Publishing House of David Batonishvili Institute of Law, Tbilisi, 2014, 37 (in Georgian).

[6] *Kozirin A., Shmamina M., Zenentsov A., Bogdanovskaya I., S. Danilov, Sazhina V., Raytelmayer K., Shaikh K., Nikerov G., translators: Kharchiladze I., Ovsyanikova N.,* Administrative Law of Foreign Countries, Tbilisi, 2014, 198 (in Georgian).

Great importance is given to classification of administrative acts intro normative and specific (individual acts). Normative acts are the acts, adopted by the public administrative bodies in the process of administrative activities, which are directed towards not specific case, but public relations abstractly, regulation in general. They establish the rules of behavior for unspecified circle of persons and are intended for multiple uses. Specific (individual) administrative acts, on the contrary, are directed towards regulation of individual specific matters (subjects). They are characterized by specificity of instruction and specific person or circle of persons, who may be mentioned in the act itself. Division of administrative acts into normative and specific (individual) acts is characteristic for France and the countries, which took French model, which we don't see in German Law. Executive administrative acts have special place in the legal mechanism of administrative activities in France.

They include "acts, issued by the administration unilaterally, by which, through imposition of obligations or granting the rights, change of legal status is achieved". Not all administrative acts, adopted on the basis of unilateral will, represent executive administrative act. Among unilateral administrative acts, together with executive acts, there are such acts, which are issued by the administrative body, but they don't change the existing norms and legal status. Thus, the main characteristic of executive individual acts, which differs them from other unilateral acts, is that such acts result into change of the existing legal status.[7]

Administrative act is a classical tool of German law. It includes single measures of the government, which obey common law rules. The above mentioned in manifested through the circumstance that administrative actions obey the established legal norms; e.g. traffic signs, construction permit, permit or rejection of activities, trade, imposition of taxes, appointment of officials, issuance of weapon permit. Administrative acts were introduced in German legal regime by *Otto Meyer*. He copies the content-related element from French law with consideration of German administrative law of the 19th century. The basis of legislative innovation was granting of the opportunity of legal protection against governmental measures to citizens, so it was necessary to take the measures, as a result of which the goal – establishment of perfect legal protection mechanism would be achieved. As a result of introduction of administrative acts, the action of administration was placed in frames; and procedural meaning of administrative acts was limited in the opportunity of appeal. Consequently, the main function of administrative act is introduction of uniform legal regime, common for various governance-related measures. Old laws used terms like decree, permit. This terminology became common and was given the name of administrative act. The definition of administrative act is provided in p. 35 of the Law of Administrative Procedures and it unifies each of old terms and includes scientific definition of these notions.[8]

Anglo-Saxon states are characterized by division of administrative acts into final and preliminary acts, e.g. Professor *Gallegan* of Oxford University provides one of the variants of division of specific administrative acts: final decisions on individual cases; preliminary or interim decisions,

[7] Ibid, 376-377.

[8] *Peine F.J.,* Allgemeines Verwaltungsrecht 7, neu bearbeitete Auflage, schwerpunkte *Muller C.F.*, Heidelberg 2004, §7, 102, 103.

preceding final decisions; preliminary or interim decisions, preceding acts, but not followed by decision, i.e. investigation; act, which is not a decision (e.g. protocols of administrative violations); acts, preceding or preparing final decisions; impossibility of making decision or rejection on making decision or implementation of action (act, implemented by absence of action).[9]

3. Individual Administrative Legal Act in Georgian and German Law

3.1. Legislative Definition of Individual Administrative Legal Act (According to Georgian Legislation)

According to Georgian legislative definition, individual administrative legal act is the "individual legal act, issued by administrative body on the basis of administrative legislation, which establishes, changes, terminates or confirms the rights and obligations of a person or limited circle of persons. The decision, made by administrative body on rejection of applicant's satisfaction on the issue, assigned to its authorities, as well as the document, issued or approved by the administrative body, which may be followed by legal consequences, shall also be deemed as individual administrative legal act".[10]

This legal definition of individual administrative legal act allows its division into four components. The elements of the notion are: administrative body, on the basis of administrative legislation; individual legal act; establishes, changes, terminates or confirms.[11] In accordance with the existing legislation, for the act to be considered s individual administrative legal act, it shall meet the abovementioned conditions. Let us discuss each of them.

Administrative body. Individual administrative legal act can only be issued by administrative body; and administrative body is the public or local self-governance body or institution, legal entity of public law (with the exception of political and religious associations), as well as any other person, implementing public legal authorities on the basis of Georgian legislation.[12]

Legal definition of the notion of administrative body consists of two parts. The first part of definition includes organizational legal notion of administrative body, which delimits administrative body from governmental, legislative and judicial authorities, as organizational legal understanding of administrative body covers only the bodies, included in the public administration system – i.e. all public and local self-governance and governance bodies and institutions. Functional understanding of administrative body, given in the second part of the definition of the notion, unifies administrative bodies in organizational legal sense, as well as physical and legal entities, which are not the subjects of the system of state bodies, but implement public legal authorities on the basis of legislation and issue administrative acts in its framework.[13]

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[9] *Kozirin A., Shmamina M., Zenentsov A., Bogdanovskaya I., Danilov S., Sazhina V., Raytelmayer K., Shaikh K., Nikerov G., translators: Kharchiladze I., Ovsyanikova N.,* Administrative Law of Foreign Countries, Tbilisi, 2014, 197 (in Georgian).

[10] General Administrative Code of Georgia, (hereinafter – GACG), Article 2.1 (d).

[11] *Turava P., Tskepladze N.,* Handbook of General Administrative Code, Tbilisi, 2013, 69.

[12] GACG, Article 2.1 (a) (in Georgian).

[13] *Adeishvili Z., Vardiashvili K., Izoria L., Kalandadze N., Kopaleishvili M., Skhirtladze N., Turava P., Kitoshvili D.,* Handbook of General Administrative Law, Tbilisi, 2005, 108 (in Georgian).

It shall be mentioned, that the term „carrier of public authorities" exist in German law, which means that all entities, equipped with public legal authorities, i.e. who have been given the right of carrying and implementing public authority, are considered as administrative bodies. This notion, as well as German law, shall be considered to cover all persons, equipped with public legal authorities.[14]

On the basis of administrative legislation. GACG determines that the measure, implemented by the administrative body for regulation of specific legal relation, shall follow from the sphere of administrative law. This condition, determined by the law, which shall be met by the administrative act, is related to the general problem, existing in law science like delimitation of public and private law and, consequently, division of the forms of activities of the administrative body into public legal and private legal forms. The presence of this condition can be easily checked in the case where administrative body is authorized for public legal activities, as specific legal relations between it and a citizen in regulated by administrative law, like in police law.[15]

Individual legal act. We deal with administrative act, when the measure of administrative body is directed towards a person or limited circle of persons. The circle of persons is specific when , at the time of making the decision, it is determined whom it concerns. Administrative act shall be directed towards individually determined persons, or shall be related to individual specific cases. Legal act has individual nature, when it is directed towards specific person, which the act described by name, or directly applies to it. Its example is issuance of permit for construction of private house to a person. In the case of general regulation, legal act is related to undefined circle of persons. It is characterized by being directed towards "everybody"; by the time of its issuance the specific circle of subjects, towards which it is directed, is not determined. Legal act is specific, when is reflects the circumstances of specific case and is a "single-time" by its nature.[16]

Establishes, changes, terminates or confirms. The action of administrative body may be considered as administrative act, when this action is directed unilaterally towards strictly determined legal result (i.e. the result of action – regulation). This element of the notion of administrative act describes its nature, as the measure, directed towards legal regulation of relation, i.e. it establishes, changes, terminates or confirms legal status of person. The essence of legal regulation is that the measure, implemented through issuance of administrative act, in accordance with the will of the administrative body, is directed towards origination of direct legal result unilaterally and mandatory power for execution. Such regulation is primarily characterized by obtaining of outcome as a result of the will of administrative body directly: because administrative body wants so and not by the virtue of law only. The unilateral nature of administrative act and its mandatory power for execution are the elements of this notion, which differ it from other forms of activities of administrative body.[17]

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[14] *Makaridze D., Khazaradze G.,* Responsibility of Administrative Body Responsibility of Administrative Body in Health Protection Law, Publishing House of David Batonishvili Institute of Law, Tbilisi, 2014, 36-37 (in Georgian).

[15] *Adeishvili Z., Vardiashvili K., Izoria L., Kalandadze N., Kopaleishvili M., Skhirtladze N., Turava P., Kitoshvili D.,* Handbook of General Administrative Law, Tbilisi, 2005, 110-111 (in Georgian).

[16] Ibid, 115-116.

[17] Ibid, 118-119.

3.2. Individual Administrative Legal Act in German Legislation

As it was mentioned in the introduction, Georgian administrative law is quite close to German, for better demonstration if this issue it is appropriate to review how the institute of administrative act is regulated in German administrative law.

Legal definition of administrative acts is provided in p. 35 of the Law on Administrative Procedures of German Federative Republic,[18] according to which administrative act is a resolution, decision or other action of authorities, which is implemented by governing body on the basis of public legislation and for regulation of single cases and which is directed towards external legal impact. General resolution is a legal act, which is directed towards the group of persons, defined or definable by general features and contains the manifestation of will.

Administrative act has regulative nature. Regulation is a legal action, expression of will, directed towards the implementation of legal results. Legal result may be the origination or change of right or obligation. Attention shall be paid to the two-sided expression of regulation. It concerns, on the one hand, to the action, and, on the other hand, to the outcome of this action, but usually final result is mainly implied in administrative act. In this aspect, acts may be divided as follows:

a) Purely factual administrative actions (real acts);
b) Preliminary (preparatory) or interim acts, when final decision is not made;
c) Expression of legally important will.[19]

Besides, the following elements of the notion of administrative acts can be outlined:

Administration, administrative body. Administrative act may originate only as a result of action, implemented by governing body. Administration is an instance (service, position) which protects the interests of public administration. It includes united instances and positions of public administrative organizations (bodies).

Sovereign legal act, issued by administrative body. The function of this element is to select from the types of diverse actions of administrative body the action, which is considered as administrative act. It comes to the determination of the type of action. Administrative action is the expression of the will of administrative law. The action relies on two components: formation of will and expression of will. Administrative act shall be understood as independent unilateral expression of will which is preceded by the formation of will.[20] Regulation shall be sovereign. It happens in the case where action is directed towards regulation of public law sphere. It makes public and private law important. The act, regulating private law can't be considered as an administrative act.

Individual case. One of the features of administrative act is that is regulates individual case. The purpose of this element of the notion is delimitation of defined and undefined circles of persons. We deal with administrative act when the regulation refers to the defined circle and it has specific-individual nature. The above mentioned doesn't imply that the act shall be directed towards one per-

[18] Specify the source Verwaltungsverfahrensgesetz (VwVfG), <http://www.gesetze-im-internet.de/bundesrecht/vwvfg/gesamt.pdf>, [11.11.2015].
[19] *Maurer H.*, Allgemeines Verwaltungsrecht, 15. Auflage, *Verlang C.H.* Beck, Munchen 2004, 190.
[20] *Peine F.J.*, Allgemeines Verwaltungsrecht 7.. neu bearbeitete Auflage, schwerpunkte *Muller C.F.,* Heidelberg 2004, §7, 110.

son, but that the defined circle of persons shall be outlined. The situation, when the act regulates undefined number of persons, i.e. when the act has specific-general nature, is problematic.

Presence of external action, Administrative act is only the act, having regulation, which determined the rights and obligations for other, external legal entities. The term itself indicates that the administrative act shall be directed externally. It occurs only in the case where the regulation, by its objective content, is defined according to the circumstance that it can trigger the impact; not only develop, instigate external impact, but develop it legally. Important feature of this reference is legislation, which shall be specifies and executed. According to the above mentioned, there are the following:

a) Internal instructions for personnel. The head (high official) is authorized to give instructions to the subordinated administrations and personnel with consideration of official positions and activities. They don't have external impact and consequently, they don't represent administrative acts. Instructions are intended for internal use only when they are meant for personnel, as public servants and vice versa, they are normative acts, if they are directed towards independent legal entities; in the first case the personnel is inside the administration, and in the second case outside the administrative sphere. Rotation of personnel or change of tasks inside the administration is also important. According to the old legislation, rotation was only internal act of administration.

b) Consent from administrative service or other administrative person (multi-stage administrative act). There exists the number of administrative acts, which, before implementation, require consent from other administrative body or entity. The consent shall be classified as the act only if it develops personal and direct legal impact for the citizen. It is marked by the right of protection of special interests and demonstration of its own interests is transferred to the body, providing consent. As a rule, the consent has only internal administrative explanation, allowed only for the organization and, consequently, it is not administrative. The act, requiring obtaining of consent – due to internal impact from other body is considered as a multi-stage administrative act.[21]

As it is seen from the discussed cases, Georgian and German legislation basically, uniformly regulates the definition of administrative acts on legislative level. And the main difference is that Georgian legislation doesn't imply the sign of external legal impact under the notion of the administrative act. And while discussing German legal system it became obvious how important this element of the notion is in the aspect of considering the act as administrative. Just on the basis of introduction of external legal impact for administrative acts, it will be possible to divide the legal acts, issued by administration into internal departmental, interim and administrative acts. Introduction of this institution will significantly simplify work for administration in the sense that in the case of its formulation in details, it will be possible to determine when the act, issued by administration, is individual and when – it not. If we rely on legal practice, established in Georgian reality, we will see that the acts, issued by administration, whether they are internal departmental or interim by the con-

[21] *Maurer H.,* Allgemeines Verwaltungsrecht, 15, Auflage, *Verlang C.H.*, Beck, München, 2004, 192, 194, 196, 199-210.

tent, are represented with the properties and rules, determined for the issuance of individual administrative legal act. E.g. internal departmental act like temporary imposition of his/her obligations by head of department on other employee, shall be issued in accordance with the procedure, determined for individual administrative legal act.[22] Besides, according to GACG, "administrative body is obliged to investigate, in the course of administrative proceedings, all circumstance, important for the case and make decision on the basis of assessment and comparison of these circumstances. For achievement of this goal, the body can request documents.[23] The action of the mentioned content on the part of administrative body represent interim act for making final decision, although the form and content of the letter is the same as that of the individual administrative legal act. Thus, if the forms of activities of administrative body are determined according to this sign and introduced in the legislation on the level of terminology, it will be possible to differ the acts, issued by administration, according to their content – whether they are "internal departmental", interim or individual acts. The above mentioned will simplify the work of administration, as well as perception of stakeholders in regard to administrative acts.

4. Individual Administrative Legal Act and Normative Administrative Legal Act

Normative administrative legal act is defined as the legal act, issued by the authorized administrative body on the basis of legislative act, which includes general rule of conduct of its permanent or temporary and multiple uses.[24] The elements of the notion of normative act are:

Authorized administrative body – the body, authorized for issuance of normative administrative act is determined by the law, which equips the relevant bodies with the authority of issuance of such act. Administrative legal norms have two types of loading – law enforcement and constitutive; these norms serve for the purpose of law enforcement, i.e. execution, due to which, according to the existing legislation, executive normative acts are issued for the purpose of law execution, i.e. they are bylaw acts.

Legislative basis for issuance of normative administrative legal act –general bases of authorities for issuance of normative administrative legal act are specifies in the Constitution of Georgia, Law of Georgia "On Normative Acts" and GACG. In the case of issuance of normative administrative legal act on the basis of legislative act it is important to determine the "content, purpose and volume" of authority of issuance of normative administrative legal act in this Law, i.e. the legislator itself shall determine the frames and direction of legal regulation, implemented through issuance of

[22] 4 of the Article 3 of the Regulation of the Legal Entity of Public Law – Center for Development of Electoral Systems, Reforms and Training, approved by Resolution №7 dated February 3, 2013 of the Central Electoral Commission of Georgia rules, that the Director of the Training Center shall issue individual administrative- legal act – order on internal departmental, staff-related and other issued, following from the activities of the Center, and in accordance with p. 11 of the same Article, in the case of annual leave, official trip or impossibility of implementation of his obligation, the Director of the Training Center shall impose implementation of his obligation on any of the members of the Center staff, <https://matsne.gov.ge/ka/document/view/1576925>, [11.11.2015].

[23] GACG, Articles 96-97.

[24] GACG, Article 2 (I).

normative administrative legal act in the future so that the governing body is able to act in the framework and in compliance with the legislator's will.

General rule of conduct – this element of normative administrative legal act delimits it from individual administrative legal act. Normative administrative legal act determines general rule of conduct, which is intended for indefinite number of participants of indefinitely many relations at the time of its issuance.

Primarily, while discussing the connection between individual acts, it shall be mentioned that individual legal acts is a single-time act and it shall comply with normative act. Individual legal act shall be adopted (issued) only on the basis of normative act and within the limits, determined by it.[25]

At first glance, the difference between individual and normative acts is obvious and there shall be no problems in the aspect of difference. Nevertheless, I would like to outline the issue, which will show the problem and the necessity of its regulation from this angle.

As it was already mentioned, individual, as well as normative act is one of the most important institutes of activities of administrative body. The title of individual and normative acts is often similar; e.g. orders, issued by the Minister of Georgia, which in some cases are of individual, and in other cases – of normative nature. P.1 of the Article 13 of the Law of Georgia "On Normative Acts" determines order as the normative act of the Minister of Georgia. Besides, in accordance with subparagraph "m" of p. 2 of the Article 5 of the "Regulations of the Ministry of Justice of Georgia", approved by the Resolution №389 dated December 30, 2013 of the Government of Georgia,[26] the Minister, by normative acts, issues normative and individual legal acts – orders in the cases and frames, determined by normative acts of the Government of Georgia. The similar situation applies to the acts to be issued by the President of Georgia. In accordance with p.p. 3 and 4 of the Article 11 of the Law of Georgia "On Normative Acts", the Decree of the President of Georgia is a normative act (only the decrees, related to human resources and personal issues, constitute the exception); the decree of the President of Georgia, as the Supreme Commander-in- Chief of the Military Forces of Georgia, can be either normative act or individual legal act. As it was mentioned in p. 3.2, the difference of administrative acts according to their content would simplify their understanding terminologically. The similar position may apply in this case – it would be good is the difference between individual and normative acts, from terminological viewpoint, in regulated on legislative level as well; it would help to avoid the situation, where the interested party fails to determine – whether the act is really individual or normative. The problem of identification of these acts is more clearly visible, when the act with one and the same content is treated as individual act in one case and as normative – in the other. The following cases could serve and an example:

The Regulations of the Legal Entity of Public Law – Revenue Service – is approved by the Order № 34134 dated July 18, 2014 of the Head of Revenue Service; the mentioned act is published in Georgian Legislative Herald and the type of the document in specified as the individual act of the Revenue Service.[27]

[25] Article 2.4 of the Law of Georgia On Normative Acts.
[26] <https://matsne.gov.ge/ka/document/view/2177616>, [11.11.2015].
[27] Internal Regulation of the Legal Entity of Public Law – Revenue Service, <https://matsne.gov.ge/ka/ document/view/2426434>, [11.11.2015].

Regulation of the State Audit Service, approved by the Order #122/37 dated June 18, 2013 of the General Auditor of the State Audit Service.[28] In the column of the legal basis of the above mentioned act, p. "m" of the Article 10 of the Law of Georgia "On the State Audit Service" is specified, authorizing the General Auditor to issue the normative act – order.[29]

As we can see, the act, carrying one and the same content – the regulations – is individual act in one case and normative act – in the other case.

It could be concluded that the cases of issuance of individual and normative acts shall be regulated in more details on legislative level. Mechanism, clearly delimiting individual and normative acts, shall be developed. As it was already mentioned, one of the ways of resolution of this problem is determination of terminological difference.

5. Judge, as the Subject, Authorized for Issuance of Individual Administrative Legal Act (Special Case)

It is very important to discuss the institute, determined by the Code of Administrative Offences of Georgia (hereinafter – COAG). In particular, the mentioned Code determines the cases of administrative offences, subject to consideration by District (City) Court,[30] considered by the Court on the basis of the Protocols of Administrative Offences.[31] It should be noted that several administrative bodies are authorized to draw up administrative offence protocols subject to court consideration. As an example, I would mention some of them: for the offence, specified in the Article 52 of the Code of Administrative Offences – contamination, degradation or making useless otherwise – the protocol of administrative offence will be drawn up by the authorized personnel of the organization under the Ministry of Environment and Natural Resources Protection of Georgia; for the offence, specified in the Article 159^1 – placement (dissemination) of improper advertisement – the protocol of administrative offence shall be drawn up by the authorized officials of local self-governance bodies. Following consideration of the case of administrative offence the body (authorized official shall make a ruling on the mentioned case. The ruling shall include: the name of the body (official) making the ruling; date of hearing; information about the person in regard to whom the case is heard; description of the circumstances, identified in the course of hearing of the case; specification of the normative act, which provides for responsibility for the given administrative offence; the decision, made in regard to the case.[32] Legal nature of the ruling, in accordance with the above specified criteria, indicates that it represents individual administrative legal act. Thus, it comes out that the court, by the virtue of the above Law, is equipped with the authority of issuance of the act, having the content of individual administrative legal content. As it became clear during discussion of the notion of administrative act, implementation of the functions, governance measures by administrative bodies

[28] <https://matsne.gov.ge/ka/document/view/1948536>, [11.11.2015].
[29] <https://matsne.gov.ge/ka/document/view/17506>, [11.11.2015].
[30] Article 208 of the CAOG.
[31] Article 239 of the CAOG.
[32] Article 266 of CAOG.

and other subject, equipped with public powers in regard to other entities is considered to be the key function of administrative legal acts. Thus, administrative acts shall be related to the implementation of governance measures by the administration. In compliance with Georgian Constitution, state governance in Georgia shall be implemented on the basis of the principle of distribution of powers.[33] Besides, the authorities are divided into judicial, legislative and executive authorities, thus ensuring mutual control and balance of the branches of authorities. The goal of administrative justice is to resolve the dispute between the private person and administration in the sphere of governance through judicial procedures.[34] Thus, through the introduction of the above mentioned institute by the Code of Administrative Offences, the court actually solves the issues, resolution of which is the competence of administrative bodies on departmental basis, this infringing the essence of Administrative justice.

6. Conclusion

The notion and general characteristics of administrative acts on the basis of the example foreign countries (basically, Germany and France) was discussed in the paper.

As a result of discussion is was demonstrated that the purpose of the field of administrative law is to regulate legal bases of administration, subjects, equipped with governmental functions and their relation with the parties, involved in this process; and implementation of this function mainly depends on implementation of administrative action, which is expressed in issuance of administrative legal acts.

Legal doctrines of foreign countries specify difference among several types of acts, like internal and external acts, internal departmental, interim, preliminary. The main feature of executive administrative acts, making them different from other unilateral acts is that such acts are followed by change of the existing legal status.

Regulation of individual administrative act in Georgian and German legislation was considered. Unlike German legislation, Georgian legislation doesn't provide for any external regulation mechanism, in regard to which an opinion was expressed that division of legal acts, issued by administration, into internal departmental, interim and individual administrative legal acts would be possible only on by introduction of external legal impact for the administrative act; and introduction of this institute will significantly simplify work for the administration in the sense that in the case of its detailed formulation is would be possible to determine – when the act, issued by the administration is an individual act and when – it is not.

When comparing individual and normative acts it became obvious that certain problematic issues exist, related to circumstance that these acts are referred to as one term and the acts with similar content are issued as normative form in one case and individual form in the other. In regard for regu-

[33] Article 5 (4) of the Constitution of Georgia.

[34] *Kozirin A., Shmamina M., Zenentsov A., Bogdanovskaya I., Danilov S., Sazhina V., Raytelmayer K., Shaikh K., Nikerov G., translators: Kharchiladze I., Ovsyanikova N.,* Administrative Law of Foreign Countries, Tbilisi, 2014, 281 (in Georgian).

lation of the problem a recommendation was made to introduce terminological difference of these acts and the mechanism, which would clearly delimit these two types of acts.

In the last chapter of the paper, attention was drawn to the possibility of issuance of the acts, having individual administrative legal content, by the court, which was assessed negatively, as the mentioned ruling contradicts the principle of administrative justice and represents interference of judicial authorities in the activities of administration.

As a final conclusion, it could be stated that legal nature of administrative acts is outlined in the paper; shortcomings of certain type are identified, certain remarks are expressed and recommendations are made in the aspect of improvement of this legal institute and its better understanding.

Ilia Tsiklauri*

Comparative Analysis of the Model of Resolution of the Tax Dispute in the System of the Ministry of Finance of Georgia

Significant issue of administrative law, such as administrative mechanism of consideration of tax dispute, is considered in the present article. The mentioned mechanism in Georgia includes consideration of dispute by LEPL Revenue Service and Dispute Resolution Board of the Ministry of Finance.

The essence of consideration of tax dispute in the system of the Ministry of Finance, the peculiarities of the relevant administrative proceedings and foreign practice of tax dispute resolution, on the examples of the United States of America and German Federation, are discussed in the article.

Finally, specific method of perfection of the procedure of administrative consideration of tax disputes and prevention of tax disputes is formulated.

Key words: *tax dispute, tax law, administrative law, prevention of tax dispute.*

1. Introduction

Resolution of tax disputes are characterized by many peculiarities, conditioned by the complexity of tax law. Tax law includes legal issues, as well as the issues of various branches of science. "In spite of special actuality, tax law is the phenomenon in the modern financial-legal science, which is studied at less extent".[1] Following the omcplexity and diversity of the mentioned sphere, resolution of tax disputes is also outstanding for significant specificity. The main subject of discussion of the present article is the problems of resolution of tax dispute.

The essence of non-judicial mechanism of resolution of tax dispute lies in the fact that the whole procedure of dispute resolution proceeds only in tax authorities. The subect of discussion of the mentioned article is the peculiarities if cinsideration of the tax dispute in the system of the Ministry of Finance. The issue is quite actual, as many tax disputes emerge every day; nevertheless, the mentioned issues is not properly studied.

The provisions of the Tax Code of Georgia (hereinafter – TCG) are reviewed in the article; foreign legislative acts and scientific papers are analysed. The method of comparative analysis are used in the paper.

The essence of ht institution of resolution of tax dispute in the system of the Ministry of Finance, the peculiarities of the relevant administrative proceedengs are analysed in the artuce; foreign practice on the example of the United States and Germany are reviewed. Hopefully, the

* Doctoral Student, TSU Faculty of Law.

1 *Rogava Z.,* Tax System and Tax Law, Tbilisi, 2002, 43 (in Georgian).

conclusions, made as a result of consideration of the above mentioned issues, will controbute to the resolution of problems of tax disputes.

2. General Review of the Essence of the Institution of Resolution of Tax Dispute in the System of the Ministry of Finance of Georgia

Tax disputes are characterized by the peculiarities, conditioned by its inter-disciplinary nature and special sphere of regulation.[2]

Tax dispute differs from other types of disputes in several aspects. Common civil dispute proceeds on the basis of some illegal action of any of the parties, and the basis of tax dispute is often mistaken declaration.[3]

In Tax law we can point out non-judicial and judicial methods of protection of the tax payer's right.[4] Resolution of tax dispute in the system of the Ministry of Finance is regulated by TCG, Section XLI of which is oriented towards the regulation of tax dispute within the system of the Ministry of Finance.[5]

Resolution of tax disputes through administrative procedures is characterized by relatively simple procedures, allowing the plaintiff to protect the right independently, without qualified legal service.[6] Administrative appeal, even in the case of negative outcome for the person, enables him/her to better understand the views of the tax authority and better prepare for protection of his/her position for the court hearing.[7] Nevertheless, administrative mechanism of resolution of dispute is deemed in legal literature as not very effective. According to international experience, consideration of the claims of tax payers in higher tax authorities very seldom ends in favor of tax payer.[8] Such situation is explained by strengthening of the position of its lower hierarchic circle by higher administrative authority.[9]

Tax system of Georgia provides for several forms of tax dispute proceedings, but court is considered to be the most effective and efficient mechanism of resolution of dispute between the tax payer and the state.[10]

According to the TCG, "the authorities, resolving tax dispute in the system of the Ministry of Finance of Georgia, are the Revenue Service and the Board for Resolution of Disputes under the Ministry of Finance of Georgia, and the Dispute Resolution Board is the authority under the Minis-

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2 *Tsiklauri I.,* The Peculiarities of Georgian Model of Resolution of Tax Disputes and the Need of its Reformation, Magazine Sarchevi, №1-2 (3-4), 2012, 77 (in Georgian).

3 *Smith W.K., Stalans J.L.,* Negotiating Strategies for Tax Disputes: Preferences of Taxpayers and Auditors, Law & Social Inquiry, Vol. 19, №2, 1994, 343.

4 *Rogava Z.,* Taxes, Tax System and Tax Law, Tbilisi, 2002, 67 (in Georgian).

5 *Tsiklauri I.,* The Peculiarities of Georgian Model of Resolution of Tax Disputes and the Need of its Reformation, magazine "Sarchevi", №1-2 (3-4), 2012, 78 (in Georgian).

6 *Nadaraia L., Rogava Z., Bolkvadze B.,* Comments to the Tax Code of Georgia, Vol. 2, Tbilisi, 2012, 668 (in Georgian).

7 Ibid, 669.

8 See *Rogava Z.,* Taxes, Tax System and Tax Law, Tbilisi, 2002, 269 (in Georgian).

9 Ibid, 270.

10 *Gabisonia I.,* The Mechanisms of Protection of the Tax Payer's Rights, Tbilisi, 2013, 109 (in Georgian).

try of Finance, resolving tax disputes".[11] According to TCG, tax dispute resolution in the system of the Ministry of Finance is a two-stage process and begins with the submission of clain in the Revenue Service.[12] Thus, appealing of the acts of the lowest bodies of the tax authorities – regional centers (tax inspection) and other bodies is first performed in the Revenue service, and then – in the Dispute Resolution Board under the Ministry of Finance or in the court, together with the decision of the mentioned body.

3. Administrative Proceedings, Related to the Resolution of Tax Dispute in the System of the Ministry of Finance of Georgia

3.1. Initiation of Tax Dispute

By the moment of commencement of tax dispute the situation of the parties to the dispute is very special. The tax payer and the tax authority are in unequal situation from the very beginning. Regardless of who refuses to fulfill the requirement, it is the tax payers who have to initiate the dispute. Consequently, the payer will always have to pay the fee when lodging the suit with the court.[13]

Initiation of tax dispute doesn't mean the action, directed towards protection of person's right using judicial or non-judicial mechanisms. General rulings are established by the TCG, which are related to the appealing of the decision of the tax authority. The Tax Code establishes, that the decision, made by the tax authority in regard to a person on the basis of this Code, may be appealed in dispute resolution body.[14]

TCG lists the type of decisions, eligible for appealing.[15] 30-day timeline from the date of handing in the decisions is established to appeal such decisions.[16] The 30-day period is relatively new provision and it was specified in this form following the modification, introduced in TCG On December 20, 2011. According to earlier situation, TCG provided for 20-day period to appeal such decisions.

It seems as if the specified dispute subjects of tax dispute are not really comprehensive and do not completely reflect all bases of tax dispute. Nothing is said in the given article about illicit actions of tax authority and appealing the damage, caused by them.

In regard to initiation of tax dispute, more or less loyal position of legislator shall be mentioned which allows the person, in exceptional cases, to protect the right after expiration of the established period. The law rules that initiation of dispute after expiration of the 30-day period is admissible on the basis of newly discovered or newly revealed circumstances or evidences.[17]

More or less, it is innovation that according to the existing legislation, the claim is submitted to the resolution authority electronically. The information, submitted by the plaintiff to the resolution

[11] Articles 54, 297 (I) and 297 (II), Georgian Legislative Herald, 12.10.2010 (in Georgian).
[12] Ibid, Article 297 (III).
[13] *Khmaladze V., Shavishvili I., Khatiashvili D., Migriauli D.,* Comments to the Tax Code of Georgia, Tbilisi, 2006, 220 (in Georgian).
[14] Articles 54 and 299 (I) of the TCG, Georgian Legislative Herald, 12.10.2010 (in Georgian).
[15] Ibid, Article 299.
[16] Ibid, Article 299 (IV).
[17] Articles 54 and 299 VI of the TCG, Georgian Legislative Herald, 12.10.2010 (in Georgian).

body has the same power, as that submitted in written form.[18] Such procedure will speed up and simplify the use of claim, as the method of protection of right.

3.2. Subject for Tax Dispute Resolution

3.2.1. Resolution of Tax Dispute by the Revenue Service

It is established by the legislation, that the bodies for resolution of tax disputes in the system of the Ministry of Finance of Georgia are the Revenue Service and the Dispute Resolution Board infer the Ministry of Finance (hereinafter – bodies for dispute resolution).[19]

According to TCG, tax payer can protect his/her rights, primarily, in the Revenue Service.[20] Section XIV of TCG establishes the procedure of resolution of tax dispute in the system of the Ministry of Finance.[21]

The TCG rules, that the plaintiff, at any stage of tax dispute in the system of the Ministry of Finance of Georgia, has the right to apply to the court.[22] The procedure of court proceedings related to the tax dispute is determined by administrative procedural legislation of Georgia.[23] Consequently, TCG admits the possibility for a person to protect his/her rights without using non-judicial mechanism as well. Nevertheless, according to Administrative Procedural Code of Georgia (hereinafter – APCG), it is ruled that the court, with the exception of the case, specified by the law, will not accept a suit against administrative body, if the plaintiff hasn't used the opportunity of single-time submission of administrative claim in accordance with the procedure established by General Administrative Code of Georgia (hereinafter – GACG) rule.[24] Following the above mentioned, the suit of the tax payer will be admissible in the court only if he/she has used the opportunity of single-time submission of the claim. For the person to be able to protect his/her right in the court, it is necessary, to use the opportunity of submission of the claim minimum to the Revenue Service.

According to TCG, the bodies for dispute resolution have regulations, approved by the Government of Georgia which established the procedure of claim consideration and relations with plaintiffs.[25]

The procedure of claim consideration and relations with plaintiffs by the bodies for dispute resolution is determined by the Regulations, approved by the Decree # 473 dated December 14, 2011 of the Government of Georgia. The Regulation of the bodies for dispute resolution is the guiding document of the bodies for tax dispute resolution in the system of the Ministry of Finance of Georgia, which specifies the procedure of claim consideration and relations with plaintiffs, as well as legal bases, functions and operational procedures of the bodies for dispute resolution.[26]

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[18] Ibid, Article, 299 (IX).
[19] Ibid, Article, 297 (I).
[20] Ibid, Article, 297 (III).
[21] Ibid, Article, 296 (II).
[22] Article, 296 (III) of the TCG, Georgian Legislative Herald, 12.10.2010 (in Georgian).
[23] Article 296- IV of the TCG, Georgian Legislative Herald, 12.10.2010 (in Georgian).
[24] Article 2 (V), of the TCG, Georgian Legislative Herald, 06. 08. 1999, 39 (46) (in Georgian).
[25] Articles, 54 and 297 (V) of the TCG, Georgian Legislative Herald, 12.10.2010 (in Georgian).
[26] *Nadaraia Z., Rukhadze K., Bolkvadze B.,* Comments to the Tax Code of Georgia, Vol. 2, Tbilisi, 2012, 670-671 (in Georgian).

The Revenue Service, as the body for dispute resolution, consists of its managers, deliberative body and office; the composition of the deliberative body shall be determined by the Head of the Revenue Service.[27]

Procedural and technical issued for dispute resolution are mostly regulated by the Regulations, approved by the Decree № 473 dated December 14, 2011 of the Government of Georgia. The same Regulations define the tax claim form.[28]

3.2.2. Resolution of tax Dispute by the Dispute Resolution Board under the Ministry of Finance of Georgia

The second stage of tax dispute resolution is consideration of the disputed in the Dispute Resolution Board under the Ministry of Finance. The composition of the Dispute Resolution Board is defined by the Government of Georgia[29]

The Dispute Resolution Board is the body for dispute resolution under the Ministry of Finance of Georgia.[30] It consists of 13 members. Public servant, as well as private individual can be assigned as the member of the Board. Appointment of public servant as the member of the Dispute Resolution Board is possible on the basis of nomination by the director of the relevant authority. A person, who is not a public servant, will be appointed as the member of the Board on the basis of personal application and decision of the Government of Georgia. The Dispute Resolution Board is managed by the Chairman. A member of the Dispute Resolution Board has the right to perform other paid activity, if it doesn't contradict Georgian legislation.[31]

The Dispute Resolution Board has the office, which ensures preparation of the claims, submitted to the Board, for consideration, provision of information on proceedings to the plaintiffs and formalization of decisions, made by the Board.[32]

Aggravation of the plaintiff's tax liabilities as a result of tax dispute in the system of the Ministry of Finance of Georgia is inadmissible, with the exception of the case of examination, conducted within this dispute with the payer's consent.[33]

Dispute Resolution Service is specially created in the system of the Ministry of Finance, one of the main tasks and functions of which is consideration claims and all materials, submitted in relation to these claims by the tax payer/ tax agent, preparation of the relevant information for submission to the Dispute Resolution Board under the Ministry of Finance of Georgia.[34]

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[27] Ibid, 671.

[28] See The Regulations of the Bodies for Dispute Resolution Approved by the Decree № 473 dated December 14, 2011 of the Government of Georgia, 16.12.2011 (in Georgian).

[29] Articles 54 and 297 (IV) of TCG, Georgian Legislative Herald, 12.10.2010 (in Georgian).

[30] Ibid, Article 297 (II).

[31] *Nadaraia L., Rogava Z., Rukhadze K., Bolkvadze B.,* Comments to the Tax Code of Georgia, Vol. 2, Tbilisi, 2012, 670-671 (in Georgian).

[32] Articles 54 and 297 (VI) of TCG, Georgian Legislative Herald, 12.10.2010 (in Georgian).

[33] Ibid, Article 298 (II).

[34] Decree № 341 dated December 17, 2013 of the Government of Georgia On Approval of the Regulations of the Ministry of Finance of Georgia, 19,12,2013, Article 20 (a) (in Georgian).

Many controversial opinions exist in regard to the second stage of administrative mechanism of tax dispute resolution, i.e. consideration of disputes in the Dispute Board of the Ministry of Finance of Georgia.

Statistical data in consideration of tax disputes were requested from the Ministry of Finance of Georgia on the basis of application. In response to the mentioned application, it was explained by the letter №21-03/36342 dated May 28, 2014 of the Legal Entity of Public Law (hereinafter – LEPL) – Revenue Service, that 9837 claims were submitted to the Dispute Division of the LEPL Revenue Service in 2013, out of them, 3072 were partially satisfied and 85 were completely satisfied. Consequently, the share of claims, partially satisfied by the Revenue Service makes 31.2%, and completely satisfied claims – 8.7%.

Besides, during 2013, 1875 applications were registered in Dispute Resolution Board. Out of these, the Board completed proceedings in regard to 877 claims. Out of these claims, 450 claims were either completely or partially satisfied.[35] I.e. the share of claims, satisfied by the Dispute Board makes 51.3% in 2013.

During 2014, 1940 claims were registered in the Dispute Resolution Board. The Board heard 3027 claims in 2014 (including the disputes, submitted in previous years). In 2014, the Dispute Resolution Board made decision on 2550 cases. By the decisions, the plaintiffs' requests were either completely or partially satisfied in 1062, 1052 were refused and in 436 cases the claim was left without consideration; i.e. the share of claims, satisfied by the Dispute Board in 2014 makes 42%.[36]

It becomes clear from the same letter #21-03/36342 dated May 28, 2014 of the LEPL Revenue Service, that 324 decisions of the Revenue Service and Ministry of Finance was appealed in 2013; out of those, 90 cases were completed in favor of the tax payer. Consequently, the court has resolved 27.2% of the processed disputes in favor of the tax payer.

Such statistics indicate to many circumstances. Primarily, it should mentioned that the percentage share of the dispute satisfaction by the tax dispute resolution bodies is quite high. Such practice may show inefficient work of tax administration.

The two-stage procedure of consideration of tax dispute is unique and different from the procedures, established in Georgia and foreign countries for dispute resolution in other spheres. On the one hand, such method might be considered expedient, as it facilitates self-control of tax authority and relieves courts of loading. Such self-control is necessary today. Nevertheless, raising of efficiency of operation of the tax administration itself is appropriate, so that the decisions of tax authorities are not illegal is mass and the tax authority itself doesn't have to abolish them.

3.3. The Process of Claim Consideration by the Dispute Resolution Body

3.3.1. Terms of Consideration of Claim

After the tax payers initiates dispute and the tax claim is received for processing, the authorized body directly considers it.

[35] See Statistical Report of 2016 of the Dispute Resoution Board under the Ministry of Finance of Georgia, <http://taxdisputes.gov.ge/images/file/2013%20Report.pdf> (in Georgian).

[36] See Statistical Report of 2014 of the Dispute Resoution Board under the Ministry of Finance of Georgia, <http://taxdisputes.gov.ge/images/file/statistika_2014.pdf > (in Georgian).

The dispute resolution body considers the claim within 20 days.[37] It shall be mentioned, that the above term differs from that defined in GACG as well.

According to GACG, unless otherwise specified by the law of bylaw act, issues on its basis, the authorized body is obliged to consider administrative claim and make the relevant decision within one month.[38] It's strange that legislation establishes the 20-day period for such complex type of dispute; nevertheless, the burden of shortness of time represents load for the tax authority rather than for the tax payer, so for the purposes of proper administration of tax payment and claim consideration, it is not negative to consider the dispute within 20 days. It shall also be taken into account, that such burden shall not prevent objective consideration of dispute; besides, the dispute resolution body shall not be oriented only towards formal finalization of proceedings, but on the content of the case and its comprehensive examination.

3.3.2. The Scope of Consideration of Claim

The dispute resolution body shall consider the claim within the scope of the plaintiff's request.[39]

TCG determines that the Dispute Resolution Board shall consider the claim the scope of the dispute, appealed in the Revenue Service.[40]

Similar ruling is envisaged by GACG, according to which, unless otherwise specified by the law or bylaw act, issues on its basis, the administrative body, considering administrative claim within the scope of the request, mentioned in it, and in the cases, provided by the law, may go beyond it.[41]

It is expedient, that tax authority is not limited by the requests, raised by the plaintiff and factual circumstance, but is oriented towards deep examination of the issue, the more so if it is obvious that the tax payer doesn't manage to effectively protect his/her right. In such case it is expedient for the administrative body to exceed the scope of request. Consequently, it is not expedient to increase the role of the administrative body only in exceptional cases towards comprehensive examination of the circumstances of the case.

3.4. The Decision of the Tax Dispute Resolution Body

The Dispute Resolution body makes decision in regard to the tax payer's claim and by this decision, the dispute resolution body is authorized to: a) satisfy the claim; b) partially satisfy the claim; c) not satisfy the claim; d) leave the claim without consideration; e) make interim decision and suspend consideration of the claim; f) make decision by unifying the content, specified in subparagraphs "a" – "d" of this paragraph.[42]

[37] Ibid, Article 302 (I).
[38] Article 183 (I) of the GACG, Georgian Legislative Herald, 15.07.1999 (in Georgian).
[39] Articles 54 and 302 (II) of the GACG, Georgian Legislative Herald, 12.10. 2010 (in Georgian).
[40] Article 302 (III) of the GACG, Georgian Legislative Herald, 12.10. 2010 (in Georgian).
[41] Article 193 (I) of the GACG, Georgian Legislative Herald, 15. 07. 1999 (in Georgian).
[42] Article 304 (I) of the GACG, Georgian Legislative Herald, 15.07.1999 (in Georgian).

According to the tax legislation, in proportion to the nullified part of the decision of tax authorities, the acts, which served as the basis for the disputed decision, issued by the same authority, are nullified.[43] It shall be mentioned, that often the acts, which served as the basis for the decision of tax authority, don't regulate relations themselves, but such recording can be considered logical.

As resolution of tax dispute is performed in two stages, the decisions of each dispute resolution body have specific terms of coming into force and appellation. The decision of the dispute resolution body shall come into force on the 21st day of handing in, in the case if it is not appealed.[44]

The decision of dispute resolution body is also subject to appellation. The TCG specifies, that if the decision, made by the revenue service, is not favorable for the plaintiff, the plaintiff shall have the right to appeal it in the Dispute Resolution Board or court within 20 days from its handing in.[45] The same 20-day term is established for appellation of the decision of the Dispute Resolution Board in the court.[46] Besides, discontinuation of the tax dispute by the plaintiff during the specified period shall be regarded as recognition of the disputed tax indebtedness.[47] It is important to mention, that following from particular complexity and specificity of tax disputes, the 20-day period of appellation might not prove to be sufficient for the tax payer. As it is known to us, in general, one month period is established for appellation of the decision of administrative body in the court.[48]

It shall also be mentioned, that even the existing situation is better for the tax payer, as the possibility of appellation of the decision of the dispute resolution body within 20 days was established only by the Law of Georgia "On Introduction of Modifications in the Tax Code of Georgia", which was adopted on December 20, 2011. According to the Article 305 of the edition of the TCG, valid till that date, only 10-day period was determined for appellation of the decision of the Revenue Service in the court or in the Ministry of Finance of Georgia. The mentioned period was extended. Nevertheless, it is expedient to give the tax payer longer period for appellation of the decision of the dispute resolution body even in the court.

4. Foreign Practice of Tax Dispute Resolution

4.1. German Model of Tax Dispute Resolution

Georgian legislation, as well as the legislation of foreign countries envisages judicial, as well as non-judicial methods of resolution of tax disputes. In the practice of foreign countries the procedure of resolution of tax dispute in special court is considered the most reliable.

As it was already mentioned, the peculiarities of resolution of tax dispute are significantly related to the system of tax authorities of a specific country.

In Germany, the system of tax authorities is defined by the "Fiscal Code of Germany". According to the mentioned act, tax authorities imply Federal Administrative Tax Authorities and tax bod-

[43] Article 304 (III) of the GACG, Georgian Legislative Herald, 15.07.1999 (in Georgian).
[44] Article 306 (I) of the GACG, Georgian Legislative Herald, 15.07.1999 (in Georgian).
[45] Article 305 (I) of the GACG, Georgian Legislative Herald, 15.07.1999 (in Georgian).
[46] Article 305 (II) of the GACG, Georgian Legislative Herald, 15.07.1999 (in Georgian).
[47] Article 305 (V)of the GACG, Georgian Legislative Herald, 15.07.1999 (in Georgian).
[48] Article 22 of the GACG, Georgian Legislative Herald, 06.08.1999 39 (46) (in Georgian).

ies of lands.[49] Local tax bodies also operate in Germany.[50] In regard to the measures, implemented by these very bodies, the tax payer's relevant interest of protection of rights may arise.

German tax system is self-administrative. With exception of indirect taxes, most of taxes are administrable through special written "notification of assessment", which shall be submitted to the tax payer by the tax body.

After receipt of this document, the tax payer can draw up an administrative claim. The payer, primarily, protects his/her right based on administrative procedures and if the tax authority doesn't satisfy the claim, the tax payer will have to protect the right through the court. Administrative claim allows the tax authority to revise its own decision in factual and legal aspect.

Tax payer, usually, has a one-month period for drawing up administrative claim on the basis of the measure of the tax authority. Such claim is free of charge.

The process of consideration of tax dispute is quite long and may last several months, taking into account the factual and legal content.

Only appealing the act doesn't mean, that the appealed act is suspended; for this purpose the tax payer shall apply to the tax authority specially. If the authority doesn't satisfy this request, the tax payer has the possibility to appeal such rejection in the court as well.

In the case of expiration of the period of appeal of tax measures for reasonable excuse its restoration is admissible, if the author of appeal justifies it; e.g. in the case is he/she has some reasonable impediment.[51]

Tax dispute prevention measures are quite encouraged in Germany. The profession of tax consultant has long tradition in Germany. Tax consulting is regulated by the Law "On Tax Consulting". By the end of 2007 over 73000 natural persons and 7500 legal entities were accredited as tax consultants in Germany. They are distinguished for their professionalism, obeying stringent ethical principles and rules in the course of implementation of their activities. The tax consultant offers to tax payer the service on the basis of contract and helps him/her.[52]

According to German tax system, alternative methods, like factual agreement, are encouraged. Discussion of this issue became particularly active since 1984 and German Court explained, that it would be expedient to give obligatory nature to such agreement; even conclude between the tax auditor and tax payer. For this very reason the method of meetings and negotiations between the parties is encouraged to increase the frequency of achieving factual agreements.[53] The existence of such arrangement shall be assessed positively, nevertheless, its transfer in the form of exact template and

[49] Fiscal Code of Germany, promulgated on 1 October 2002, Section 6, (2)

[50] Ibid, Section 6, 5.

[51] See KPMG Deutsche Treuhand-Gesellschaft AG., Tax Procedure: Tax Litigation and Dispute Resolution in Germany, <http://www.mondaq.com/x/7706/Arbitration+Dispute+Resolution/174+Tax+Procedure+Tax+Litigation+and+Dispute+Resolution+in+Germany>, [29.07.1999].

[52] *Gabisonia I.,* Tax Code, The Mechanisms of Protection of the Tax Payer's Rights, Tbilisi, 2013, 112 (in Georgian).

[53] See KPMG Deutsche Treuhand-Gesellschaft AG., Tax Procedure: Tax Litigation and Dispute Resolution in Germany, <http://www.mondaq.com/x/7706/Arbitration+Dispute+Resolution/174+Tax+Procedure+Tax+Litigation+and+Dispute+Resolution+in+Germany>, [29.07.1999].

granting of similar power to tax auditors may not be expedient for Georgian reality in order to avoid formation of biased practice in the form of illegal arrangement between a tax payer and tax auditor.

According to German model, the institution of preliminary decision is also offered, which is implemented directly upon completion of tax audit. Federal Tax Court ruled that such decision may be present, when fixing of specific events is required, which occurred for expression of discretion, granted to the authority, or a tax payer has the interest to obtain preliminary decision.[54]

4.2. The US Model of Tax Dispute Resolution

In the issue of resolution of tax disputes, American scientists give priority to pre-trail mechanisms and it is considered, that the initial phase play decisive role in proper management of tax dispute. Tax payer can select some body, through which is will obtain the relevant legal decision; nevertheless, the US legislation creates certain preliminary stages and in some cases these administrative measures are obligatory.[55] Besides, the trend of resolution of dispute not through court proceedings, but in the system of tax system itself is more frequently noted. Tax services openly encourage mediation and voluntary liaison arbiter and alternative ways of dispute resolution. Tax court rules also encourage alternative methods of consideration of tax dispute.[56] As for alternative methods of dispute resolution, presently the mechanism of tax arbitration is actively used in the United States. American scientists particularly support the encouragement of existence of tax arbitration for various states.[57]

In the US, tax authorities issue formal basis for appellation – "tax request", which is subject to appellation during 90 days from its handing in.[58]

In the US judges restrain from making decision before the tax payer uses all administrative methods of protection in his/her disposal. As a result of the above mentioned method, when considering the tax dispute, the parties often arrive to agreement before starting the hearing. Due to such policy, the judge of the US Tax Court considers 10% of suits. As for the persons, who submit claim to the Tax Court without sufficient justification and intentionally procrastinate the process, may be subject to imposition of penalty.[59]

More and more priority in given in the US to the alternative methods of dispute resolution and its elimination in the very first stage. In tax science, great audit importance is given to audit in prevention of tax dispute and achieving consensus in regard to it. It is quite actual measure, the more so that 45% of the interviewed tax payers in the US specified, that they have undergone audit.[60]

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[54] See KPMG Deutsche Treuhand-Gesellschaft AG., Tax Procedure: Tax Litigation and Dispute Resolution in Germany, <http://www.mondaq.com/x/7706/Arbitration+Dispute+Resolution/174+Tax+Procedure+Tax+Litigation+and+Dispute+Resolution+in+Germany>, [29.07.1999].

[55] *Treusch E.P.*, What to Consider in Choosing a Forum to Resolve an Ordinary Tax Dispute, Journal Tax Lawyer, Vol. 55, №1, 2001-2002, 83.

[56] Ibid, 84.

[57] Ibid, 6.

[58] Ibid, 86.

[59] *Gabisonia I.,* Tax Code, The Mechanisms of Protection of the Tax Payer's Rights, Tbilisi, 2013, 114 (in Georgian).

[60] *Smith W.K., Stalans J.L.,* Negotiating Strategies for Tax Disputes: Preferences of Taxpayers and Auditors, Law & Social Inquiry Journal, Vol. 19, №2, Spring, 1994, 355.

In the scientists' opinion, disputes between public authorities and citizens on tax issues differ in several aspects. Dispute arises, when the relevant official considers, that the citizen didn't obey the law. Besides, the relevant official has formal power to complete dispute within the scope, where enforcement of the decision is possible.[61] Several stages of development of tax dispute are distinguished in modern tax science.

The first stage of potential tax despite is identification of mistake or incorrect declaration by auditor. If auditor discovers similar issue, he/she must decide whether he/she begins it with the tax payer.

After expression of his/her own position by the auditor through claim/ suit and formulation of specific way of problem resolution, the citizen can agree to this position or follow the way, offered by the auditor, till resolution of the issue, so that the case doesn't grow into tax dispute.

If the tax payer doesn't agree to the auditor's position, partially or completely, the case will transform into dispute, which, in its turn, include negotiations and counter-claim from tax payer.[62]

So, on the stage before initiation of dispute, special importance is given to the negotiation of the auditor and the tax payer. From auditor's side, main accent is made on the consensus, conforming to the law. They will not like compromise and capitulation methods, unlike tax payers. Difference of formal power can be seen in the issues of giving the priority to negotiations. Auditors, more often, have rigid positions, whereas tax payers are more willing to cooperate, especially those who are oriented towards saving time.[63] Consequently, such method of avoiding tax dispute, when auditors are equipped with certain powers, is important and interesting; nevertheless, it is important to analyze the risks, which follow from granting these powers.

In the US, tax payers where interviewed on how much they could influence auditor's decision, from 1 to 5 scores, where 1 score meant complete impossibility of making influence. 11% responded that they didn't know the answer, and those who knew, specified mainly 3.0.[64] Consequently, it is important that the auditor's and the tax payer's consensus doesn't obtain negative form and doesn't transform into biased practice.

5. Conclusion

It shall be concluded that consideration of tax disputes is characterized by specificity and complexity. The above stated is proven by the analysis of legislative norms and the relevant literature. For this very reason, legislation envisages complex – two-stage system of non-judiciary mechanism of tax dispute resolution.

The two-stage tax system, and, moreover, the two-stage mechanism of dispute resolution in the system of the Ministry of Finance is not very efficient presently. Against this background court represent more efficient way of protection of right. More attention shall be paid to the raising of effi-

[61] *Smith W.K., Stalans J.L.,* Negotiating Strategies for Tax Disputes: Preferences of Taxpayers and Auditors, Law & Social Inquiry Journal, Vol. 19, №2, Spring, 1994, 337.
[62] Ibid, 342.
[63] Ibid, 365.
[64] Ibid, 355.

ciency of activities of tax authorities and increasing of the number of lawful decisions, made by them; and the existence of the complex, two-stage system of tax dispute resolution is not an efficient method for achieving this goal.

The 20-day period, established for appellation of the measures of tax authorities by administrative procedure can be deemed quite shot, as this time might not be sufficient for the addressee of these measures to prepare perfectly for commencement of dispute. Against this background, the fact that much longer, 30-day period was given to the tax payer to appeal against specific measures of tax authority, shall be assessed as positively.

Besides, the legislation establishes 20-day period for resolution of such complex dispute by the tax authority; nevertheless, the shortness of the period burdens the tax authority and not the tax payer and although it is short as compares with the period, established by the legislation of other countries, it doesn't limit the tax payer to comprehensively protect his/her right. Nevertheless, it is important that the main principle is not just prompt resolution but complete and objective consideration, making fair and lawful decision. With consideration of this provision, it would be proper to revise the period of dispute resolution.

The period of appealing against the decision of the tax authority, resolving the dispute, was increased from ten to twenty days. Regardless the already existing change, it is expedient to give the tax payer even longer period for appealing the decision of the tax authority, resolving the dispute, in the court.

It is expedient that the tax authority is not limited by the demands, raised by the tax payer and factual circumstances, but is oriented towards in-depth study of the issue. Besides, the tax authority, resolving the dispute, shall be oriented towards maximum involvement of the interested party on the process of dispute resolution.

It is also important to consider foreign practice of tax dispute resolution and extend the periods, established for appealing against the measures of the tax authorities for protection of his/her rights. Besides, it is necessary to strengthen the role of various institutions and measures like tax consultant, tax auditor, factual agreement, preliminary decision and tax arbitrages. Various special procedures of tax dispute resolution, existing in foreign countries represent quite efficient and reasonable mechanism.

It is expedient to strengthen the role of non-judiciary mechanism of tax dispute resolution and to refine the procedure, which would lead to faster and more efficient restoration of the violated right.

Marina Garishvili[*]

Response to the Monograph by Prof. I. A. Isaev "Law Mythologemes: Jusice and Literature"

In 2015, one more monograph work by famous Russian lawyer, law historian, Professor Igor Isaev: "Law Mythologemes. Justice and Literature" was published. The mentioned publication is the result of many-year researches of the respected scientist in the sphere of law philosophy, history, political sciences and legal culture spheres.

In the history of law numerous attempts of dealing with the normativism press could be found. The myth of the justice is not only higher level of the reality but also the esthetic expression of the dream about justice.

Monograph is based on the vast source materials reflecting emergence and evolution of the law and justice, level of the law awareness and legal culture level, judicial procedure, views about various law violations and punishment measures, the law authorities and persons are studied, as well as characteristics of the statehood formation, in a form of the ancient, medieval and modern myths, stories, legends, from the Hellenic epoch up to the mythical events and the 20th century. In particular, the author, in his judgments, rely upon the tragedies by Sophocles, Euripides, Eschilles, historical-philosophical and ethical works by Plato, Aristotle, Machiaveli, literary works by Goethe, Dante, F. Kafka, E. Junger, K, Schmidt, K. Jasper, study o the views of Marquise de Sad. Such variety of the old and relatively new myths, depicting the most complicated process of transformation of the ancient ethical and divine requirements into the law allows tracing of their evolution, especially regarding that the law mythologems are countless and unlimited. Scientific value of the mentioned monograph is determined by the goal of the study: clarify the role and significance of myths in creation of the laws and, in the wide sense, the outcomes of their effect on the culture, politics and linguistics; trace the process of creation of the myths and law in the depths of the people's soul and demonstrate close relations between them, as well as mythic explanation of the specific typology of legal reality and law awareness. The author further strengthens the stated objective by the examples based on numerous myths, legends, literary and philosophical works of the world civilization. In scientific study of the most complex processes of the social-legal phenomena, the technique of using of the literary work turns the wide audience of the readers into the co-participants of these phenomena, as for him, the myth heroes and their unusual adventures known to him from the childhood are identified with the moral and legal rules that shall be complied with and fulfilled by each member of both, ancient and modern societies.

Structure of the monograph study completely corresponds to the process of law creation, legal understanding and law culture evolution process from the ancient time, as well as early and late medieval civilizations and people of the new era, especially regarding that most of them have contributed greatly to formation and further improvement of the mentioned social events.

[*] Associate Professor, Doctor of Law, TSU Faculty of Law.

Monograph consists of seven chapters and each of the chapters covers quite large historical and cultural layer of world civilization. It tells about: human self-awareness, in the period of domination of the ancient mysteries and tragedies; makes us think about the impact of the natural phenomena; or what are the results of actions of the heroes of the ancient times – the gods in the process of ruling of the ancient Hellenic cities or their protection; trace formation of the citizens' democratic rights and obligations in the Hellenic polices, as well as establishing of the principles of law compliance, fair trial and sentence, and offensive action; explains substance of the word and sign in the medieval law, process of "death of gods" and "coming of the super-human"; brings us to Camelot and turns us into the King Arthur's Round Table members, especially regarding that in the history of ancient England there is no epoch more beautiful than that of rule of King Arthur and his brave knights, where, as the counter force of the cruel power and betrayal widespread in the medieval epoch, noble nature and dedication to the king and native country; brings us to Sangraal palace; shows us the way heading there, whose cult was formed in Britain, in the medieval period and is the bowl from where Jesus Christ took food and drink at a time of secret feast; as in the Gospel there is directly mentioned a cup that was of particular significance for Christ and after Christ was crucified and killed with the spear, his blood was collected in that cup. Later, Joseph of Arimath, a "good and kind man" (known for he has removed Christ's body from the cross, wrapped into his own cloth and placed him into the coffin and prepared the funeral ritual) and received this cup from Pontus Pilate and sent it to Britain, where Sangraal became the first Christian talisman. A cup, buried or lost somewhere near Glostenberry – the first center of Christianity in Britain, became an object of many-century search. Knights o King Arthur, who have found the cup – by that period the cup was regarded as not only the holly symbol of Christians but also some kind of magic cup providing to its owner immortality and divine wisdom. Though, soon the cup was lost again in the situation as mysterious as the one of its finding by King Arthur and his knights and since then people seek it vainly. It helps us to understand the experience of the "other world" based on Dante's "Divine Comedy", the world quite clear and at the same time, complicated and harmonically built one, where in some way there are connected antique cosmogony, elements of "Eneide" universum, Plato's philosophy and medieval theology where Dante's system of world creation is based on strict logic and is harmonized. Three-part structure of Dante's world, with each of three parts further divided into nine sections – magic of all these sacral numbers, even in the world of Dante's period, drowned in the dark depths of the centuries and reminded us Plato's divine number (Plato's god, unlike the Hebrew and Christian gods, has created the world not from nothing but rather transformed it from some initial material. He have mind to the soul and soul to the flesh and created the world as a universal live creature with the soul and mind. There is only one world and not set of the worlds, as stated by the Pre-Socratic, no more than one world can exist, as it is the created copy intended to correspond to the eternal original perceived and created by God as precisely as possible. World, as a whole, is a single visible animal containing the other animals. It is the sphere as it is similar to non-similar that is thousand times more beautiful and it is only a sphere – similar everywhere. It revolves as the circular movement is most perfect of all; and because it is the only movement thereof, it does not need any hands or legs. Four elements – fire, air, water and earth - each of them, presented, supposedly, in a form of number, is always pro-

portional, i.e. fire correlates with air as the air does with water and water – with the earth. God used all these elements to create the world and therefore, the world is perfect and it will never become old or sick. World's harmonization was provided by the proportion and harmony creates the striving for friendship and therefore, only god can divide the world into parts. Lord has initially created the soul an afterwards – the flesh. The soul consists of indivisible – unchangeable and divisible – changeable. This is the third and intermediate type), Christian esoterism and ancient pre-Christian mystic doctrine of divine numbers and – of their proportion in the world; returns us to the cave etc.

It should be especially noted that the chapters of the work – its logically built parts, at one glance, contain seemingly non-systematized and unrelated passages taken from various myths and legends but after careful examination of the text, it becomes clear that separate mythical characters and the actions unifying them – in the process of evolution of the justice and law, provide the chain of unified and mutually conditioning events and without them it could not be even imagined how the mankind could create the desired sample of law and order, compliance with the law and, as a result – the society arranged in the statehood, regarding that at the first stage of world civilization the mankind had quite scarce set of social knowledge and skills of administration of even primitive proto-civilization.

Each chapter is divided into the thematic rubrics – paragraphs, dealing with the specific subjects of the doctrine and applies, for this, the methods of historical-comparative and comparative-legal analysis, as well as chronological and portray techniques. Monograph by professor I.A. Isaev "Law Mythologems: Justice and Literature" is intended for the specialists interested in the history, law, political sciences, philosophy and the wide audience of the readers interested in the law and legal culture.

Responsible translators:

Irma Khvedelidze

Tamar Kvlividze

Tsiala Gabashvili

Alexander Vaselevi

Ana Adamia

Tamuna Beradze

Mariam Kandelaki

Diana Alugishvili

Cover Designer Mariam Ebralidze
Layout Designer Lali Kurdghelashvili

14, Ilia Tchavtchavadze Ave., Tbilisi 0179
Tel: 995(32)2251432
www.press.tsu.edu.ge