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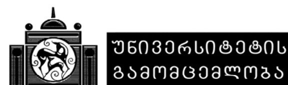

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Michael Bichia[*]

Scope of Civil Legal Concept of Dignity

(Analysis of Theory and Judicial Practice)

1. Introduction

Human dignity is the area for discussion for various sciences, out of which the research of its legal, namely, civil legal basis is noteworthy. This issue has not been properly studied in Georgian, as well as foreign legal literature, therefore there is no unified position regarding human dignity concept. However, based on the various theories on concept of dignity, it is possible to distinguish main characteristics, distinguishing dignity.

The purpose of research is to determine the scope of human dignity concept, essential features of dignity, relation between the dignity and other personal rights. For consideration of these aspects, it is necessary to first of all, examine the essence of dignity, and then – setting of human dignity against honour. In addition, the purpose of this research is separation of constitutional legal and civil legal concepts of dignity. For examination of the mentioned problem it is required to establish constitutional legal concept and reveal its role in the area of dignity protection in general, and then – to clarify the scope of civil legal concept. The aspects of civil legal protection of dignity are even more relevant, as the scope of private legal concept of dignity is less represented in the research. These details are also important as in the end it relates to application of legal basis of claim and means of particular protection in case of abusing dignity, in addition, selection of most optimal mechanism of human protection in accordance with the functions of rights' protection. Therefore, definition of scope of private legal concept of dignity has theoretical, as well as practical relevance.

For examination of the mentioned problem, the historical, sociological, comparative legal, normative – dogmatic and logical methods are used. Consequently, the present work attempts to determine the scope of private legal concept of dignity and to outline the specifics of civil legal protection of dignity, based on critical analysis of various theories.

2. Ontological Nature of Dignity

2.1. The Term "Dignity" and its Etymology

The concept "dignity" has originated from adjective "valuable", which has its roots in group of Indo-European languages; in addition, the "dignity" relates to words "worthiness" or "value" in some languages (for example, Danish or Swedish languages). However, it is inadmissible to consider the

[*] Doctor of Law, Invited Lecturer at TSU Faculty of Law.

dignity and value as synonyms. The dignity is the specific type of value; the value is generic term, which refers to various manifestations of value.[1]

The term "dignity" originated from Latin word *decus* and pride, uniqueness, respect, excellence are implied in it. *Decet*, that is what fits to you, is form of verbal expression, without any personality. In general, the dignity means readiness to respect the individuality. This means that the matter is incomparability of its status (condition) and ability or value, also, respecting status of person, which is the basis for human rights and is perceived as something granted from God.[2]

Accordingly, two types of dignity are differentiated in the form of "human dignity" and "personal dignity". The sense of human dignity is based on the human nature and it is equally granted to all human beings, regardless of any sign.[3]The term "human dignity" is used for evaluation of meaning of human and value.[4]In addition, the principle of conception of human rights is natural and integral feature of right manifested in the concept of human dignity. As for the personal dignity, it is achieved through noble deed, kind actions, but it may be abused by mean behaviour.[5] In addition, there was a time, when the preferences, excellence, prevalence in the clan or among the facts that serve the same function or destination were considered as dignity. Therefore, the human dignity relates to an essential sign, by which one human differs from other human; in addition, it is perceived as the preference, in accordance with the particular scope and criteria of value and progress. The compliance with the conscience is also considered in dignity, the objective criterion of evaluation of which is fairness. The conscience and dignity represent the phenomenon of self- evaluation. Moreover, the conscience of a human may be deteriorated (restricted) by this human himself through flagrant violation of duties. The dignity is viewed in the same way. Any attempt of encroachment of a person is disappearing from the moment, when a person starts straggle for self-defense purposes.[6] In addition, personal dignity is mainly encountered in ethical rules. For example, one of the bases of client's trust to the lawyer in Article 3 of Code of Professional Ethics of the Georgian Bar Association is the personal dignity of the lawyer.

Accordingly, the particular person may have many personal dignities, however, the human dignity is only one; the human dignity, regardless the personal dignity, is characterized with generality. The human dignity is of generic nature and is necessarily connected with human worthiness. The person's dignity, aimed at idealism, is that the human dignity is revealed not only in human's freedom, but also in free worthiness of a physical person – protection and facilitation of

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1 *Tiedemann P.*, Menschenwürde als Rechtsbegriff, Eine philosophische Klärung, 2. Auflage, Berlin, Berliner Wissenschafts-Verlag GmbH, 2010, 217, 221.

2 *Lebech M.*, What is Human Dignity? Maynooth Philosophical Papers, Maynooth, 2004, 55-56.

3 *Beberashvili Z., Beselia N., Makhashvili N. and etc.* Path to the Rights: Teacher's book (Editor *Mikashavidze M.,*), Tb., 2002, 60 (In Georgian).

4 *Lebech M.*, What is Human Dignity? Maynooth Philosophical Papers, Maynooth, 2004, 55-56.

5 *Sakvarelidze Ph.,* Dignity: Main Concepts Concerning the Human Rights and Freedom (Dignity, Freedom, Equality): Part I, Periodic Edition of Public Defender of Georgia "Solidarity", №2 (29), 2009, 56-57 (In Georgian).

6 *Bandzeladze G.,* Concept of Human Dignity in Marxist Leninism Ethics, Tb., 1975, 10, 49, 103 (In Georgian).

norms and idealism established in the society.[7] The human's dignity is one of the forms of revealing the dignity. Indeed, both forms of dignity given above are undoubtedly interesting, but proceeding from the purpose of this work the human dignity will be emphasized.

2.2. Real Nature of Dignity

2.2.1. Polyscentric Concept of Dignity

Historically, the idea of human dignity has developed as the phenomenon existing outside the concept of social honour.[8] In addition, the dignity is understood from various viewpoints. In accordance with one of the concepts, the dignity is closely related with the essence of policy-state. In ancient Greece only men were governing the policy-state; the issue of man's dignity was also discussed. The women and slaves did not enjoy the right to govern; approximately the same approach was shared in Rome. Thus, the dignity was considered based on the sexual principle.[9] In line with given approach, the dignity is associated with concept of citizenship, which is based on the utopian vision of the world, where all human beings could be happy.[10] As the citizenship considers the person's political legal relation to the state, which is reflected in unity of reciprocal rights and duties and is based upon the respect of human's dignity, acknowledgement of human's rights and independence,[11]the dignity itself relates to the state fundamentals as well. In this regard, the happiness of each human being (citizen) depends on how much they observe the external events proceeding from the state vision. Therefore, the given concept was named as polycentric theory. In general, the dignity was either innate or the person could acquire it by King's Decree, and it belonged to the privilege of aristocracy.[12]

The polycentric theory is constrained by social reality existing in the country. The mentioned reveals two argumentations developed in this concept, through the contradiction between (1792) – a Vindication of the Rights of Men (1790) and a Vindication of the Rights of Women. The basis for men's rights is protection of the rights declared by French Revolution, but the rights of women were based on the postulate that, by that time, the women were deprived of their rights and needed acknowledgement of their rights. The point is that, in the end, both argumentations are manifestations of human rights' protection. In addition, for improvement of conditions of various members of society, it was important to get the education, which would help people to be aware of own "conscious dignity", following that they would not have the desire for slavery. However, this process is linked with the social changes, which may not happen rapidly. In this regard, the term "human dignity" is

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7 *Mkheidze S., Kubusidze V.,* Concept of Dignity in Ethics (Review), Newspaper "Tbilisi", №256 (6858), October 31, 1975, 3 (In Georgian).

8 *Hughes A.*, Democracy in Crisis, Equality and Human Dignity in South Africa and Ireland, 2011, 16, <http://ciisn.files.wordpress.com/2011/01/democracy-equality-dignity-sa-irl-ah-1-4-2011.pdf> [14.08.2013].

9 *Hughes A.*, Democracy in Crisis, Equality and Human Dignity in South Africa and Ireland, 2011, 16.

10 *Lebech M.*, What is Human Dignity? Maynooth Philosophical Papers, Maynooth, 2004, 56.

11 *Rukhadze Z.,* Constitutional Law of Georgia, Batumi, 1999, 125 (In Georgian).

12 *Lebech M.*, What is Human Dignity? Maynooth Philosophical Papers, Maynooth, 2004, 56.

considered as the linguistic tool, by which a person acquires the self-esteem and has the political influence. This was the basis for democracy and human rights. In addition, similar to *Kant*, the dignity of human was reviewed in relation to mind; indeed, owing to the mind, all (man and woman) have the dignity,[13] notwithstanding their virtue, actual social and political status or any other sign.[14]Thus, with the help of sexual sign and public basics of citizenship, the dignity, actually, is the real phenomenon;[15] however, its link with the rights and duties distinguishes the signs of ideal area in dignity. In spite of this, based on polycentric approach, the close link of dignity is not yet properly presented in the area of essence and the dignity is explained only narrowly, based on the aspects discussed above. Accordingly, thorough explanation of concept of dignity is impossible based only on the phenomenon given above under polycentric theory.

2.3. Ideal Nature of Dignity

2.3.1. Cosmocentric Concept of Dignity

The ideal nature of dignity is observed by Cosmocentric theory of antique age, according to which the human's nature is explained based on the natural origins. In the Cosmocentric approach the application of theory on value is essential (axiology). Here, the value is considered in terms of human nature and human's evaluation from the side of society. However, in line with this theory, the persons are equated, but, as it is known, they are not equal and differ from each other even in value *(axia)* sign. Based on the given notion, the idea of *dignitas humana* is placed in the forefront; its main essence is that condition of humans is exceptional due to their higher mind and they stand above the beasts exactly due to this sign. In *Cicero's* view, the dignity is considered as the respect of personal merits. However, he determined the idea of justice and mentioned that justice is the habit of mind, which gives the preference to everybody, according to the merit. Owing to the mind, the human's dignity gives the privilege to humans to be above the nature of beasts and rule the world, distribute actual powers together with Gods. In addition, prosperity must be shared, as space and universe. Although, inequality existing in the universe distinguishes merits of some human at a higher level, compared with other persons. In addition, in accordance with the Cosmo-centric theory, the dignity in antique Rome applies to prerogative of public entities, i.e. dignity bearing specific status under management.[16]

Accordingly, consideration of dignity in cosmic space is related to the semantic model, existing in consciousness area.[17] An individual model of action is expressed in individual ability (right) of

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13 *Lebech M.*, What is Human Dignity? Maynooth Philosophical Papers, Maynooth, 2004, 56, 61.

14 *Hughes A.*, Democracy in Crisis, Equality and Human Dignity in South Africa and Ireland, 2011, 16.

15 About Signs of Real Essence, see *Avaliani S.,* Theoretical Philosophy, Tb., 2007, 35-38 (In Georgian).

16 *Lebech M.*, What is Human Dignity? Maynooth Philosophical Papers, Maynooth, 2004, 56-57; *Dangl O.*, Der Begriff der Menschenwürde, in der Publikationsreihe des Kompetenzzentrums für Menschenrechtspädagogik an der Kirchlichen Pädagogischen Hochschule Wien/ Krems, 09/2012, 2.

17 The Problem of Ideality is not realized only in Form of Brain and ideal's Relationship. It is prohibited to Identify Ideal and Psychical. About the Mentioned, see *Jugheli O.*, Gnosiological Aspects of Ideal, Tb., 1988, 9, 15 (In Georgian).

action or in necessity (duty);[18] second, ideal sphere is belonging to the future, something that does not exist now, but is desired, so it has not yet been realized. The ideal is that has to be, but does not exist in reality. The ideal is infinity; third -right and duty is ideal, because the ideal is infinity, because it has to always be. The ideal will be transferred to the area of essence through realization; fourth, ideal essence is general and abstract.[19] Therefore, the deontic nature is distinguished in this theory and the dignity is considered in the axiological context, which is significant, because contextual meaning (superiority) of the dignity is clearly outlined. However, the areas involving the dignity relate to other real or ideal aspects, which are not encountered in this theory.

2.3.2. Christocentric Concept of Dignity

In the Middle Ages *Thomas Aquinas* has formulated Christocentric framework, which explains human dignity in relation to Jesus Christ.[20] In Christianity, the human being was considered as image of Christ due to his special role[21] and existence of personal fundamentals in the human being.[22] In this theory the human rights are considered based on the Christian values, and the human being, as the crown of divine creation, takes special place; the human being is image of the God; it has immortal soul and free will. By commitment of sin the person, first of all, is abusing own Christian dignity.[23]In this regard, *Thomas Aquinas* considered an individual as "a subject distinguished by dignity". The dignity determines the essence of subject by sign of individualism. The dignity is the key element for transferring of individual into a personality. The human dignity is understood in Christocentric concept as ideal phenomenon.[24]

The positive side of Christocentric theory is that the utmost importance of dignity is distinguished in the theory; it is obvious that religious attitude is reflected in the concept of dignity in some way, that have to be taken into consideration; however, consideration of dignity only in the religious context is of monist nature. In the meantime, the dignity is too much idealized in the theory. The main

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18 *Tkachenko U.*, Methodological Issues of Theory of Legal Relationships, Msk., “Legal literature”, 1980, 107 (In Russian).

19 About Ideal Essence of these Signs, see *Avaliani S.*, Theoretical Philosophy, Tb., 2007, 218-219, 341, 342, 47 (In Georgian).

20 *Lebech M.*, What is Human Dignity? Maynooth Philosophical Papers, Maynooth, 2004, 56.

21 *Dangl O.*, Der Begriff der Menschenwürde, in der Publikationsreihe des Kompetenzzentrums für Menschenrechtspädagogik an der Kirchlichen Pädagogischen Hochschule Wien/ Krems, 09/2012, 2.

22 *Lossky V. N.*, Feature of Mystic Theology of Vostochnoy Church, Dogmatic Theology, M., 1991, 91 (In Russian).

23 *Berbichashvili G.*, Human Rights – Target or Opportunity, Scientific Seminar on "Christian Tolerance and Human Rights", Tb., 2013, 4, 13 (In Georgian); in detail see *Tiedemann P.*, Menschenwürde als Rechtsbegriff, Eine philosophische Klärung, 2. Auflage, Berlin, Berliner Wissenschafts-Verlag GmbH, 2010, 115-122.

24 *Lebech M.*, What is Human Dignity? Maynooth Philosophical Papers, Maynooth, 2004, 58-59; *Tsikadze I.*, Constitutional legal Guarantees for Protection of Human Dignity, "Almanac", Criminal Law Series (III), №18, 2003, 1; *Berdiaev N. A.,* About the Dignity of Christianity and Lack of Dignity is Christians, Paris, 1931, 1, 7 (In Russian). <http://odinblago.ru/filosofiya/berdyaev/berdyaev_n_o_dostoinstve_/> [13.09. 2014]; Translated by *Imerlishvili Z.,* "Emaos", №2(5), 2005, 1, 7; About Several Signs of ideal Essence, see *Avaliani S.*, Theoretical Philosophy, Tb., 2007, 218-219, 341-342, 47 (In Georgian).

essence of human nature cannot be expressed only by showing of deontic nature. This, finally, hampers determination of ontological nature of dignity.

2.4. Specific Character of Dignity

2.4.1. Logocentric Concept of Dignity

a) Human Ability

In accordance with the logocentric model of modernity, *Immanuel Kant* and *Pico Della* explained the dignity based on the ability of human being. The human beings are autonomous creatures, and their nature is worthy. The dignity is associated with respect of subject (categorical imperative of *Kant*). The human has ability to recognize the idea of universality of maxims of own actions.[25] In this theory, generalized understanding of Italian renaissance (*Pico della Mirandola*) in modernity and the dignity under the philosophic research, is shared, by which the human has dignity, because he is able to think and act based on own independent decision made under the condition of moral independence (Conception of freedom).[26]

What is the basis for possession of dignity? In *Kant's* opinion, the dignity belongs to a person, because he has ability to be oriented on observing of moral rules. There is no dignity based on humans' ability, because the ability is human's natural feature. Therefore, it is unclear, which one has the normative nature. Accordingly, there is no normative basis for the possession of human dignity, because it is not formed as normative. If the basis for possession of dignity exists, this does not belong to primary claim of normatively enhanced dignity. The dignity is basis for other rights, even without any (legal) basis. Here, the human is considered as creature with dignity, not for the reason that he has the ability of self-estimation or for having other ability, but only proceeding from the fact that he has dignity. Therefore, there is no normative basis.[27]

It is true that, the human being, who is equipped with the rights and duties (legal phenomenon), is distinguished in given theory, but it has to be taken into account that human is made of two different (real and ideal) origins. Its biological structure and psychical processes belong to the area of actual essence.[28]Exactly this aspect is distinguished by explanation of dignity, through the help of ability.

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[25] *Lebech M.*, What is Human Dignity? Maynooth Philosophical Papers, Maynooth, 2004, 56, 60-63.

[26] *Dangl O.*, Der Begriff der Menschenwürde, in der Publikationsreihe des Kompetenzzentrums für Menschenrechtspädagogik an der Kirchlichen Pädagogischen Hochschule Wien/ Krems, 09/2012, 2-3.

[27] *Schaber P.*, Menschenwürde und Selbstverfügung, Zurich, In: Jahrbuch für Recht und Ethik, Annual Review of Law and Ethics, Themenschwerpunkt: Recht und Ethik im Werk von Jean-Jacques Rousseau (Herausgegeben von *Byrd Sh. B., Hruschka J., Joerden J. C.*), Berlin, 2012, 10, 12.

[28] About actual Essence of this Sign, see *Avaliani S.*, Theoretical Philosophy, Tb., 2007, 37; Existence of alive Human in Universe Considers Existence of Legal Subject itself. See *Jugheli T.*, Legal Subjectivity of Physical Persons (Comparative Legal Research, by Way of Example of Georgian and French Law), Tb., 2007, 66 (In Georgian).

b) Dignity and Moral

The German philosopher *Kant* has distinguished the value of an individual, in the context of categorical imperative, as self-intension: "Actso that you treat humanity, whether in your own person or in that of another, always as an end and never as a means only."[29] When the human falls into decay to the level of mean for achieving of object or purpose, then we are dealing with the encroachment of human dignity. The human as a subject is principally ignored and it lacks the development.[30] In general, the dignity of an individual is universal and inviolable. Each human has his dignity, regardless the skin color, religion, faith and other signs.[31] The human's dignity remains without purpose if not being connected to human's nature. In line with *Kant*, the dignity is the humanity itself.[32] The biological and intellectual, i.e. moral outcome of human is not considered in the concept of human dignity, but claim of right of respect, which belongs to each human based on its human being.[33] The dignity itself is considered as moral condition, the basis of which is autonomy. The humans have autonomous rights, because they have their dignity. This proves the existence of normative power for humans itself.[34] Thus, in line with *Kant*, the dignity of mankind is based upon the moral nature of humans.[35] Taking into account the good will and self-intension and emphasizing the ethics, *Kant* has transferred the source of moral to each human, in accordance with the "moral law in us". Hence, the dignity is understood as the fundament.[36] In terms of normative, the dignity is inherent essence of a human, on one hand, and moral requirement of a human on the other hand, which is granted to a human by opportunity of autonomy and self-intension. The dignity is considered as a priori sign determining the human's essence. Regarding the mentioned, moral freedom of a human and equality of humans' life has to be taken into account.[37]

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29 *Pfordten Dietmar von der*, Zur Würde des Menschen bei Kant, In Fünf Untersuchungen “Menschenwürde, Recht und Staat bei Kant”, 1. Auflage, Mentis, Paderborn, Verlag C.H. Beck, 2009, 11.

30 *Martini S.*, Die Formulierung der Menschenwürde bei Immanuel Kant in: Vortragsskript eines im WiSe 2005/06 gehaltenen Referats im Rahmen des rechtsphilosophischen Seminars "Die aktuelle Werte-Debatte" bei *Prof. Adomeit Kl.* (Freie Universität Berlin), 5-7.

31 *Aguas Jove Jim S.*, The Notions of the Human Person and Human Dignity in Aquinas and Wojtyla, KritikeVolume Three Number one (June 2009), 57-59.

32 *Lebech M.*, What is Human Dignity? Maynooth Philosophical Papers, Maynooth, 2004, 61-62.

33 *Bielefeldt H.*, Menschenwürde: Der Grund der Menschenrechte, Berlin, 2008, 15; About Understanding of Freedom in Line with *Kant* and Legal Subject, as Subject Nature, see *Zoidze B.*, Attempt of Cognition of Practical being of Law, Preferentially in the Context of Human Rights, Works, Tb., 2013, 57-58, 61-62 (In Georgian).

34 *Schaber P.*, Menschenwürde und Selbstverfügung, Zurich, In: *Byrd Sh. B; Hruschka J., Joerden. J. C.,* Themenschwerpunkt: Recht und Ethik im Werk von Jean-Jacques Rousseau, Berlin, 2012, 1.

35 *Joas H.*, Würde und Menschenwürde, in: “Werte und Politik”, Ein Beitrag für den Kongress der Friedrich-Ebert-Stiftung, 2012, 1.

36 *Pfordten Dietmar von der*, Zur Würde des Menschen bei Kant, In Fünf Untersuchungen “Menschenwürde, Recht und Staat bei Kant”, 1. Auflage, Mentis, Paderborn, Verlag C.H. Beck, 2009, 19, 24; About Separation of Legal Liabilities, see *Zoidze B.*, Attempt of Cognition of Practical being of Law, Preferentially in the Context of Human Rights, Works, Tb., 2013, 23-24 (In Georgian).

37 *Lim Mi-Won*, Der kantische Begriff der Menschenwürde in der bioethischen Perspektive, in “Nomos”, No. 20, Jun, 2007, 60-61, 65-66.

Therefore, human dignity, as the value,[38] in terms of metaphysics, necessarily belongs to the subject bearing it.[39] In the meantime, the difference between the dignity and relative values is that the dignity is of absolute value.[40] Absolute value of a human may be reflected in own free will, but not in a way when humans may do, what they wish to do, but in a way that they are able to desire, what they desire.[41] In addition, it has to be implied that views (worthy behaviour is dignity - virtuous) of *Kant* (on inviolability of dignity) and *Cicero* find reflection in contemporary thinking.[42]

Therefore, this logocentric aspect of dignity also relates to semantic model existing in the area of awareness.[43] Individual model of action is revealed in the forms of individual opportunity (right) of action or necessity (duty);[44] in addition, the matter relates to what is desirable to be (sphere of deontology); also, this aspect of dignity is ideal (infinity), proceeding from ideal nature of right and duty, but an ideal essence is general and abstract.[45]Accordingly, under these circumstances, the dignity belongs to deontic sphere.

c) Dignity – as the Basis for Human Rights

In logocentric viewpoint, the dignity is basis for human rights and relates to the dignity, as the respect, perfection and power, as well as the dignity of morally permissible and infringed person. In this regard, the human dignity is considered as the principle.[46] The matter is that separate rights create so called "catalogue" of claims, closely related to each other, as they contextually and institutionally supplement each other. As the basis for these rights is in human dignity, "inalienable rights" take also conspicuous place among human rights. It relates to the legal guarantees, which, first of all, shall be protected by the state; on the other hand, the notion of indivisibility is based upon the moral scope of human rights.[47] Inalienability of rights considers that these rights are discussed as inherent rights, which are associated with human being. In addition, the purpose of concept of human rights is pro-

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38 *Tiedemann P.*, Der Begriff der Menschenwürde (Eine Anfrage an die Sozialphilosophie), in E-Journal Philosophie der Psychologie, Frankfurt a. M., 2006, 8.

39 *Dangl O.*, Der Begriff der Menschenwürde, in der Publikationsreihe des Kompetenzzentrums für Menschenrechtspädagogik an der Kirchlichen Pädagogischen Hochschule Wien/ Krems, 09/2012, 1.

40 *Kant I.,*: Metaphysik der Sitten Tugendlehre Königsberg, 1797, 94, In: *Weischedel W.,*(Hrsg.): Immanuel Kant, Werke in 10 Bänden Bd.7 Darmstadt [Wissenschaftliche Buchgesellschaft] 1983, 569.

41 *Tiedemann P.*, Der Begriff der Menschenwürde (Eine Anfrage an die Sozialphilosophie), in E-Journal Philosophie der Psychologie, Frankfurt A. M., 2006, 11-13.

42 *Hughes A.*, Democracy in Crisis, Equality and Human Dignity in South Africa and Ireland, 2011, 16.

43 About Ideality and Psychical Aspects, see *Jugheli O.*, Gnosiological Aspects of Ideal, Tb., 1988, 9, 15 (In Georgian).

44 *Tkachenko U.*, Methodological Issues of Theory of Legal Relationships, Msk., "Legal literature", 1980, 107(In Russian).

45 About these Signs of Ideal essence, see *Avaliani S.*, Theoretical Philosophy, Tb., 2007, 218-219, 341, 342, 47 (In Georgian).

46 *Dangl O.*, Der Begriff der Menschenwürde, in der Publikationsreihe des Kompetenzzentrums für Menschenrechtspädagogik an der Kirchlichen Pädagogischen Hochschule Wien/ Krems, 09/2012, 2; The *N. Teifke* has Considered Human Dignity as Principle. See *Teifke N.*, Das Prinzip der Menschenwürde (Studien und Beiträge zum Őffentlichen Recht), Mohr Siebeck Tübingen, 2011, 33-169 (In Georgian).

47 *Bielefeldt H.*, Menschenwürde: Der Grund der Menschenrechte, Berlin, 2008, 34.

tection of primary imperative – the human's dignity, which is reflected in the mentioned rights.[48] In this regard, the human dignity is the basis, out of which human rights are developed, depending on the situation.[49]

In line with the Constitution of Georgia, similar to Basic Law of Germany, the concept of human right is based upon the values, which are protected by human rights. In given case the essence of mechanism for protection is that human rights in themselves imply liabilities of others. In addition, as there is the only human dignity as well as many rights of humans, each right of a human being protects only the part of dignity. The logic of mereological, i.e. integer and part, relationship is literally understood here. Therefore, the value, protected by any right of a human being, may be considered overall as abstract part of human dignity. Accordingly, the human dignity and human rights do not represent the problems that have to be discussed separately, but they are just various aspects. Therefore, it can be said that, in general, the success, achieved in the analysis of concept of right generally and specific rights of human beings, is achievement of clarification of human dignity as well.[50]

Accordingly, the dignity is of generic nature. It is considered a) as essence created based on moral genesis, which is related to various results of various concepts; b) in addition, the concept of human dignity is determined not in plane of ethical theory, but in plane of justice and everyday moral; c) here, the function of everyday moral has to be outlined, to extend the normative power over the regulation of human practice, in line with various structures of concepts. Furthermore, generic concept of dignity relates to special consideration of each right.[51]

Thus, the natural character of human dignity is distinguished here; however, representing of human dignity in the context of principle proves that deontic fundaments are found in it. Therefore, this sign of dignity shall be considered as an expression of axiological law.[52]The synthesis of contradictory basics, given in dignity, cannot be understood as the simple sum of first two, but it means maintaining of positive moments of each of them and, by this, ascending in development process, rejection of old and establishing of new.[53]Accordingly, the dignity explained by logocentric theory shall be considered as specific phenomenon, through unification of ideal and real basics, that reflects the specific nature of it. Indeed, the mentioned aspects are significant for defining the dignity, all the more, for defining its concept of private law, but is limited to general philosophical consideration, but not specific signs (for example, self-evaluation, moral satisfaction and etc.) of dignity.

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[48] The Decision (№3/1/512) made by Constitutional Court of Georgia on June 26, 2012 (In Georgian).

[49] *Bielefeldt H.*, Auslaufmodell Menschenwürde? Warum sie in Fragesteht und warum wir sie verteidigen müssen. Freiburg, 2011, 138; *Fricke E.*, Achtung der Menschenwürde als ständige Herausforderung: Virtualität und Inszenierung _ auch ein Rechtsproblem? in E-Journal: "Communication Socials", 44. Jahrgang, Nr. 4, 2011, 459.

[50] *Stepanians M.*, Gleiche Würde, gleiche Rechte, in: *Stoecker* (Hg.): Menschenwürde _ Annäherungen an einen Begriff, öbv & hpt, Wien, 2003, 51, 63.

[51] *Birnbacher D.*, Menschenwürde – abwägbar oder unabwägbar? In: *KettnerM.* (Hrsg.), Biomedizin und Menschenwürde, Frankfurt a.M. 2004, 251.

[52] About the Dignity in detail, see *Nachkebia G.*, Methodological Alphabet of Criminal Law Science, Tb., 2006, 66-71, 100-101 (In Georgian).

[53] *Avaliani S.*, Theoretical Philosophy, Tb., 2007, 40-41 (In Georgian).

3. Dignity and Honour

Actual social and normative (ethical and legal) honour is differentiated.[54] The actual honour considers the public honour, acknowledgement in real life, evaluation of people around, feeling of own dignity and coincidence of human's behaviour with his ethical requirements set to him, on one hand, and in opinions of these humans, on the other hand.[55] The given aspect of wide generic concept of honour is considered as social prestige, respect, rename or image. In some cases, it is associated with the outward honour, good name or popularity.[56] Accordingly, the honour is perceived as social phenomenon, i.e. acknowledgement of a person in the society.[57]

As for the normative concept of respect, the human being's internal dignity, based on the personal dignity, is implied in it.[58] In normative (ethical - legal) terms, the honour is originated from necessity (from sphere, which has not been ascertained–from Sollen's sphere), claim of respect in relationship of people around, which may be fulfilled or abused, and is depending upon the actual and social acknowledgement; this, in some extent, meets the concept of internal honour. In sociological terms, *Berger* and *Kellner* considered the right of claim of given independent respect as the dignity, when the respect is associated with the institutional role and fulfilling of this role. Therefore, the concept of dignity determined the normative meaning and the respect determines actual – social meaning. The human's dignity is inviolable and this is not of descriptive nature.[59] Thus, the legal concept of honour is associated with internal and external evaluation of human, as its dignity, i.e. self-acknowledgement, within the society and evaluation of a person in the society.[60]

Thus, in normative terms, any human being has his/her human dignity, due to humanity, in particular, legal claim of respect, to act in line with his internal honour and not to infringe his right of claim, proceeding from honour. In terms of normative, the concepts of honour and dignity are characterized with similar rights of claim, which are possessed by every human, as a human. In ethical and legal terms the honour and dignity belong to sphere of normative and deontology, because only the right of claim of respect gives the possibility to the humans, who are actually unequal and, in social terms, have unequal honour, to be considered as equal. Therefore, public acknowledgement of specific value created by a person is associated with the honour. It cannot be said that human does not have the dignity, worth to be appreciated, but has not been appreciated by the society yet. The dignity of human is in his free merit, which is associated with consciousness of its value and respect towards him. The name is considered as outer being, but the dignity – as inner essence.[61] Indeed, in line with

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[54] Rühl Ulli F. H., Die Semantik der Ehre im Rechtsdiskurs, "Kritische Justiz", Heft 2, 2002, 200.

[55] *Perger T.*, Ehrenschutz von Soldaten in Deutschland und anderen Staaten, Köln, 2003, 25.

[56] Rühl Ulli F. H., Die Semantik der Ehre im Rechtsdiskurs, "Kritische Justiz", Heft 2, 2002, 201; *Niggli M. A., Riklin F.*, Skript Strafrecht, Besonderer Teil, (§ 9 Ehrverletzungen), 10, Auflage, 2007, 181-182.

[57] Rühl Ulli F. H., Die Semantik der Ehre im Rechtsdiskurs, "Kritische Justiz", Heft 2, 2002, 203.

[58] *Perger T.*, Ehrenschutz von Soldaten in Deutschland und anderen Staaten, Köln, 2003, 25.

[59] Rühl Ulli F. H., Die Semantik der Ehre im Rechtsdiskurs, "Kritische Justiz", Heft 2, 2002, 201.

[60] *Perger T.*, Ehrenschutz von Soldaten in Deutschland und anderen Staaten, Köln, 2003, 22.

[61] *Mkheidze S., Kubusidze V.*, Concept of Dignity in Ethics (Review), Newspaper "Tbilisi", No.256 (6858), October 31, 1975, 3 (In Georgian).

these two phenomena, different origins of dignity and honour are distinguished, but their contextual meaning shows that real and ideal aspects are to be considered in them.

4. The Role of Constitutional Legal Concept in Clarification of Civil Legal Concept of Dignity

4.1. The Scope of Constitutional Legal Conception of Dignity

The civil law is based on the values, which create the fundament for private law and are enhanced with constitution, but then act in private law. The Constitution of Georgia, which sets the necessary boundaries for the development of private law, is considered as the measurement of valuable order in Civil Law of Georgia (article 2 of CLG).[62] Accordingly, it is necessary to define the constitutional legal conception of dignity.

The human dignity represents the supreme constitutional value.[63] In accordance with the article 17 of the Constitution of Georgia, the honour and dignity of a human being are inviolable. Proceeding from absolute and categorical nature, this norm implies the positive liability of the state, to carry out overall and effective investigation in case of infringement of given regulation, in order to determine the violation fact and carry out appropriate measures against the violator.[64]

The point is that the constitutional and legal conception of honour and dignity are of wide nature and actually imply the social requirements for the respect of human being, by which its sociological approach is acknowledged. The primary purpose of the state is the human not to become as the mean of achieving this purpose. The dignity is the constitutional principle, on which other basic rights are based. In addition, the primary value is the human being, as original, free and equal to other human beings. The dignity belongs to a human because it is a human. The respect for human being's dignity, as an absolute right, means personal acknowledgement of each human being, deprivation and restriction of which by any reason is inadmissible.[65] Therefore, restriction of dignity is not allowed by any norm of constitution (articles 17 and 46)[66]. In addition, in constitutional and legal terms, the human dignity and his/her personal freedom are mainly inherent (but not originated) rights of the human being. Since this moment, the state is vested with liability to adequately provide each human with the

62 *Chanturia L.,* General part of Civil Law, Tb., 2011, 82-84 (In Georgian).

63 *Löw K.*, Die Würde des Menschen und der deutschen Nation, in: "Wie geht unsere Politik mit Deutschland um? Freiheitlich, demokratisch, rechtsstaatlich?" Deutschland Journal – Sonderausgabe, Dokumentation zum Seminar am 27. February 2010, 15.

64 *Tughushi T., Burjanadze T., Mshvenieradze G., Gotsiridze G., Menabde V.*, Human Rights and Practice of Legal Proceedings of Constitutional Court of Georgia (Scientific Editor: *Kopaleishvili M.*, Tb., 2013, 85 (In Georgian).

65 The Decision made by the Constitutional Court of Georgia on October 26, 2007 on the Case No.2/2/-389 (In Georgian).

66 The Decision made by the Constitutional Court of Georgia on March 11, 2004 on the Case No.2/1/241; *Tughushi T., Burjanadze G., Mshvenieradze G., Gotsiridze G., Menabde V.*, Human Rights and Practice of Legal Proceedings of Constitutional Court of Georgia (Scientific Editor: *Kopaleishvili M.*, Tb., 2013, 91 (In Georgian).

opportunity of total self-realization of personal freedom.[67] Accordingly, the fetus, as well as any person born with physical disability or person suffering from mental illness, has dignity. The human dignity also applies to the dead body and the memory of deceased person.[68]Thus, the signs of logocentric theory are obviously shown in this phenomenon of dignity.

In addition, it has to be noted that close relationship of personal honour with human dignity shall be reflected in the constitutional and legal definition of the honour. The right of personal honour, with its essence, is personal right, because the honour finds its grounds in human being's personality.[69] In the meantime, there are frequent cases of intersection of dignity and other primary rights. For example, the right for privacy, as well as other rights, are considered as expression of human dignity.[70] In addition, the respect of human dignity is manifested in the freedom of belief.[71] However, the dignity is also associated with the signs of article 14 of the Constitution of Georgia, which are proceeding from the factors manifesting the human being's identity, and which are based upon the respect of their dignity and determine the basics for prohibition of discrimination.[72]

The dignity, in ethical and constitutional-legal (normative) terms, is the right of claim of respect, which may not be lost for a human even via heavy violation of the law. The human being possesses dignity as he/she is human, but not based on general ethics, Christian or positive law.[73]

So, possession of dignity by a human being does not depend upon the fact, are all potentials realized or may be implement only in the future? The human dignity belongs to each individual just for humanity, as essence itself. The bearer of human dignity disposes the rights that originate the liabilities. In the meantime, the matter is protective rights on embryo, fetus and corpses, related to giving the consent.[74]The dignity is also considered as taboo. The taboo, recognized by constitution, is not simply prohibition of abstention, but it does not require even dogmatic explanation and implies the special status of prohibition in legal sociology, that accentuates its natural character.[75]

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67 The Decision made by the Constitutional Court of Georgia on July 2, 2007 on the Case No.1/2/384 (In Georgian).

68 *Kublashvili K.,* Comment of Article 17, in Book: "Comments of Constitution of Georgia", Tb., 2005, 85 (In Georgian).

69 *Perger T.*, Ehrenschutz von Soldaten in Deutschland und anderen Staaten, Köln, 2003, 23.

70 The Decision made by the Constitutional Court of Georgia on October 24, 2012 on the Case No.1/2/519 (In Georgian).

71 The Decision made by the Constitutional Court of Georgia on December 22, 2011 on the Case No.1/1/477 (In Georgian).

72 The Decision made by the Constitutional Court of Georgia on March 8, 2011 on the Case No.2/1/473;.*Tughushi T., Burjanadze G., Mshvenieradze G., Gotsiridze G., Menabde V.*, Human Rights and Practice of Legal Proceedings of Constitutional Court of Georgia (Scientific Editor: *Kopaleishvili M.*, Tb., 2013, 88 (In Georgian).

73 Rühl Ulli F. H., Die Semantik der Ehre im Rechtsdiskurs, "Kritische Justiz", Heft 2, 2002, 201-202.

74 *Birnbacher D.,* Menschenwürde – abwägbar oder unabwägbar? In: *KettnerM.,*(Hrsg.): Biomedizin und Menschenwürde. Frankfurt a.M. 2004, 249-250.

75 About Inviolability of Dignity, in detail see *Poscher R.*, Die Würde der Menschen ist unantastbar (Die Menschenwürde, als Tabu), in: JZ, 15/16/ 2004, 756-762; See *Posher R.*, Human Dignity, as Tabu (Translated from German and Supplied with Preface by *Bichia M.*), Journal „Justice and Law", №2, 2014, 51-65.(In Georgian).

It seems that the constitutional legal concept of dignity, actually, shares the vagueness of logocentric theory. In addition, using of the term "human dignity" is reasonable only for public law. However, as the human must have the human dignity itself, it may be met in public law in the form of term "dignity", involving its broad concept. In addition, the constitutional legal concept of dignity is important in respect of the fact that it is the basis for civil legal conception. However, it is obvious that constitutional legal basics of dignity are specified in Civil Law by other specific signs. The signs of constitutional legal concept of dignity look as follows: the owner of right of dignity protection is only a human; in addition, the dignity, as the primary sign for defining the personality, is considered as supreme natural value, which is recognized as normative; in addition, the dignity is the basis for other primary rights of a human being, which are associated with the universal nature of dignity.

4.2. Dignity in the Civil Law

4.2.1. Civil Legal Concept of Dignity

The constitutional legal concept of dignity differs from its civil legal concept. The point is that the dignity is not considered in the Constitutional Law as subjective benefit, which is different for every human being. Such understanding of dignity protection right would contradict with the concept of right itself, because the benefit cannot be considered as the right, the scope of which may be different for various human beings, in line with their views.[76]

The means of protection of dignity are envisaged by the article 18 of the Civil Code of Georgia (hereinafter referred to as CCG). In accordance with 2nd part of this article, person, through the court, enjoys the right to require rejection of those notes, which infringe his honour, dignity, privacy, personal inviolability or business reputation, if a disseminator of these notes does not confirm that they were corresponding to the reality. Correct qualification of given article requires determination of definition of legal protection of person's dignity. Assessment of own moral or other features, own public meaning by a person is considered in dignity.[77] Therefore, the dignity is evaluative category. In line with article 18 of CCG, authorized person himself, who requires protection of his/her dignity, has the ability to evaluate the dignity of protected person as the value. The dignity involves evaluation of own moral features, responsibility to society, own public meaning. Moreover the areas protected by reputation right, may also involve aspects protected by dignity right.[78]

In terms of ethics, the dignity is a right of claim of self-evaluation. Moreover, the dignity cannot be evaluated in the cash form,[79] as, non-property relations, itself, lacks economic content and does not have any value, for which violation of rights protected by the law is sufficient for proving the da-

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76 The Decision made by the Constitutional Court of Georgia on November 10, 2009 (the Case No.1/3/421, 422) (In Georgian).

77 The Decision made on June 25, 2002 by the Chamber on Civil, Entrepreneurial and Bankruptcy Cases of the Supreme Court of Georgia (Hereinafter Referred to as _ SCGD) (No.3k-337-02) (In Georgian).

78 SCGD 23.07.2009 (No.as-1174-1319-08) (In Georgian).

79 *Fricke E.*, Achtung der Menschenwürde als ständige Herausforderung: Virtualität und Inszenierung _ auch ein Rechtsproblem? in E-Journal: “Communicatio Socials”, 44. Jahrgang, Nr. 4, 2011, 456.

mage.[80] In the Republic of South Africa, the human dignity had significant influence on human rights, such as the area of equality, criminal law, autonomy, private life and freedom of expression. This became the instrument for the protection of democratic principles of transparency, participation and accountability.[81]

In civil legal terms, the attitude of society towards the person and evaluation of own meaning by a person is considered in moral categories of honour and dignity, which have to comply with appropriate facts of reality.[82]

4.2.2. Areas Protected by Dignity

Due to universal nature, dignity may involve other personal rights, due to which, taking into account the mentioned aspect, during civil legal protection, the personal rights' providing norm, which also has been abused, will be enacted, in addition to the norm protecting the dignity. This may also apply to the rights of honour, reputation, protection of name or image and other rights.

In addition, it is possible to abuse the name via infringement of dignity. As the name is considered as the mean of individualization, the mean of individualization of a person is changed during its change. Besides, changing of gender is relevant today, [83]which is followed with the change of name. This relates to registration (identification card) of status of civil acts, getting driving license, distribution of immanent rights for specific gender. From the above moment, he is authorized to require from others to respect personal life. In order to protect the person, this phenomenon shall be discussed within legal fiction. In addition, infringement of the name may cause infringement of honour and dignity. However, this does not mean neglecting separate legal protection of these benefits.[84] In addition, the mentioned may be followed by infringement of honour.

In accordance with part 1, article 18 of CCG, in the process of contending for the use of name, the civil complaint should be based on the following: a) the disputable name belonged to the plaintiff and b) the defendant shall refuse that disputable name belongs to the defendant. The civil complaint will be acknowledgement of the name. If the right of name is abused by defendant's intention or gross negligence, the defendant may require compensation of material and/or intangible damage, [85]which may be satisfied, regardless the guiltiness of infringement.[86]

In addition, an image may be placed within the areas protected by dignity. Namely, publication of person's image may be followed by infringement of honour and dignity, if, in published photo, it is in distorted and offensive form, or in such form that the negative opinion may be formed about this person from the society.[87]

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80 SCGD 03.04.2012 (No.as-1477-1489-2011); SCGD 25.02.2013 (No.as-1149-1169-2011) (In Georgian).

81 *Hughes A.*, Democracy in Crisis, Equality and Human Dignity in South Africa and Ireland, 2011, 16.

82 SCGD 03.08.2012 (No.as-1739-1720-2011); SCGD 03.08.2012 (No.as-208-201-2012) (In Georgian).

83 *B. v. France*, Decision made on March 25, 1992 (In Georgian).

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

85 *Ninidze T.*, Right of Name, CCG Comments, B. I, Tb., 2002, 58-60 (In Georgian).

86 *Ninidze T.*, Personal Non-property Rights, CCG Comments, B. I, Tb., 2002, 70; see SCGD 24.04.2003 (Case No.3k-1240-02) (In Georgian).

87 SCGD 23.07.2009 (Case No.as-1174-1319-08) (In Georgian).

In addition, the pseudonym enjoys such guarantees of protection, as author's true name.[88] It is noteworthy that as the person puts his spirit into the work, the copy right acknowledges its individuality. In given case the point is the authenticity of work and determination or protection of originality.[89]

Hereby, it has to be noted that it is possible to abuse personal life by infringement of the dignity. This is especially clearly accentuated by European court practice on human rights. The European Court has discussed the rights of physical inviolability and dignity protection. It was determined that aspect of dignity is included in the areas of protection of personal life (article 8 of European Convention), which is related to the claim of respect, as the positive liability.[90] Thus, the European Court has considered the dignity as one of the spheres of personal life, because, it is not considered under the convention as benefit of separate protection, but in line with this approach, protects it. The above was based on the universal nature of dignity. However, in particular cases, the dignity may also imply personal sphere, as integral part, that distinguishes specific nature of dignity.[91]

Therefore, the dignity, as determinative sign of individuality, is inexhaustible sphere, due to which defining of its parties in full is impossible. However, it is possible to accentuate that, contextually the human dignity means respect of person's dignity. In addition, in civil legal terms, the relation of human dignity to protection of (a) identity and self-evaluation of a human, (b) physical (corporal) and psychological inviolability, (c) intimacy, (d) primary area of human's self-determination and (e) social relations, shall be distinguished.[92] Accordingly, the parties, concerned by these signs, always consider the spheres involving the dignity.

4.2.3. Dignity - as the Object of the Civil Legal Relationship?

In essence, the civil legal relation is mainly the mean for ensuring regulative civil rights, [93] relating to the property rights and duties. However, in exceptional cases, civil legal relation exists even following infringement and implies the material legal relation of protective nature.[94] This applies to certain

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88 *Ninidze T.*, Content of Right of Name, "Soviet law", No.1, 1976, 33 (In Georgian).

89 *Peifer Karl-Nikolaus*, Individualität im Zivilrecht, Mohr Siebeck, Tübingen, 2001, 55-113.

90 *R(Bernard) v. Enfield* [2002] EWHC2282 Admin.; Human Rights and Equality, Runnymede's Quarterly Bulletin March, 2006, 14; *Wildbore H.,* The Protection of Freedom Under the Human Rights Act: What We've Gained, in: UCL Human Rights Review, Second Edition (Editor-in-Chief: *Annicchino P.*), London, 2009, 157;*Pretty v. United Kingdom*, 29.7.2002; *Wildhaber L.*, The European Court of Human Rights in Action, Ritsumeikan Law Review, No. 21, 2004, 84-85; See also *Maxine Goodman D.,* Human Dignity in SupremeCourt Constitutional Jurisprudence, 84 Neb.L. Rev. 2006,740,751,753,777,784; See in detail *Barossa L. R.*, Here, There and Everywhere: Human Dignity in Contemporary Law and in the Transnational Discourse, Vol. 35, Issue 2, 5-1-2012, 331-393.

91 *Bichia M.*, Protection of Personal life, in accordance with the Civil Law of Georgia,Tb., 2012, 159-166 (In Georgian).

92 *Fricke E.*, Achtung der Menschenwürde als ständige Herausforderung: Virtualität und Inszenierung _ auch ein Rechtsproblem? in E-Journal: "Communication Socials", 44. Jahrgang, Nr. 4, 2011, 456.

93 *Krashenninikov E.,* The Interest, Protected by Law and Means of Protection, Scientific Conference Materials: "Issues of Theory on Protective Legal Relations", Yaroslav, 1991, 14, 18 (In Russian).

94 *Vershinin A.*, Protective material-legal Relationships and the Right of Remedy, Scientific Conference Materials: "Issues of Theory on Protective Legal Relations", Yaroslav, 1991, 36 (In Russian).

personal non-property relations that do not relate to property, but are protected under the civil legal norms.[95] The mentioned is enhanced in the form of right in element of absolute relation,[96] which is opposed by the general liability of each third person not to intervene in the "property" of an authorized person.[97] The right of dignity protection is the personal non-property rights. "Intangible (spiritual) benefits are the objects for personal non-property rights".[98] In addition, absolute rights exist beyond the legal relations. The law does not regulate them, but ensures their protection during their violation.[99]

Liabilities of protection of own rights have relation with the primary rights, which are used in private legal relations, taking into account the dispositional norms. The main rights embody an objective order of values, which is transformed into private legal relationship. In Civil Law, acknowledgement of general personal right as ordinary right has unusually enhanced the protection of personality of injured person.[100] Indeed, the constitutional law determines an individuality in the form of principle, but the civil law gives the specific form to protection of personal rights, in order to the person implement them themselves, through granting various rights. Moreover, primary rights are the person's self-protective rights from actions of the state, when the purpose of civil law is to regulate the legal relationships between the separate persons.[101] Thus, the Constitution of Georgia regulates the private law (horizontal) relationships, through indirect private law.[102]

In addition, the lawmaker discussed various moral rules, protecting the dignity, in the range of formal laws, in accordance with the article 18 of CCG, which essentially shares the experience of Civil Law of Germany. In addition, by its essence, the dignity is considered as the central sphere of general personal right, which represents one of the integral parts of general independence of own personality development. As the freedom of development of own personality is acknowledged in the Georgian legislation, the dignity, together with the right (article 16 of the Constitution of Georgia) of free development of a person, is capable to protect the benefit, directly unexpected under the article 18 of

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95 *Maleina M.*, Personal non-property Rights of Citizens: Conception, Implementation, Protection, second Edition, Corrected and Amended, M., "M3_PRESS", 2001, 24; about Protection of Personal Relation, see *D. Kereselidze,* General Provisions of Civil Code, "Review of Georgian Law", 7/2004-1, 7 (In Georgian).

96 *Bratus C., Ioffe O.,* Civil Law, Msk., "Knowledge", 1967, 41 (In Russian); *Kobakhidze A.,* Civil Law. General part, Vol. 1, Tb., 2001, 100; *Schlechtriem P.*, Schuldrecht Allgemeiner Teil, 5., neubearbeitete Aufl., Tübingen, Mohr Siebeck, 2003,8-9 (In Georgian).

97 *Enneccerus L., Kipp T., Volf M.,* The Course of German Civil Law, v. 1, Introduction and General Part, Translation from 13th German Eddision *Grave K.*, *Polinslaya G.,*and *Altshuller V.*, Msk., Edition of Foreign Literature, 1949, 274; *Krasavchikova L.*, Personal Life of Citizens under Protection of Law, Msk., "Legal Literature", 1983, 58, 59-62 (In Russian).

98 *Maleina M.*, Personal Non-property Rights of Citizens: Conception, Implementation, Protection, Second Edition, Corrected and Amended, Msk., "M3_PRESS", 2001, 13 (In Russian); in addition, see *Sh. Chikvashvili,* Responsibility for Moral Damage, Tb., 2008, 8 (In Georgian).

99 See <http://dissertations.ub.rug.nl/FILES/faculties/jur/2002/j.e.wichers/wichers.PDF> [07.05.10]; About similar, see *Lapach V.,* Civil Rights Objects System: Theory and Court Practice, St. Petersburg, "Legal Center Press", 2002, 106, 115 (In Russian).

100 *Uesseler CH.*, Einwirkungen der Grundrechte auf das Schadenersatzrecht (Dissertation), Wuppertal, 2008, 46, 48, 50-51, 70.

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

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

CCG, by article 992 of CCG[103], which implies the "general delict".[104] This is of flexible nature and, due to its universal nature, even protects the general personal rights.[105] In addition, in line with the article 18 of CCG, the honour and dignity are protected, which serves/supports the individualization of a human, as considers person's self-determination in the society.[106] Indirect influence of third parties on general personal right of primary right, generates civil legal general personal right of article 992 of the Civil Coda of Georgia, which is the sub-sphere of freedom, to determine the space protecting the self-determination right. The right of self-determination, as the general personal right, is the person's authority to individually decide, in what volume to make accessible the aspects of expression of own personality and, specifically, for whom.[107]Thus, the right of dignity protection, by its essence, shall be discussed as the personality right, but the dignity – as the civil legal protection object.

4.2.4. Subject of Dignity Protection Right

In line with section 2, article 18 of CCG, the proper plaintiff shall be defined, in other words the person, who enjoys the right to protect his/her own dignity from abusing, through the court and as prescribed by the law. If the disseminated information does not correspond with the reality, he may require rejection through the court.[108] Here, an addressee of the private law relationship outcomes is considered. This applies to the opportunity to gain the separate private law rights and undertake the liabilities proceeding from appropriate relationship.[109] In accordance with the article 11 of Civil Code of Georgia, the human being is eligible, i.e., has an ability, to bear the civil rights and duties.[110] The person's ability, to have personal rights, may be considered as one of the forms of manifesting the eligibility.[111] Taking into account its specifics, the subject of dignity protection right may be human being, in the form of primary value, which is equal to original, free and other human beings.[112]

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[103] *Ehmann H.*, Der Begriff des Allgemeinen Persönlichkeitsrechts als Grundrecht und als absolute-subjektives Recht, in: Festschrift für Apostolos Georgiades, Athen; München, 2005, 116-117.

[104] *Chikvashvili S.,* Tort Liabilities in Civil Law, in Anniversary Edition dedicated to 80th Anniversary of Faculty of Law of Tbilisi State University: "Topical Problems of State and Law" (editor: *Shengelia R.*), Tb., 2003, 184 (In Georgian).

[105] *Schmidt R.*, Schuldrecht Besonderer Teil II _ Gesetzliche Schuldverhältnisse, 1. Aufl., Grasberg bei Bremen, Rolf Schmidt GmbH, 2003, 190, 193; *Schmidt R.*, Schuldrecht Besonderer Teil II _ Gesetzliche Schuldverhältnisse, 4. Aufl., Grasberg bei Bremen, Rolf Schmidt GmbH, 2006, 203.

[106] *Ninidze T.*, Human's Individuality – The Soviet Civil Law Protection Subject, "The Bulleting of SSR Scientific Academy of Georgia", Philosophy, Psychology, Economy and Law Series No.4, 1977, 88 (In Georgian).

[107] About Part I of Article 823 of Civil Code of Germany, see *Ehmann H.*, Der Begriff des Allgemeinen Persönlichkeitsrechts als Grundrecht und als absolute-subjektives Recht, in: Festschrift für Apostolos Georgiades, Athen; München, 2005, 125, 129-130.

[108] SCGD 01.06.2006 (No. as-1284-1520-05) (In Georgian).

[109] *Kereselidze D.,* The most Systemic Notions of Private Law, Tb., 2009, 96 (In Georgian).

[110] *Chanturia L.*, Introduction in General Part of Civil Law of Georgia, Tb., 2011, 167-168, 175-176 (In Georgian).

[111] *Kereselidze D.*, The most Systemic Notions of Private Law, Tb., 2009, 135 (In Georgian).

[112] The Decision made by the Constitutional Court of Georgia on October 26, 2007 on the Case No.2/2/-389 (In Georgian).

In addition, the forms of human participation in the law, in the form of person and personality, are special. The human, as the person, has the rights and duties; the person is unity of spiritual values of human beings and the subject of legal protection".[113] The person, with rights and duties, is interesting for lawyers. However, it has to be taken into account that human being is composed of real and ideal basics, but its biological structure and psychical processes belong to the sphere of real essence.[114] Indeed, the human being, as the subject of legal relationships, disappears following decease, but the social influence of the human being, as the personality, may remain. In this regard, the law protects a person, before the social influence is terminated. Exactly this value is reflected in the dignity, which deserves protection even following the decease. In accordance with the article 19 of Civil Code of Georgia, a person, who does not enjoy the right of name and personal dignity, but, by this reason, has the worthy interest of protection, may use the benefits given in the article 18. He may require protection of the name and dignity in a way, which determines the person's creature and continues even following decease. Claim of compensation of moral damage for infringement of name, honour, and dignity or business reputation, is prohibited following decease. However, the principle – "protection of human being's dignity applies to the dead body, as well as to the memory of deceased" – has to be taken into consideration.[115]

4.2.5. Results of Infringement of Dignity

Dissemination of information on the person, which relates to evidence, violation of law or moral norms by him, conduct of unworthy action by him, is considered as the infringement of dignity.[116]The dignity may be abused by abasement, decline, discrediting,[117] as well as offense and slander.[118]

The dignity is much more comprehensive in Civil Law. Compensation of damage, (moral) satisfaction, payment of revenue, inaction, revision (correction) and etc[119] and not the punishment are considered as civil legal outcomes. In this regard, the tools for protection of personal right are: refraining from (inaction) implementation of such action, which abuses the right and termination, rejection, publication of responsive notes and compensation of damage.[120]

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[113] *Ninidze T.,* Protection of Personal Rights Following Decease, in Book "Comments to Civil Code of Georgia", B. I, Tb., 2002, 78-79 (In Georgian).

[114] About Actual Essence of this Sign, see *Avaliani S.*, Theoretical Philosophy, Tb., 2007, 37; about Legal Subjectivity of Physical Persons, see *Jugheli T.*, Legal Subjectivity of Physical Persons (Comparative Legal research, by Way of Example of Georgian and French Law), Tb., 2007, 66 (In Georgian).

[115] About the mentioned, see *Schweers St.*, Die vermögenswerten und ideellen Bestandteile des Persönlich-keitsrechts nach dem Tod des Trägers (Dissertation), Köln, 2006, 172-174.

[116] SCGD 25/06/2002 (No.3k-337-02); SCGD 03.08.2012 (No.as-208-201-2012) (In Georgian).

[117] *Fricke E.*, Achtung der Menschenwürde als ständige Herausforderung: Virtualität und Inszenierung _ auch ein Rechtsproblem? in E-Journal: "Communicatio Socials", 44. Jahrgang, Nr. 4, 2011, 456.

[118] *Niggli M. A., Riklin F.*, Skript Strafrecht BT. 8. Auflage, 2005, 196-197.

[119] *Niggli M. A., Riklin F.*, Skript Strafrecht BT. 8. Auflage, 2005, 205; *Niggli M. A., Riklin F.*, Skript Strafrecht, Besonderer Teil (BT.), (§ 9 Ehrverletzungen), 10. Auflage, 2007, 191.

[120] *Siebrecht I.*, Der Schutz der Ehre im Zivilrecht, in: JuS, Heft 4, 2001, 338.

a) Claims Regarding the Refraining from Implementation and Termination of any Action

Abusing of right of protection of dignity, under the strict conditions stipulated by the law, generates the claim on termination of action or rejection of action. The lawmaker links the realization of norm-violated right with two cases: a) when a person is competed in right of bearing of a name and b) if this right is abused by illegal use of his name. The possibility of rising of analogous claim is considered under the Civil Code of Georgia, also in the event of abusing the right of protection of image (parts 1 and 2 of article 18).[121]There is a possibility to advance above mentioned claim, regardless the guiltiness. However, if dignity is abused by somebody's guilty action, the person may compensate non-property type damage.[122]

Refraining from implementation of infringing actions represents the temporary ordinance, which gives rapid and effective possibility to an interested person, to prepare the law breaking media reportage. This claim, raised in future, may avoid second time infringement of private sphere. The precondition for rising of given claim is existence of serious danger of repeated violation.[123]In addition, primary fulfillment and repeated implementation dangers of action are distinguished. In general, "the key point for non-fulfillment of action is a notion of danger". The claim of refraining from implementation of action is justified, if a danger of publishing takes place. The danger of first implementation of action is sufficiently justified, when the future, not so far, law braking obviously takes place, or there is the serious danger of it. As for the danger of repeating of fulfillment of action, it takes place, if additional (new) impediment is the basis for danger of facts-based serious infringement. Generally, bringing of a claim about refraining from fulfillment of action prevents only publishing of incorrect facts. In addition, a person shall undertake the liability of approval, through submission of evidences, which proves the facts infringing the honour; if he is not able to fulfill the abovementioned; his statement is evaluated as incorrect. The negatory claim is satisfied, if it is determined during court proceeding on examination of evidences that this statement does not comply with the reality.[124]

In addition, it is worth to mention that preconditions for claim on suspending (termination) of actions shall always apply to actual evidences. In case of claim of refraining from (negatory) implementation of action, disclaimer of opinion is not taken into account, because the mentioned leads to intervention in the freedom of expression of opinion. In addition, if evidence is submitted incompletely, excessively or vaguely, then a person may be prosecuted for termination (prevention) of action for clarification or complementation.[125]

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[121] SCGD 01.08.2011 (Case No.as-152-146-2011) (In Georgian).

[122] 24.04.2003 (Case No.3k-1240-02) (In Georgian).

[123] *Münch H.*, Der Schutz des Einzelnen vor Presseveröffentlichungen durch den Deutschen Presserat und die britische Press Complaints Commision, Eine Untersuchung zur Spruchpraxis unter besonderer Berücksichtigung des zivilrechtlichen Rechtsschutzes der Privatsphäre (Dissertation), Konstanz, 2001, 128-129.

[124] *Siebrecht I.*, Der Schutz der Ehre im Zivilrecht, in: JuS, Heft 4, 2001, 338.

[125] Ibid 339.

b) Request on Rejection

The claim[126]of rejection of information not corresponding with the reality through court regulation, originated regardless the infringement guiltiness[127] and mostly related to the evidences on factual circumstances, publicized on press pages,[128] is given the special significance. The rejection shall be made by the same mass information medium, through which the dignity insulting notes have been disseminated (part 3 of article 18 of the CCG). Advancing of this claim is permissible if disseminator of information cannot prove that disseminated notes correspond with the reality.[129]

In accordance with the changes made on June 24, 2004 to the article 18 of the Civil Code of Georgia, the person may protect personal rights "via the regulation prescribed by the law". Namely, in line with the article 17 of the law "on freedom of word and expression", rejection of publicized notes is possible only in case of slander. Any restriction of rights, considered under this law, shall be based upon the incontrovertible evidences. In accordance with the paragraph 6 of given article, the burden of assertion of restriction of speech freedom is placed over the initiator of restriction.[130] In line with sub-paragraph "e" of article 1 of the same law, the statement, involving essentially false, as well as discrediting information, dangerous for person, is considered as slander. However, for determination of slander, the facts shall be separated from evaluations.[131] The point is that authenticity may be proved only regarding the facts, but an opinion is not subject to evidence.[132] In addition, the standard of slander shall apply to the private person. In line with the article 13 of the law "on freedom of word and expression", the civil legal responsibility will be assigned to a person for slander over the private person, if the plaintiff proves that the statement of defendant involved the false fact immediately about the plaintiff and, by this statement, the honour and dignity of plaintiff was abused. Therefore, by dissemination of given facts, the burden of evidence of infliction of damage to a person is fully assigned to the plaintiff. The fact, that this information was disseminated exactly by the defendant, shall be confirmed by evidences (direct or indirect). Accordingly, if the statement does not exist or dissemination of above given notes cannot be proved, the slander (and, accordingly violation of the law) will be also excluded.[133]

In addition, it has to be taken into account that protection of privacy is specific, the initial point of which is idea of ensuring of dignity. The point of this feature is that the notes, reflecting secret aspects of personal life, may correspond to the reality, however, the person himself may be interested

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[126] SCGD 01.06.2006 (case No.as-1284-1520-05) (In Georgian).

[127] *Ninidze T.,* Personal Non-property Rights, CCG Comments, B. I, Tb., 2002, 70 (In Georgian).

[128] *Fezer K.-H.*, Kommerzialisierung des Persönlichkeit, (vorgelegt von *Beuter Cl.*) (Dissertation), 2000, 18.

[129] *Barabadze N.*, The Basics for Origination of Compensation Right of Moral Damage, "Human and Constitution", No.3, 2005, 75, 76 (In Georgian).

[130] SCGD 14.07.2011 (Case No.as-207-194-2011), SCGD 06.09.2010 (Case No.as-131-125-10) (In Georgian).

[131] SCGD 20.02.2012 (Case No.as-1278-1298-2011), SCGD 19.03.2007 (No.as-385-780-06) (In Georgian).

[132] The Decision made by the Constitutional Court of Georgia (2nd Collegium) on March 11, 2004 (the Case No.2/1/241) (In Georgian).

[133] SCGD 10.10.2013 (No.as-1378-1300-2012) (In Georgian).

in the protection from disclosure of these notes,[134] as they contains the notes reflecting the personal life (part 2 of article 18 of CCG). The Supreme Court of Georgia has explained that factual data may be published incompletely and, even in this case, the same rules do apply, if, by the mentioned, the dignity of a person is abused.[135]

In addition, the issue of compensation for the inflicted damage and non-property damage may rise together with denial. However, if the notes corresponding with the reality have been disseminated, generation of right of claim on denial is excluded. In case of existence of offensive form of such type notes, compensation of non-property damage is permissible.[136] Public denial of stated opinion reduces the volume of compensation of intangible damage.[137]

c) Request on Publication of Own Response

In case of publication of notes not corresponding with the reality, publication (part 4, article 18 of the CCG) of response by the same means, through the mass communication media, is considered under the CCG.[138] The explanatory note of interested person, which indicates to the contradictory circumstances of the article disseminated through periodic printed media, is considered. The response shall be facts' oriented and formulated briefly, which requires separation of evidences from the expression of opinion.[139]

It has to be mentioned that mass communication media institution does not have a right to change the text sent by interested person, as well as to load the text with additional markings. This institution may only add the explanatory note, if it relates to imagination on the facts, or the notes, sources of which are referred to by the person. The given institution does not have right to add the comment to response speech (denial).[140]

The claim of publication of response is discussed by court regulation only in those civil cases, which are based upon the regulations about court decision on claim provision. The preference of claim of publication of responsive notes is that this claim may be rapidly and effectively fulfilled, without compliance with reality of facts under discussion or collecting the evidences about inappropriateness. By this way, the damaged person may react on the first submission through specification (correction) or adding[141].

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134 SCGD 24.04.2003 (Case No.3k-1240-02) (In Georgian).

135 SCGD 14.04.2004 (Case No.as-593-1241-03) (In Georgian).

136 See *Barabadze N.*, The Basics for Origination of Compensation Right of Moral Damage, "Human and Constitution", No.3, 2005, 75, 76 (In Georgian).

137 SCGD 03.12.2009 (Case No.440-754-09) (In Georgian).

138 On Responding Speech, see *Perger T.*, Ehrenshutz von Soldaten in Deutschland und anderen Staaten, Köln, (TUP-Productions) (Dissertation), 2003, 81-82 (In Georgian).

139 *Fezer K.-H.*, Kommerzialisierung des Persönlichkeit, (vorgelegt von *Beuter Cl.*) (Dissertation), 2000, 12-13.

140 *Frick Marie_theres*, Persönlichkeitsrechte, Beiträge, Liechtenstein-Institut, Forschung und Lehre, Nr. 5, Liechtenstein, Fürstentum Liechtenstein, 1996, 21.

141 *Siebrecht I.*, Der Schutz der Ehre im Zivilrecht, in: JuS, 2001, Heft 4, 340.

d) Compensation for Damages

By abusing the dignity protection right, as absolute right, new legal *(delict)* relationships are generated (part 1 of article 317 and articles 992-1008 of the CCG).[142] The damage may be result of dignity abuse. In accordance with article 992 of the Civil Code of Georgia, availability of damage, law-breaking action, causative relationship between this action and the damage, cumulative guiltiness are necessary for placing the civil responsibility upon the person due to infliction of damage. The unity of these conditions creates legal composition ("General delict").[143]

It has to be noted that property damage is compensated only in the event of infringement of those personal benefits, which are listed in the article 18 of the CCG.[144] In the event of infringement of personal rights, the damage is compensated by cash only when the matter relates to accusative and heavy violation, "compensation" of which, on the other hand, could not take place through refraining from denial or implementation of action.[145]

In order to evaluate the dignity infringement as law violation, the abusing of interest shall be law breaking.[146] The dignity may be abused by defined act (= action), which generates the liability.[147] Unlawful action may infringe particular right of a person protected by various norms,[148] in particular, right of dignity protection. In addition, it shall be determined whether the circumstances (consent, public interest, social interest), excluding the civil legal responsibility, exist or no.[149] In addition, for assigning the civil responsibility, considered under the article 992 of the CCG, for abusing of dignity, it is necessary to determine that the outcome of implementation of law-breaking action is adequate to the given damage.[150] Infringement of dignity may also generate non-property damage. In addition, existence of presumption of non-property damage is used. This means that, by committing the law-breaking action, it is assumed that it was inflicted by non-property damage (before the contradictory fact is not approved). As an exception, it may apply to mentally ill person, because he is not able to realize nonexistence of

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142 *Nachkebia G.*, Guiltiness, as the Category of Social Philosophy, Tb., 2001, 173-176 (In Georgian).

143 *Chikvashvili S.,* Tort Liabilities in Civil Law, in Anniversary Edition Dedicated to 80th anniversary of Faculty of Law of Tbilisi State University: "Topical Problems of State and Law", Tb., 2003, 184 (In Georgian).

144 *Ninidze T.*, CCG Comment, B. I, Tb., 2002, 70, 71 (In Georgian).

145 *BGHZ*, NJW 1997, 1371 (1374); NJW 1995, 985 (986); *Siebrecht I.*, Der Schutz der Ehre im Zivilrecht, in: JuS, Heft 4, 2001, 340.

146 *Schmidt R.*, Schuldrecht Besonderer Teil II _ Gesetzliche Schuldverhältnisse, 1. Auflage, Grasberg bei Bremen, Rolf Schmidt GmbH, 2003, 191; *Schmidt R.*, Schuldrecht Besonderer Teil II _ Gesetzliche Schuldverhältnisse, 4. Aufl., Grasberg bei Bremen, Rolf Schmidt GmbH, 2006, 204; Also see *Perger T.*, Ehrenshutz von Soldaten in Deutschland und anderen Staaten, Köln, (TUP-Productions) (Dissertation), 2003, 84, <http://ub.unibw-muenchen.de/dissertationen/ediss/perger-tilmann/inhalt.pdf>, [10.09.10].

147 *Schmidt R.*, Schuldrecht Besonderer Teil II _ Gesetzliche Schuldverhältnisse, 1. Auflage, Grasberg bei Bremen, Rolf Schmidt GmbH, 2003, 190-191.

148 *Shengelia R.,* Property Damage and Liability of its Compensation, Tb., 1991, 4 (In Georgian).

149 About the mentioned, see *Münch H.*, Der Schutz des Einzelnen vor Presseveröffentlichungen durch den Deutschen Presserat und die britische Press Complaints Commision, Eine Untersuchung zur Spruchpraxis unter besonderer Berücksichtigung des zivilrechtlichen Rechtsschutzes der Privatsphäre (Dissertation), Konstanz, 2001, 124-126.

150 *Schmidt R.*, Schuldrecht Besonderer Teil II - Gesetzliche Schuldverhältnisse, 1. Aufl., Grasberg bei Bremen, Rolf Schmidt GmbH, 2003, 192.

abusing of own rights and physical and mental (spiritual) suffering.[151] In addition, the issue of guiltiness shall be examined, which relates to the determination, whether the person is able to undertake the responsibility by own property, or not.[152] Thus, in accordance with the general rule, the principle of presumption of guiltiness of damage injurer is used in Civilistics (*lat. Iuscivile*), according to which the damage injurer is considered as guilty, if he does not prove the moment of non-existence of guilt. Therefore, the burden of evidence shall be distributed between the parties.[153] In addition, the person enjoys the right to claim compensation for non-property damage (part 6 of article 18 of the CCG), only in case of guilty infringement. However, if the fact of abusing of honour and dignity is not proved, then there is no basis for even using of this norm.[154] Moreover, non-property damage shall be compensated in cash, in line with the amount set by the court, regardless the fact, whether the property damage, together with non-property damage, takes place or not, and whether the latter is compensated or not.[155]

However, exceptional rule is also known in Civilistic, where the responsibility for non-property damage may be assigned even without any guiltiness. One of the cases, when the civil legal responsibility for non-property damage may be placed without any guiltiness, is illegal placing of criminal responsibility during detaining or illegal imposition of administrative fine towards the person, as well as dissemination of notes, infringing the honour, dignity and name.[156] In addition, the public servants, together with the state, undertake the joint responsibility in case of guilty abusing of dignity. In given case it is expedient to consider the article 413 of CCG in relation to article 1005 of the CCG.[157]

The non-property damage shall be compensated in reasonable and fair manner (section 1, article 413 of the CCG). Determination of reasonable and fair compensation is evaluative and shall fully depend upon the court's opinion. In addition, during examination of a case the court shall take into account other, much objective, circumstances; however, in the process of defining the volume of compensation of non-property damage, the court cannot exceed the scope of plaintiff's claim.[158]In addition, the heaviness of damage, as well as the grade of guiltiness is decisive during compensation of damage. The light feelings and physical pains will not be taken into account. The property condition of parties shall be taken into

151 *Barabadze N.,* The Basics for Origination of Compensation Right of Moral Damage, "Human and Constitution", No.3, 2005, 69-71 (In Georgian).

152 *Schmidt R.*, Schuldrecht Besonderer Teil II _ Gesetzliche Schuldverhältnisse, 1. Aufl., Grasberg bei Bremen, Rolf Schmidt GmbH, 2003, 192, About Forms of Guiltiness (Intention and Negligence), see *Schlechtriem P.*, Schuldrecht Allgemeiner Teil, 5., neubearbeitete Aufl., Tübingen, Mohr Siebeck, 2003, 169-173. About Negligence, see *Hütte F., Helborn M.*, Schuldrecht Allgemeiner Teil, 3. Aufl., Bremsen, Verlag Rolf Schmidt GmbH, 2005, 204, 206-207 (In Georgia).

153 *Chikvashvili Sh.*, Delictual Liabilities, see "CCG Comments" (editor: *Chanturia L.,*), B. IV, Vol. II, Tb., 2001, 378-387 (In Georgian).

154 SCGD 19.03.2007 (No.as-385-780-06) (In Georgian).

155 See *Chikvashvili S.,* Tort Liabilities in Civil Law, in Anniversary Edition Dedicated to 80th Anniversary of Faculty of Law of Tbilisi State University: "Topical Problems of State and Law", Tb., 2003, 188 (In Georgian).

156 *Barabadze N.*, The Basics for Origination of Compensation Right of Moral Damage, "Human and Constitution", No.3, 2005, 72-73 (In Georgian).

157 *Barabadze N.*, The Moral Damage and Problem of its Compensation, Tb., 2012, 196, 210 (In Georgian).

158 See Common Practice of Supreme Court of Georgia, with Regard to Civil Cases, Tb., July 25, 2007, 14-15 (In Georgian); *Mästle T.*, Der zivilrechtliche Schutz vor sexueller Belästigung am Arbeitsplatz, Berlin, Duncker und Humblot GmbH, 2000, 44.

consideration as well, in order to prevent the person from getting into the heavy financial state[159] and compensation of non-property damage does not become the source for unreasonable enrichment.[160] The functional approach is significant here, that considers compensation of damage in the amount, which will be sufficient for "reasonable consolation" of a person.[161] Therefore, often, the compensation of damage, as well as reparation of non-property damage will always be of compensative nature.[162] The cash compensation is only the surrogate, but not the direct reparation tool. The cash remuneration cannot be equivalent to the intangible damage, because equalization of moral and money is inadmissible.[163]

Therefore, compensation of non-property damage has symbolic meaning. In addition, the sphere of research of jurisprudence shall be the reflection of objective forms of damage. Although, this may be compensation, however, in exceptional cases, the civil legal relationship exists even following infringement,[164] i.e. it implies the protective relationships as well.[165] It is obvious that compensation of non-property damage cannot be suitable for the compensation receiver. Accordingly, the compensative function cannot be implemented completely.[166]Therefore, the prevention shall become the primary function for the protection of intangible benefits, following which achievement of compensative function shall bear the symbolic meaning.

5. Conclusion

Thus, none of the above mentioned theories can fully explain the essence of human's dignity. However, they are based upon various signs of human reality, which, taken together, may give certain hints for defining the essence of dignity. First of all, the human dignity is acknowledged as the most primary value, in line with each concept, and its possessor shall necessarily be a human being. The concept of human dignity is criteria for individual evaluation.[167]The idea of dignity is claim of elementary honour of human, which creates the precondition for any normative liability and equally applies to all the humans, regardless the differences.[168] In addition, the concept of human dignity is of wide scale, because it is the basis for axiological components of understanding of human rights; it is obvious that, indicating the dignity, as the source of rights, human rights, based on their humanity, do not belong to *homo sapiens* species in biological essence, but represent the ensemble of biological, social and cultural values, which create the worthy life of human being in mankind. Thus, the human

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159 *Chikvashvili Sh.,* The Responsibility for Moral Damage, Tb., 2003, 96-98 (In Georgian).

160 SCGD 03.12.2009 (Case No.as-440-754-09) (In Georgian).

161 See *OgusF. I*, The Law of Damages, L., 1973, 195 (In Georgian).

162 See *Ninidze T.,* Moral Damage in Civil Law, "Soviet Law", No. 2, 1978, 45, 50, 54-55 (In Georgian).

163 *Rtskhiladze Gr.,* Compensation of Moral Damage, "Soviet Law", No. 4, 1928, 81 (In Georgian).

164 *Vershinin A.*, Protective Material-legal Relationships and the Right of Remedy, Scientific Conference Materials: "Issues of Theory on Protective Legal Relations", Yaroslav, 1991, 36 (In Russian).

165 *Yoffe O.*, Personal Non-property Rights and their Place in the System of Soviet Civil Right, "Soviet State and Law", №7, 1966, 53 (In Russian).

166 See Common Practice of Supreme Court of Georgia, with Regard to Civil Cases, Tb., July 25, 2007, 14-15 (In Georgian).

167 *Lebech M.*, What is Human Dignity? Maynooth Philosophical Papers, Maynooth, 2004, 64-66, 63.

168 *Bielefeldt H.*, Menschenwürde: Der Grund der Menschenrechte, Berlin, 2008, 34.

rights, first, are rights on human's dignity. Moreover, as compared with the concept of human rights, the concept of dignity clearly accentuates that it is normative measure for defining the welfare of individuals. The human dignity is considered as normative source for other persons, owing to the claim of fulfilling of obligations generated from human rights.[169]

It has to be mentioned that the dignity is specific phenomenon, because it involves the real and ideal basics, the synthesis of which gives something new, in which the specific nature of dignity is manifested. Exactly, based on the above mentioned, the dignity is universal. This, itself, considers that it may imply and ensure other personal rights, which have especially wide nature in the private law. It is more obvious, if private legal means of protection are taken into account. In this regard, the scope of civil legal concept of dignity is wide. As compared with the private law, the constitutional legal concept of dignity is of narrow nature and, actually, is expression of public legal concept of dignity.

The dignity, in civil legal terms, includes the areas, which relate to the honour, business reputation, name, personal life, authorship, activities, identity, self-evaluation, physical and moral inviolability, intimacy, self-determination, or the personal expressions of relation to socium. This is general definition of dignity, by which listing of all sides of dignity is possible; however, the mentioned aspects, considered in dignity, create particular frameworks for the dignity concept. In addition, the less are signs of any phenomenon, the wider this phenomenon is. Accordingly, the scope of the private legal concept of dignity shall be comprehensive.

In the meantime, the civil legal concept of dignity relates to extensive protection of damaged person. The tools for protection of civil rights are considerable here, taking into account specific preconditions. In this regard, the functions of civil responsibility for law violation are significant; the compensatory function is emphasized among these functions, however, it acquires the symbolic meaning in given case, due to impossibility of transmission of damage in objective forms. Therefore, achievement of prevention shall be determined as the basic function of civil responsibility for damage. The means of right of dignity protection are so extensive that it creates sound and effective mechanisms for ensuring the dignity.

[169] *Stepanians M.*, Gleiche Würde, gleiche Rechte, in: *Stoecker* (Hg.): Menschenwürde - Annäherungen an einen Begriff, öbv & hpt, Wien, 2003, 52.

Nona Zubitashvili*

Assessment Standard of the Article 3.6 of Law of Georgia on Entrepreneurs from the View of Corporate Veil Piercing Doctrine

1. Introduction

Paragraph 6, article 3 of Law of Georgia on Entrepreneurs (hereinafter referred to as LGE) the normative basis for the personal liability of the shareholder for the debts of company. Namely, according to the above mentioned article, the shareholder will not be able to protect himself from the company's creditors, if he/she abused the legal forms of limited liability.[1] Despite the fact that there is no precedent for the definition of above provision in the practice of Supreme Court of Georgia, the interest towards the veil piercing responsibility in the corporation is high in the scientific circles as well as among the practicing legal professionals.[2]

There are cases discussed in the Georgian legal literature, where the courts of countries with developed legal system pierce the corporate "veil". Namely such cases include: under capitalization of the company, disregarding the corporate formalities and commingling of assets.[3] Taking into account the above circumstances it is important to define the inter-relationship between the misuse of the forms of limited liability, which is the only legislative basis for the personal responsibility of the shareholder under the Georgian legislation, and the doctrine of corporate veil piercing. In particular, it is important to define whether the doctrine on the corporate veil piercing responsibility covers the circumstances envisaged under the law on entrepreneurship and which standards shall be used by the courts for the assessment of shareholders' conduct Above discussed is the subject of the present article.

The purpose of the present article is to define circumstances, which should be examined by the court incase of misuse of the limited liability and define the possible standards of assessment. The abovementioned will be discussed based on the comparative analysis of corporate veil piercing doctrine and principle of limited liability. Research outcome shall facilitate development of corporate veil piercing doctrine as the legal mechanism protecting the interests of creditors in the Georgian courts.

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

1 Published in the herald of Parliament of Georgia, 1994 year, #21-22, article 3.6 (In Georgian).

2 This term has been established (In Georgian) legal literature in 2009; See *Burduli I.,* Statutory capital and its functions, in the collection of works – Theoretical and practical issues of modern corporation law, Tb., 2009,236(In Georgian). Up to date there are only two cases in the practice of Supreme Court of Georgia (SCG), where the cassator was indicating on the abuse of legal forms of limited liability; however the court has not provided any definitions regarding this issue in any of the above cases. See judgment No as-1162-1091-2013, dated 07 March 2013 and judgment No as-286-272-20132013, dated 13 May 2013.

3 *Gulashvili N.,* Piercing Corporate Veil as the Special Measure for the Protection of Creditors in the Context of Relationship of Parent-subsidiary Corporations (according US and Georgian corporate law), Collection of Works on Corporation Law, edited by *Burduli I.,* Tb., 2011, 83-85 (In Georgian).

2. Substance of the Limited Liability Principle

Principle of limited liability is the part of private law system. Accordingly, it is not specifically the achievement of corporate law, it characterizes the whole private law system. The above mentioned along with the examples discussed below is confirmed by the fact that development of limited liability was not historically connected with the development of corporation forms. For example, in antique Rome, despite the fact that there actually were associations of persons, as well as legal mechanisms for the limitation of civil liability, these two concepts were never connected to each other.[4]

According to the general principle of private law the person directly committing the actions causing the damage is responsible against the creditor. Despite the above, as an exception from the general principle, there are several examples of liability attribution that exclude the liability of one subject determining the liability of other subject for the actions of the above subject. First it excludes the liability of one subject and defines the responsible person, who although is not direct executor of action, however by virtue of law the action raising responsibility is attributed to this very person. In case of civil liability of corporation we are dealing with this example of liability attribution. Second, the liability of one subject is excluded and the liability of other person is determined, but the action causing the liability is not attributed to the latter In this case civil liability of the second person is caused not by committing the action directly causing the damage, but by the violation of civil obligations.

The above violation of civil obligations is then followed (as a result) by the action causing the damage committed by the first person. This version of limited liability is established in the tort law – namely for the reimbursement of damage caused by immature or incapable person.[5] The third manifestation excludes the liability of one person and determines the liability of second person, due to the agreement executed between these two persons. The example for the above is the insurance agreement, when in exchange of the insurance premium person limits his civil liability towards the third parties.[6]

However, none of the above manifestations are unlimited. Person cannot enjoy the privilege granted by the insurance agreement if he caused the damage with the intentional unlawful action.[7]Indeed the liability of immature or incapable person remains limited in the tort law; however, the liability of person responsible for the supervision is not also generated, if the latter could not prevent the damage even providing due care and diligent supervision. It can be stated, that private law provides the privileges of limited liability in case when person acts in good faith, with due diligence standards.

To summarize, it can be noted that principle of limited liability is not the general rule of private law, on contrary - this is the exception from the general rule. In the light of the above thesis the corporate veil piercing doctrine shall be considered as fully ordinary mechanism.

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[4] *Hillman R.,* Limited Liability in Historical Perspective, Washington and Lee Law Review, Vol. 54, 1997, 616.

[5] For example: Civil Code of Georgia (CCG), articles 994 and 995 (In Georgian).

[6] CCG, Article 839 (In Georgian).

[7] CCG, Article 842 (In Georgian).

2.1. Legal Analysis of the Limited Liability Principle

Unlike the criminal law, which via the criminalization of offence sets the liability for the unlawful action, the private law establishes the liability but do not criminalize the action causing the liability. Private law is based on the principle, where persons in horizontal relationship decide themselves on the issue of liability. For example, breach of the contract obligation by debtor does not automatically cause his liability (even in case if the fine was considered for the breach). The liability of private debtor is not imposed until the creditor requests reimbursement of loss or payment of fine/penalty. In other words, the raising claim by the creditor causes debtor's liability; however the creditor has right and not the obligation to claim,

As mentioned above, private law provides the privileges of limited liability in case when person acts in good faith, with due diligence standards. There is a position in the modern legal literature, based on which boundaries for the effectiveness of limited liability principle should be limited by the public policy.[8] The response of public policy toward the application of limited liability expressed via the granting the immunity to the shareholder or withdrawal of such immunity, shall be based on the relevant reasoning. Following examples clearly demonstrate the role of public policy in the process of application of limited liability: a) Several persons have invested significant funds with the purpose to jointly carry out entrepreneurial activities. They desired to achieve success, however they did not want to risk with their own properties; therefore they have chosen the liability limiting organisational – legal form. They were managing business in a responsible manner; however business failed. In this case, public policy shall allow the use of privileges based on the liability limitation principle.[9]Such response of public policy is justified, as any entrepreneurial activity is related with the economic risks. In this case evaluation should be made based on how the shareholders were managing the risks accompanying the company activities; in particular, whether the company shareholders were approaching such risks reasonably and responsibly) Several persons used the legal form of limited liability not to achieve business success, but simply to become rich at the expense of creditors. In this case legal form of limited liability is used as a mechanism for getting profits via the fraudulent ways. In such circumstances public policy shall not give immunity from liability to the shareholders.[10]The action described in this example, with its composition, may be closer to the criminal offence than with the actions envisaged under the private law.[11] Therefore, it is logical that public policy criminalizes such an action. However, public policy shall also ensure effective and efficient protection of creditors' interests. Activation of shareholders unlimited liability as a result of his/her criminal responsibility is not effective mechanism for the above purpose. According to Georgian criminal law, satisfaction of creditors' interests will be realized only after the decision imposing criminal liability becomes effective. And the above will not be implemented automatically, only after the creditor, as the person recognized as the injured person in criminal case, takes to the court the civil claim,[12] following the satisfaction of the claim and legal effectiveness of such satisfaction. It has to be also noted that according to the common practice of Supreme Court of Georgia, the court decision

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8 *Gelb H.,* Limited Liability Policy and Veil Piercing, 9 Wyo. L. Rev. 551, 2009, 552.

9 Ibid, 553.

10 Ibid, 553.

11 Compare, Criminal Code of Georgia, article 2051 (In Georgian).

12 Criminal Procedure Code of Georgia, Article 217 (In Georgian).

on the criminal case enjoys prejudice in relation to the civil case only with regard to the fact of offence commitment and not in the section of damage volume or other factual circumstances.[13]In other words, due to the complaint of creditor recognized as the person injured under the criminal law case, the court on civil case only considers the fact of criminal offence – fact of fraud committed by the shareholder on behalf of the company - covered under the criminal case court hearing, as for the proving of the scope of damage incurred as a result of fraud – is the creditor's burden. As it is clear, criminal law mechanism is only the precondition (dragged in time) for the creditor of commercial legal person for getting reimbursement of damage inflicted by the unlawful actions of the shareholder via the civil case processing. Due to the above inefficiency, it is expedient to have the system where the public policy provides creditor with the alternative means for the reimbursement of damages via the civil case processing using the veil piercing doctrine) Several persons form a commercial legal entity to go into business together and make profit but want to risk little or none of their investments. Their goal is to try to develop a successful business but lose nothing, leaving all risks to the creditors of the business. In this case public policy shall give immunity from liability only in case if the shareholders properly disclose to the creditor the financial position of the company and with the consideration of the above information creditors still invest in the business and by this way consciously undertake the risks accompanying the limited liability of shareholders in case of business failure.[14]

Legal analysis of principle of limited liability cannot avoid the concept of corporation personality, entity. In this regard, it should be noted that principle of limited liability is not the main characteristic of legal personality, legal forms with unlimited liabilities also enjoys separate legal personality It is noteworthy that principle of liability limitation is not unconditional instrument. Every more or less developed legal system acknowledges the reality where the forms of limited liability can be misused and such system tries to prevent the above via the imposing of civil or criminal liability. Moreover, limitation of liability via the organizational –legal form is not the unique tool. Law has applied the mechanism for the insuring the liability. Accordingly, the persons involved/united in the-legal forms with unlimited liability can insure almost any type of liability, including professional liability which becomes the alternative to the principle of limited liability. [15] However, by using this alternative the partnership type organization will not reinforce or weaken the level of its legal subject. It has to be also noted that, like the corporate-legal mechanism – limitation of liability, as well as the insurance of liability is not an unconditional mechanism. The fundamental principle of insurance law is that damage caused by the unlawful and intentional actions of the person is not subject to reimbursement.[16] Accordingly, in such cases person is not provided with the privilege of limited liability via the insurance.

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[13] See for example Judgment #238-224-10, Supreme Court of Georgia, dated 2010, the court indicated that prejudicial power is granted only to the action committed by the person identified by the summarizing decision which is valid and made on the criminal law case; the burden of proving of material and moral damage inflicted via such action is assigned to the claiming party for the civil case (In Georgian).

[14] *Gelb H.,* Limited Liability Policy and Veil Piercing, 9 Wyo. L. Rev. 551, 2009, 552.

[15] *Halpern P., Tribelrlock M., Turnbull S.,* An Economic Analysis of Limited Liability in Corporation Law, 30 U. TorontoL.J. 117, 1980, 138.

[16] Civil Code of Georgia, Article 842 – (In Georgian).

3. Preconditions of Piercing the Corporate Veil and Standards for their Assessment

3.1. Origins of Development of Veil Piercing Doctrine

„Piercing the corporate veil", which is today the internationally acknowledged term, was established in the legal literature by American ***professor Mouice Worsmer***.[17]According to his concept the court should not be bound with the fiction of legal entity and for any specific case court should determine the real nature of artificial entity, ***Professor Worsmer*** was not declining the theory of the independent and separate legal personality; however, he was of the view that making cult of the fiction of legal entity was related to the high risk, as its unconditional admission in the court's practice would encourage the judges to base all further cases on the abovementioned fiction, without any investigation of company's real nature, which is not reasonable, as principle of limited liability provide the opportunity to misuse the privilege for the achievement of unlawful and unfair goals.[18] ***Professor Worsmer*** did not consider the uncertainty, of veil piercing as the weakness of doctrine; in contrary, he was of the view that codification of preconditions for the corporate veil piercing would be mistake.[19]Despite the above he was distinguishing the circumstances, existence of which would not be sufficient for piercing of corporate veil. For example, according to Worsmer's theory for piercing of corporate veil it is not sufficient that two corporations have identical shareholders or when one corporation is participating in other corporation by 100%, or when related corporations are implementing identical activities. Piercing of corporate veil should only be applied in cases when the factual circumstances reveal that one corporation is used for the achievement of unfair and unlawful goals, including avoiding the existing legal liabilities, by another subject.[20]

It can be stated that one of the earliest and at the same time significant precedents in USA is the case *United States vs. Reading Co.*[21] In the case United States in accordance with the anti-monopoly statute (according to which the transportation of the following type goods by railway to oversees is considered as unlawful – goods owned partially or fully by the railways; goods produced or obtained by the railway or railways had direct or indirect interests towards the goods to be transported) raised the claim against the Railway Company of Reading. On the other hand, Reading Railway Company was part of the complex corporate structure. Namely, Reading Co. had established company producing coal. The latter was also the subsidiary company of the holding company which also owned Reading Co. The court applied concept of piercing of corporate veil and reviewed three companies acting behind existing corporate structure as one legal entity.[22]

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[17] *Wormser M.,* Piercing the Veil of Corporate Entity, Columbia Law Review, Vol.12, No. 6, 1912, 496.

[18] *Presser S.,* Piercing the Corporate Veil, 2011 Edition, 35.

[19] Ibid, 36.

[20] *Wormser M.,* Disregard of the Corporate Fiction and Allied Corporation Problem 1927, reprinted 2000, by Beard Books, Law Classics series, 55-56.

[21] *United States v. Reading Co*. 253 U.S. 26 (1920), Quotation: *Krendl C., Krendl J.,*Piercing The Corporate Veil: Focusing The Inquiry, Denver Law Journal**,** Vol. 55, No. 1, 1978, 3.

[22] *United States v. Reading Co*. 253 U.S. 26 (1920), Quotation: *Krendl C., Krendl J.,*Piercing The Corporate Veil: Focusing The Inquiry, Denver Law Journal**,** Vol. 55, No. 1, 1978, 3.

New-York appeal court and later judge of the Supreme Court of United States, Benjamin Cardozo have played important role in the development of Veil Piercing doctrine. In 1927 the judge Cardozo reviewed case *Berkley vs. Third Avenue Railway Company,* [23] the issue of veil piercing was raised for the purpose of reimbursement of incurred loss in the context of parent subsidiary companies. In order to prove that the subsidiary company did not have independent legal existence, the party was indicating to number of facts. Attention was focused on the fact that the car, which caused the damage, had the name of parent company unscripted. Moreover, the report of parent company was submitted to the court, in which subsidiary company was mentioned as the part of parent company's structure; employees of both companies were considering the employers as identical companies; and it was noted that parent company provided the subsidiary company with the loan. Judge Cardozo did not consider above mentioned facts sufficient. He determined that subsidiary company had a separate bank account, used for salary settlements; company possessed its own property and certain level of separation.[24]

In the first half of 20th century, in parallel with Maurice Worsmer and Benjamin Cardozo, Professor Frederic Powell was also working on the issue of veil piercing responsibility. His concept, unlike to Worsmer's concept, is based on the need of unification of basis for the veil piercing; he implemented such unification in the book printed in 1931 year.[25] Despite the fact that Powell was conducting systemisation in the context of parent-subsidiary corporations, it was also used for the application of shareholder's personal liability.[26]According to the theory developed by him, in the context of parent-subsidiary corporations there are at least three stage tests, which must be in place in full for the application of corporate veil piercing doctrine. At the first stage it must be checked whether the parent company constitutes the subsidiary company's alter-ego or the subsidiary company represents the instrument in the hands of parent company or in other words full control from parent company and full domination over the subsidiary company should be existed. At the second stage the presence of fraudulent and unlawful actions or unfairness must be determined, which requires to have parent company acting via the use of subsidiary company, it must be unfair, fraudulent and unlawful with the claimant company. At the last, third stage it must be checked whether the damage was inflicted to the claimant as a result of actions detected at the second stage.[27]

In England for the indication of "piercing the corporate veil" is used the term "lifting the corporate veil". The famous decision of the House of Lords of England, dated 1887 year on the case Salomon vs. Salomon and Co, established the foundation for the development of doctrine of piercing the corporate veil. In this case the Lord Halsbury , based on the theory of fiction, rejected the possibility to pierce the corporate veil. Decision was based on the following reasoning: the company at hand, had been established in accordance with the legislation (Company Act 1862), it despite the

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[23] *Berkey v. Third Avenue Railway Co* 244 N.Y. 602 (1927), Quotation: *Presser S.,* Piercing the Corporate Veil, 2011 Edition, 27.

[24] Ibid, 28-29.

[25] *Powell F.,* Parent and Subsidiary Corporations: Liability of a Parent Corporation for the Obligations of its Subsidiary, 1931, See*Krendl C., Krendl J.,* Piercing the Corporate Veil: Focusing the Inquiry, Denver Law Journal**,** Vol. 55, No.1, 1978, 5-7.

[26] *Presser S.,* Piercing the Corporate Veil, 2011 Edition, 40.

[27] Ibid, 41.

artificial nature, in terms of law, became the independent entity and separate from its members.[28] This decision stimulated the development of veil piercing doctrine. Starting from the first half of 20th century the doctrine veil piercing has been actively applied. Judge Lord Denning has played important role in the development of corporate veil piercing doctrine in England.[29] Establishment of Single Economic Unit theory is connected with his name. In the case DHN Food Product Distributors LTD vs. Tower Hamlet London Borough Council, Lord Denning characterized connection between three companies as Single Economic Unit. According to his view, this type of connection with its nature is similar to partnership. Shareholders involved in this unit should not be considered by the law as the subjects of disputable legal relationship.[30]

And finally, there is no basis to affirm that initially the veil piercing doctrine was developed in and spread from one specific legal system. There is higher probability that different national law systems in their development process reached the phase, where it was necessary to introduce legal tool against the limited liability.

3.2 Preconditions for Veil Piercing in Various National Law Systems

3.2.1. Basis of Veil Piercing in USA

In USA the veil piercing has three preconditions: first – domination and control, which may be manifested in the form of inadequate capitalisation, disregarding of corporate formalities, comingling, identical directorates or / and other circumstances. The second precondition is fraud and misuse of corporate form. Third precondition is represented in causality (cause and effect). On its own, separately taken single precondition or circumstance is not sufficient for the veil piercing responsibility.[31]

On the other hand, the mechanisms for the determination of domination and control are theories of alter-ego, instrumental theory and identity theory, within which the independent bases for the piercing the corporate veil are developed. For example, according to alter ego theory, the corporate veil shall be pierced when we have cumulatively in place the following circumstances: first – the ownership and interest between the corporation and controlling shareholders are so connected that independent existence of corporation's legal subject cannot be in place. Second – consideration of corporation and controlling shareholder as independent subjects will cause unfair result.[32]

Instrumental theory is based on three circumstances. First – control not only at the cost of majority of shares, but also domination, which is demonstrated in the control over finances, as well as in the determination of policy and direction of activities, which excludes the existence of corporation as

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28 *Salomon v A Salomon & Co* Ltd [1897] AC 22.

29 *Cheng T.,* A Comparative Study of The English and The U.S. Corporate Veil Doctrine, Boston Collage International and Comparative Law Review, Vol. 34, 2011, 334.

30 "[t]his group is virtually the same as a partnership in which all the three companies are partners. They should not be treated separately so as to be defeated on a technical point." *DHN Food Distributors Ltd v Tower Hamlets London Borough Council* [1976] 1 WLR 852.

31 *Duglas S.,* Piercing the Corporate Veil in Regulated Industries, 2008 BYU L. Rev. 1165, 2008, 1196-1182.

32 *Cox J., Hazan T.,* Business Organizations Law, 3rd ed., 2011, 127.

independent legal subject. Second – such control and domination is implemented by the shareholder for cheating, avoiding lawful or contractual liabilities and equals to the unlawful and unfair actions against the rights of claimant. Third – there must be causal (cause and effect) relationship between the control and action.[33] Hence, modern version of instrumental theory is based on Professor Powell's approach.

Theory of identity repeats the accents of the previous two theories and determines that there must be in place such connection between the ownership and interest, which excludes the existence of independent legal subject. With such connection in the background, fiction of existence of independent legal subject allows the Single Economic Unit to avoid responsibility at a cost of other subject for the benefit of united enterprise.[34] Theory of identity allows raising the personal responsibility of controlling person notwithstanding the fact whether he holds the status of shareholder or not.

In the modern legal literature the position that for the determination of unlawful domination and control in the context of parent-subsidiary companies examination of four factors was sufficient, was expressed. Namely, parent company: daily participates in the activities of subsidiary company, determines policy of the subsidiary, makes important decisions avoiding the directors of the subsidiary company and gives instructions to the employees of the subsidiary company.[35]

Control and domination, which is common for all three theories, is mainly demonstrated in the form of inadequate capitalisation, violation of corporate formalities and confusion of properties. Moreover, there might be in place the overlapping of board of directors and centralised location in case of group of companies.[36] However, the last two factors might be united in the group of generally deceiving actions or violations of corporate formalities.

For the determination of inadequate capitalisation, first of all, it must be determined what volume of financing shall be considered as adequate. There is not straightforward definition of adequate capitalisation; however some type of formula has been developed through the court practice. According to this formula, the volume which would be considered as reasonable volume by the smart and prudent person with the general knowledge of specific business area and with the consideration of special circumstances present in the moment of incorporation is considered as adequate.[37] According to other definition, the volume which is reasonably adequate to the expected requirements of the business is considered as adequate capitalisation; the nature, size and risks related to the activities of corporation must also be taken into consideration.[38]

There is also view in the court practice, according to which for the definition of underca-pitalization the disputable data shall be compared with the average capitalisation levels of other

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[33] *Cox J., Hazan T.,* Business Organizations Law, 3rd ed., 2011, 127

[34] Ibid, 128.

[35] *Blumberg P.,* the Law of Corporate Groups: Problems of Parent Subsidiary Corporations under Statutory Law of General Application, 1989, 188.

[36] *Gevurtz F.,* Corporation Law, 2nd ed., 2010, 75-78.

[37] *Castro S.,* Undercapitalization as a Factor in Piercing the Corporate Veil in Contract Cases: Balancing Risks and Incentives, Philippine Law Journal, Vol. 74, 2000, 641.

[38] "If the capital is illusory or trifling compared with the business to be done and the risk of loss, this is a ground for denying the separate entity privilege" Quotation: *Vandervoort J.,* Piercing the Veil of Limited Liability Companies: The Need for a Better Standard, *3 DePaul Bus. & Comm. L.J. 51,* 2004, 61.

corporations operating in the same area based on the publicly available information.[39] Although it is fact that even the different corporations functioning in the same area are not guided with the same reasoning in the process of capital formation. Therefore, these standards must be used independently. The above can be used as the initial point; however the court must make final conclusion based on the reasonable judgment with the consideration of existing legal and economic circumstances.

According to the position dominating in the scientific circles, inadequate capitalisation may become the basis for the corporate veil piercing only for the benefit of non-voluntary creditors, whose right of claim was generated as a result of tort.[40] The logic of this position is that contractual creditor has opportunity to preliminarily consider the financial condition of corporation. If the financial condition of corporation raises doubts and creditor still concludes the contract with the corporation then the risks of possible negative results are extended to the above creditor. However, the court practice does not share the above position. As early as by the end of 80-ies of 20th century, as a result of empirical research conducted by professor Robert Thompson it was revealed that piercing the corporate veil on the basis of inadequate capitalisation in favour of contractual creditors takes place in 5% more cases compared with the similar situation with the non-voluntary creditors.[41]According to the results of empirical research conducted in 2010, the number of cases where piercing of corporate veil took place in favour of contractual creditors on the basis of inadequate capitalisation equalled to 30, 75% (in 35 cases out of 114 cases the corporate veil piercing was applied), and piercing of corporate veil in favour of non-voluntary creditors – in 15% of cases (6 cases out of 40).[42]

Based on the generalisation of court practices the following cases can be considered as equal to the violation of corporate formalities: the meetings of shareholders are not held; shareholders do not use their authority to appoint directors; meeting minutes are not drafted; rules for documentary recording and description of transactions between the shareholder and corporation are violated. However, the above circumstances separately are not independent bases for corporate veil piercing.[43] Similarly, adherence to the corporate formalities does not guarantee that corporate veil piercing will not take place, if other circumstances justify such piercing. The key component of corporate veil piercing is control or unlawful manipulation. This very component creates link between the actions of two subjects.[44]

As for the confusion of properties, in USA it is considered that single transfer of property between the shareholder and corporation is not the basis for the corporate veil piercing even if the offered price is lower than market price or counter compensation has not been paid at all.[45] However, it would be more correct to make assessment with the consideration of numerous facts of property

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39 *Castro S.,* Undercapitalization as a Factor in Piercing the Corporate Veil in Contract Cases: Balancing Risks and Incentives, Philippine Law Journal, Vol. 74, 2000, 643.

40 *Gevurtz F.,* Corporation Law, 2nd ed., 2010, 90-95.

41 *Thompson R.,* Piercing the Corporate Veil: An Empirical Study, *76 Cornell L. Rev. 1036,* 1991, 1046-47.

42 *McPherson R., Raja N.,* An Empirical Study of Piercing Rates and Factors Courts Consider when Piercing the Corporate Veil, *45 Wake Forest L. Rev. 931,* 2010, 965.

43 *Cox J, Hazan T.,* Business Organizations Law, 3rd ed., 2011, 128-29.

44 Ibid.

45 *Gevurtz F.,* Corporation Law, 2nd ed., 2010, 85.

transfers, but with the consideration of importance of property for the company and its value compared with the remaining assets of the company.

In USA adherence to the rules on the maintenance of accounting books and financial reports are also focused under the context of confusion of the properties. If the documents are maintained in the way that it is impossible to determine the owner of the property, it is deemed that we are dealing with the confusion of properties.[46] For example, in the case Penick vs. Frank E. Basil Inc the court did not satisfy the request for corporate veil piercing based on the fact that relationships between the parent-subsidiary were transparent. For the above case, employee of subsidiary company was requesting the responsibility of parent company due to the termination of labour agreement. The court decided that relationship between the companies was satisfying the standard of so called "open hand", as both of them were independently and transparently maintaining the financial accounting and the confusion of properties was not present.[47] For the other case, two closed type corporations were present, which were controlled by one individual partner. Companies had identical address, telephone number, office and manager, however accounting books and financial reports were maintained independently and in compliance with rules. Due to the above fact – it was possible do differentiate the companies in financial terms – the court rejected possibility to use doctrine on corporate veil piercing.[48]

Literature does not discuss the issue of solidary responsibility of dominating and minority shareholders. The only matter with the agreed position is that passive shareholder shall not be responsible together with the dominating partner, if wrong action from the passive shareholder is not confirmed.[49] What to consider as correct or wrong action of minority shareholder in the "process" when the dominant shareholder is abusing the corporation form, is not defined in the doctrine. Solidary responsibility of dominant and minority holding shareholders may become relevant in case, when inaction of minority shareholder causes negative outcomes for the company and creditors under the conditions when the shareholder has right and liability to apply the effective measures. This issue in light of Georgian legislation will be discussed below.

Despite the diversity of basis and assessment standards for the corporate veil piercing in USA, it is acknowledged that veil piercing is an exceptional mechanism, which must be applied only in cases when the corporate form is used as a shield without lawful business goals.[50]

For the summarization purposes, it must be noted that in the analysis of corporate veil piercing the court along with other facts evaluates the following circumstances: 1. Joint ownership; 2. Wide control; 3. Overlapping of entrepreneurial activities; 4. Inadequate capitalization (undercapitalization); 5. Insolvency of corporation at the moment of transaction implementation; 6. Non-adherence to the corporate formalities; 7. Appropriation of corporation finances by the dominant partner; 8. Violation of rules related to the accounting books and financial accounting; 9. Use of corporation for the

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[46] *Atling C.,* Piercing the Corporate Veil, In American and German Law – Liability of Individuals and Entities: A Comparative View, 2 Tulsa J. Comp. 7 Int'l L. 187, 1995.

[47] *Penick v. Frank E. Basil, Inc.*, 579 F. Supp. 160 (D.D.C. 1984).

[48] *Amsted Industries, Inc. v. Pollak Industries, Inc.*, 382 N.E.2d 393 (I ll. App. Ct. 1978).

[49] *Gevurtz F.,* Corporation Law, 2nd ed., 2010, 78.

[50] *Strasser K.,* Piercing the Veil in Corporate Groups, 37 Conn. L. Rev. 637, 2005, 650.

implementation of dominant partner's transactions; 10. Use of corporation for cheating.[51] Above listed and other circumstances must be assessed in complex and only after the confirmation of relevant basis the piercing of corporate veil shall be undertaken.

3.2.2. Basis for Veil Piercing in Germany

In Germany doctrine of veil piercing -*"Durchgriffshaftung"* has been developed through the court practice. The factors determining *"Durchgriffshaftung"* are similar to the *piercing the corporate veil* case. In particular, these factors are: confusion of properties, non-adherence to the corporate formalities, under capitalisation. In the event of domination by one corporation over the other corporation the issue of responsibility is regulated under the Concern law.[52] Similar to USA, where the personal responsibility of shareholder maybe raised for closed Type Corporation and Limited Liability Companies *(LLC),* in Germany corporate veil piercing more often takes place for the limited liability companies *(GmbH)*.[53] If the issue of corporate veil piercing arises within the group of companies, imperative norm regulating the concerns becomes the basis for the responsibility of parent company; the above norms are envisaged under the German Corporate law.[54]Hence, the basis for the personal liability of shareholder is on the one hand, the doctrine developed by the court -*"Durchgriffshaftung"* and on the other hand, Concern law – imperative norms regulating the concerns. Despite the fact that imperative norms are provided in the Corporate law, in 70-ies of twentieth century the German Federal Constitutional Court developed the practice of using the analogues in relation to the limited liability companies (GmbHS).[55] However, in 2001 and following years the Supreme Court changed the above practice. According to the new approach, Concern norms envisaged under the corporate law shall not be extended over the LLC-s. Veil piercing for the LLC-s shall be applied only in cases when the abusing of company form is in place.[56] It has to be noted that imperative norms regulating the activities of concern are based on the same principles of justice as the *"Durchgriffshaftung"* doctrine. In light of this similarity, it would be logical for the German courts to extend the effectiveness of norms of concern law over the cases for which doctrine *"Durchgriffshaftung"* could also be applied.

a) "Durchgriffshaftung" Doctrine

As mentioned above, *"Durechgriffshaftung"* doctrine considers the confusion of properties, non-adherence to the corporation formalities and inadequate capitalization as the factual basis for the

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[51] *Bendremer F.,* Delaware LLC's and Veil Piercing: Limited Liability Has its Limitations, *10 Fordham J. Corp. & Fin. L. 385,* 2005, 390.

[52] *Presser S.,* Piercing the Corporate Veil, 2011 Edition, 1407-1411.

[53] Ibid, 1408.

[54] Ibid, 1408.

[55] Ibid, 1384.

[56] *René Reich-Graefe,* Changing Paradigms: The Liability of Corporate Groups in Germany, 37 Conn. L. Rev. 785, 2005, 790.

application of corporate veil piercing. Federal Supreme court generally determines the veil piercing for the individual shareholder only for the cases on bankruptcies.[57]

Confusion of properties - *"vermoegensvermischung"*– may become the basis for application of veil piercing only in cases when accounting books are maintained in the way that it is impossible to identify the property of the company. German courts do not consider sufficient for the application of veil piercing the fact that property was transferred between the company and the partner. However if the above fact is not properly recorded in the documentation then the veil piercing may be applied.[58]

Non-adherence to the corporate formalities -*"sphaerenvermischung"*– is also basis for the corporate veil piercing; however, only in case if it is confirmed that as a result of such violation creditor was deprived the possibility to identify the counter-agent - for example, when the affiliated companies use the same address or name.[59]

In Germany, similarly to USA, it is acknowledged that in case of inadequate capitalization it is possible to apply corporate veil piercing. Unlike USA, German corporate law considers the mandatory requirement for the initial capital. In light of this difference, the different approach in encountered in terms of inadequate capitalization. Economists are of the view that minimal volume of capital, which would be adequate to the specific business activities, cannot be determined preliminarily.[60] With the consideration of the above position, the notions of nominal and material capitalization are distinguished in the legal literature. Nominal capitalization is in place when the minimal initial capital requirement envisaged under the law is met. Inadequate material capitalization considers the case when the shareholders do not make adequate investments in the business beyond the nominal capitalization level.[61] Hence, complying with the requirement of nominal capitalization is not *apriori* guarantee that the corporate veil piercing is not applied on the basis of inadequate capitalisation.

Inadequate material capitalization is determined via some type of formula. According to this formula, inadequate material capitalization is in place when the financial tools of corporation concerning the specific activities are not adequate. If corporate veil piercing is applied with this basis, it is assumed that all shareholders are solidary responsible, which differs from the approach applied in the American law according to which in case of further inadequate capitalization only the active shareholders are responsible.[62]

It has to be noted that German Corporate law does not differentiate contractual and involuntary creditors in the context of inadequate capitalizations.[63]

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[57] *Atling C.,* Piercing the Corporate Veil, In American and German Law – Liability of Individuals and Entities: A Comparative View, 2 Tulsa J. Comp. 7 Int'l L. 187, 1995, 198.

[58] *Atling C.,* Piercing the Corporate Veil, In American and German Law – Liability of Individuals and Entities: A Comparative View, 2 Tulsa J. Comp. 7 Int'l L. 187, 1995, 199.

[59] Ibid, 218.

[60] Ibid, 207.

[61] Ibid, 207.

[62] Ibid, 210.

[63] Ibid, 210.

b) Concern Law

Along with other issues, Concern law regulates the issues of liability of connected /related businesses against the creditors. The issue of liability is determined by the approach according to which controlling and controlled businesses are considered as "economic unity"[64]

The concern is established when, on the one hand, there is controlling and on the other hand, controlled company. Control is expressed by the possession of majority of shares. In the event of absence of majority shares the control is in place when the minority shareholder implements direct influence based on the contract or significant representation in the supervisory board.[65]

Contractual concern *("Vertragskonzern")* is one of the forms of concerns. The most spread contract forms are so called domination *(Beherrschungsvertrag)* profit transfer contracts. Domination contract provides the controlling company with the right to give directions/ instructions to the management of controlled company. Profit transfer contract makes the subordinated company liable to transfer its profits to other company.[66] In case of both contracts, the controlling company is mandated to reimburse the annual loss to the controlled company. Imperative rules regulating the contractual concerns protect creditors in various directions. For the ensuring of reimbursement of loss incurred by the controlled company, controlling company is liable to create the reserve fund; the contracts must be registered and publicly accessible in the commercial registry, in order to provide the creditors with the possibility to obtain information on the contract. Termination of contract is also subject to registration. In the event of termination, controlling company shall provide the creditors of controlled company, for whom the claim has been generated under the agreement terms, with the claim securitization or guarantee. Creditors are protected by the standards on the protection of duties of key management staff. Members of board of directors and supervisory board are solidary responsible for the violation of standard on due diligence. Obligation to comply with the due diligence standard is also extended to the instructions provided by the controlling company management to the controlled company management.[67]

Imperative norms of corporate law also regulate de facto *("faktischerKonzern")* concern, making the controlling company liable to reimburse any unfavorable transaction to the subordinated company.[68] In case of absence of contract, the board of directors of controlling company are mandated to provide annual report on the relationship with the affiliated company. The report shall cover all transactions implemented in the process of relationship with the affiliated company. In terms of transactions, it has to be explained whether the transactions are favorable or unfavorable for the subordinated company. If the controlling company is subject to the audit inspection, the transaction must be also recorded in the audit

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64 *Jugeli G.,* Protection of Capital in Joint Stock Company, Tb., 2010, 78 (In Georgian).

65 *Miller S.,* Piercing the Corporate Veil Among Affiliated Companies in the European Community and the U.S.: a Comparative Analysis of U.S., German, and U.K. Veil-Piercing Approaches, *36 Am. Bus. L.J. 73,* 1998,101.

66 Ibid, 102.

67 Ibid, 102-104.

68 *Atling C.,* Piercing the Corporate Veil, In American and German Law – Liability of Individuals and Entities: A Comparative View, 2 Tulsa J. Comp. 7 Int'l L. 187, 238-39.

reports and financial documentation.[69] Unlike the contractual concerns, the rights and duties of de facto concern members are not clearly defined. Controlled enterprise shall justify that controlling company has placed it under unfavorable conditions. Moreover, the damage shall be confirmed, the burden of proving is borne by the members of controlled company.[70]

The German court during the 70-s of the last century within the concern law established the independent doctrine on the qualified de facto concern *("qualijizierterfaktischerKonzern")*. "Assigning" the status of qualified de facto concern is carried out by the court in case of Limited Liability Company. If the controlled company is permanently suffering from the involvement in the business activities from the controlling company, the relationship can be qualified as the de facto concern. In this case controlling shareholderis obliged against the creditors of controlled LLC, in the same way as in case of JSC.[71] Hence, qualified concern is "established" *post factum.*

Unlike the de facto concern, in case of which for the definition of responsibility there is no need for proving the existence of specific transactions, in the event of qualified concerns, the attention is drawn to the fact whether the shareholder is conducting the explicit control.[72] Significant influence and control is creating the presumption that its application is *apriori* damaging, within this presumption there is no need for the confirmation of specific damage.[73]It has to be noted that the court practice allowed extension of de facto concern rules post factum over the individual shareholders of LLC.[74]

In 2001 the German federal law has suddenly abolished doctrine on qualified de facto concern and made new decision on the responsibility of group of companies, which is known with the name *Bremer Vulkan*.[75] Despite the fact that factual circumstances of this case was allowing for the application of doctrine on qualified de facto concern, the court has explicitly changed the practice and

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69 Ibid.

70 Ibid.

71 *Singrahof B.,* Equity Holder's Liability for Limited Liability Companies' Unrecoverable Debts –Reflections on Piercing the Corporate Veil Under German Law, 22 Loy. L.A. Int'l & Comp. L. Rev. 143, 1999-2000, 167.

72 *René Reich-Graefe,* Changing Paradigms: The Liability of Corporate Groups in Germany, 37 Conn. L. Rev. 785, 2005, 790.

73 In *Autokran*case the Federal Supreme Court defined, that main company was liable for the payment of lease to the lessor of controlled enterprise. The controlled LLC was leasing crane from the lessor. LLC had liability of lease payment. Due to the violation of lease liability by LLC, the lessor sued and acquired the court decision on the unpaid amount of the lease. However the lessor did not manage to execute the court decision due to the inadequate capitalizations (under capitalizations) of LLC. Supreme Court of Germany in terms of veil piercing responsibility for this case determined that the defendant, main company was carrying out such control, that legal relationship between them was satisfying rules for de facto concern and responsibility of defendant should have been determined accordingly. See Decision of 16 September 1985, BGH II. Zivilsenat, BGHZ 95 (1986) Quotation:*Miller S.,* Piercing the Corporate Veil Among Affiliated Companies in the European Community and the U.S.: a Comparative Analysis of U.S., German, and U.K. Veil-Piercing Approaches, *36 Am. Bus. L.J. 73,* 1998,106.

74 For example: "Video" Case. Quotation:Weber-Rey D., Insolvency of a German Limited Liability Company: De Facto Shareholder, Group Liability for Individual Shareholders, 7 Pace Int'L L. Rev. 523, 1995, 527.

75 *René Reich-Graefe,* Changing Paradigms: The Liability of Corporate Groups in Germany, 37 Conn. L. Rev. 785, 2005, 800.

defined that for the controlled LLC-s the imperative norms envisaged under the law on stocks should not be extended based on analogy. By this decision, the court has changed the homogenous practice, which had been used for more than 20 years in Germany. In two following decisions made in 2002 year *(Bremer Vulkan II* and *KBV)* the federal court has reinforced the new approach, according to which responsibility of parent company against the creditors of subsidiary company is admissible only in cases when the involvement of parent company breaches the autonomous existence of subsidiary company *("existenzvemichtenderEingriff").*[76] Therefore, responsibility of parent company is in place if as a result of its influence the subsidiary company becomes insolvent. As noted by the court in the decision on KBV case, the basis and justification of such approach is the abuse of LLC corporate form by the parent company *("Missbrauch der Rechtsformder GmbH).*[77]

In summary we shall note that in the light of parent-subsidiary companies the German law considers imperative norms, based on which in the event of existence of above discussed relevant circumstances, creditors of controlled company are entitled to submit the claim against the controlling company. It is important that German federal court has changed the practice on the *post factum* extension of concern rules over the controlling LLC. Hence, in Germany, corporate veil piercing is regulated in a dualist manner. First, this is court doctrine, and secondly – concern law, which as mentioned above, is currently used only for joint stock companies.

3.2.3. Basis of Veil Piercing in France

In France, like other countries, the principle of limited liability represents the basic rule. Despite the above, there is a possibility to have the personal responsibility of persons protected under the corporate veil against the creditors. This takes place in cases when the inadequate actions of shareholder corresponded to cheating or such action has brought the corporation to bankruptcy.[78] In France, unlike America, there is no one doctrine established clearly. Normative basis for the corporate veil piercing is provided in the statutes on bankruptcy and two main doctrines developed in the court practice: doctrine of fictive company *("societe fictive")* and doctrine on confusion of properties *("confusion des patrimoines").*[79]

a) Normative Basis of Corporate Veil Piercing

According to the statute on bankruptcy, the mechanism favouring the creditor is considered, which implies court processing against the person covered with the corporate veil with the purpose to assign the liability in case of insufficient property *("action en responsabilite pour insuffisanced'actif").*[80] This mechanism is used in cases when the bankruptcy plan is not completed or the court made decision on the

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[76] Ibid, 801.
[77] Ibid, 801.
[78] *Dobson J.,* "Lifting the Veil in Four Countries: the Law of Argentinda, England, France and the United States, International and Comparative Law QUARTERLY, Vol. 35. No.4 1986, 839.
[79] *Presser S.,* Piercing the Corporate Veil, 2011 Edition, 1392.
[80] Ibid, 1393.

liquidation of corporation. In such case the creditor generates the right of claim against the director, whose inadequate actions *("faute de gestion")* caused bankruptcy.[81] The researchers of this issue have recognized that "*faute de gestion*" – inadequate action must be defined widely and cover the violations as well as carelessness (indifference). On the other hand, the court in the context of *action en pesponsabilite pour insuffisanced'actif*hasqualified the activities of director causing the loss and implemented with the intention, incorrect financial accounting as inadequate action.[82]

Second mechanism considers application of *"action en obligation aux dettes sociales"*, by which it is possible to achieve the responsibility of other persons, considered under the corporate protection act.[83] Responsibility covered under the corporate veil for the corporation liabilities becomes valid if the following circumstances are present: a) Loss of corporation property for personal purposes; b) Conclusion of deal on behalf of the corporation for the personal interest; c) Use of corporation property against the interests of corporation or in favour of other company, in which he/she has the direct or indirect interest; d) Intentional increase of volume of corporation liability.[84] During the above court processing creditor shall prove the causal relationship between one of the above mentioned actions and delay in the satisfaction of creditor's claim (the causal relationship between the action and volume of debt does not require proving).[85]

In the context of bankruptcy only those creditors which were registered at the start of bankruptcy case enjoy the right to claim the corporate veil piercing responsibility.[86]

It has to be noted that with the both bases it is possible to impose the liability on the above two bases over the shareholder representing de facto or de jure director.[87] Despite the fact that there is no difference between de facto or de jure directors at the normative level, the court has established several characteristics allowing for the differentiation. The person can be considered as de facto shadowy manager who carries out managerial activities under his/her discretion.[88]Generally, status of controlling shareholder apriori is not sufficient factor for the qualification of person as de facto director. Practice of France's supreme court for the last decade confirms that even in cases, when the parent company owns 99% of subsidiary company, there is no presumption that parent company is qualified as de facto director. However, in parallel to the above mentioned there are court precedents, where under the presence of adequate circumstances on the subsidiary company (and accordingly on the board of directors) the parent company executing control has been considered as the de facto director of subsidiary company.[89] Circle of adequate circumstances cover the cases, when the inadequate actions of parent company caused insolvency of subsidiary or delays in repayment.

[81] Ibid, 1393.
[82] Ibid, 1393.
[83] Ibid, 1394.
[84] *Presser S.,* Piercing the Corporate Veil, 2011 Edition, 1396.
[85] Ibid, 1396.
[86] Ibid, 1396.
[87] Ibid, 1396.
[88] *Dobson J.,* "Lifting the Veil in Four Countries: the Law of Argentina, England, France and the United States, International and Comparative Law" QUARTERLY, Vol. 35. No.4 1986, 856.
[89] *Presser S.,* Piercing the Corporate Veil, 2011 Edition, 1396.

b) Piercing of Corporate Veil According the Court Doctrine

Concept on the piercing of corporate veil with the additional basis is developed via the two different doctrines established by the court. These doctrines are: doctrine on fictive company *("societe fictive")* and doctrine on confusion of properties *("confusion des patrimoines").*[90]

Corporation is considered as fictive when it does not implement real activities and there is no will of shareholders to collaborate for the achievement of common goals – *affectio societatis.*[91] Generally, such corporations are established for fraudulent purposes by the controlling person. Doctrine is based on the "simulation" theory, according to which for the deception of third parties the shareholders create "quasi reality". The above may take two forms – agreement of shareholders does not represent the founding agreement, this is other type of agreement/deal or the agreement places under shadow one specific person – *"maitre d' affaires".*[92] In such case for the piercing of corporate veil, the French courts determine the circle of circumstances to be defined, which covers the organic and functionality elements.[93] Organic element comprises capital structure, relative/kindred or other type of relationship between the shareholders, identity of directors in case of parent-subsidiary companies. Within the functionality element, on the other hand, the real "existence" of company is determined; in this process the attention is focused on conducting shareholder meetings; real economic activities and existence of independent management. Courts of France similarly to the American courts attempt to determine the substance behind the form and deem the functional element as more important.[94] Moreover, functional element is common with the doctrine on confusion of properties. In case of fictive corporation, only the creditors of this corporation have right to claim corporate veil piercing.[95]

Theory on confusion of properties is based on the confusion of properties of corporation and personal property of shareholder and liabilities tied to the above properties in the way that even the qualified finance specialist cannot separate them for assigning them to the independent subjects. Under this theory dominant control as well as the common directorate is not sufficient for the piercing of corporate veil. The united maintenance of financial accounting and violation of special rules for the accounting must be also present.[96] Confusion of properties may be conditioned by the large outflow of so called *cash flows* from the corporation. The courts of France have developed number of criteria, according to which it is possible to detect the large cash outflows. In particular, the cash outflow shall not be related to the corporation interests and counter compensation, and the volume shall exceed the financial capabilities of corporation.[97]

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[90] Ibid, 1398.
[91] *Dobson J.,* "Lifting the Veil in Four Countries: the Law of Argentina, England, France and the United States, International and Comparative Law QUARTERLY, Vol. 35. No.4 1986, 839.
[92] *Presser S.,* Piercing the Corporate Veil, 2011 Edition, 1398.
[93] Ibid, 1399.
[94] Ibid, 1399.
[95] *Dobson J.,* "Lifting the Veil in Four Countries: the Law of Argentina, England, France and the United States, International and Comparative Law Quarterly, Vol. 35. No. 4 1986, 839.
[96] Ibid, 839.
[97] *Presser S.,* Piercing the Corporate Veil, 2011 Edition, 1396.

Two doctrines discussed above provide the possibility to unify the personal property of shareholder with the property of corporation in the process of bankruptcy; as a result it becomes possible to satisfy creditor via the personal property of partner.[98]

It has to be noted that simulation theory is close to the American concepts of corporate "fraud" and "misleading". The normative basis of theory can be also found in Georgian law; namely, in the article 56 of Civil Code of Georgia, which considers the annulations of hypocritical deals. Possibility to use the above in the context of corporate veil piercing in the Georgian reality will be discussed below.

3.2.4 Basis of Veil Piercing Responsibility in Japan

Similarly to other countries, the doctrine of the corporate (*kaisha*) veil piercing - "*hinin-hojinkaku*"[99] - has been developed in Japan too.[100] The doctrine was created and developed through court decisions. The normative basis of doctrine is on the one hand, article 1 (3) of civil code of Japan, which prohibits abusing of "corporate form" and on the other hand, article 54 (1) of trade code of Japan, provision considering the independent existence of legal subject.[101] Despite the normative basis, the courts of Japan make decisions regarding the corporate veil piercing based on the review of mentioned general imperative norms and factual circumstances of specific cases in the context of fairness/justice.[102] In the practice of Supreme Court of Japan the first precedent of corporate veil piercing took place in 1969 year. The court decided that rejecting the corporate normative structures is possible only when the following factors are present: a) Abusing the corporate form for avoiding contractual responsibilities or law action, and b) The only mission of the corporation is achievement of the above goal.[103] Hence, it can be stated that imposing of corporate veil piercing responsibility is implemented under the conditions when the corporation plays the role of "shield" for the partner, used for unlawful avoiding from the fulfillment of liabilities. In the process of evaluation of abuse of corporate form it has to be determined at what level was the shareholder controlling the corporation and whether the shareholder used corporation for the purpose to avoid responsibilities.[104] What does the term abuse mean in the context of Japanese law is disputable in the legal literature. Is it necessary to have the subjective intention of the partner? The court position is inclined towards the need of existence of subjective intention as precondition.[105] In the end the court practice established the list of cases of abuse of corporate forms. In particular these cases are: avoiding liabilities, inadequate

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[98] Ibid.

[99] *Presser S.,* Piercing the Corporate Veil, 2011 Edition, 1412.

[100] Japan is part of continental law family; however since 50-ies of the last century it has been under the influence of common law especially in the area of corporate law; *Zveigert K., Kotz H.,* Introduction to Comparative Law Studies in the Area of Private Law, Tb., 2000, 320 (In Georgian).

[101] *Zveigert K., Kotz H.,* Introduction to Comparative Law Studies in the Area of Private Law, Tb., 2000, 320 (In Georgian).

[102] Ibid, 1413.

[103] *Zveigert K., Kotz H.,* Introduction to Comparative Law Studies in the Area of Private Law, Tb., 2000, 1413 (In Georgian).

[104] Ibid, 1414.

[105] Ibid.

capitalization, so called "unfair labor practice"[106] and violation of agreement on the prohibition of competition. Moreover, the court has also defined that in addition to the control of corporation by the shareholder least one fact out of the following facts shall be present: 1. Confusion of properties – case, when the shareholder uses corporation funds personally or in the contrary corporation utilizes the personal funds of the shareholder under the conditions when there is no loan agreement or fact of counter payment; moreover, cases characterized with the inadequate financial accounting or maintenance of common accounting; 2. Non-adherence to the corporation formalities – neglecting the meetings of the shareholders; selection of common directors and auditors will be also taken into account. It has to be noted that the court does not strictly and directly interpret corporate formalities, as it is considered that word by word interpretation of this factor will cause piercing of corporate veil of many corporations. 3. Existence of common identification characteristics; 4. Implementation of overlapping transactions between the shareholder and corporation numerous times or overlapping activities of shareholder and corporation implemented not a single time.[107]

3.3 Interpretation of Article 3, Paragraph 6 of Law on Entrepreneurship of Georgia

Normative basis for the corporate veil piercing is considered in the article 3, paragraph 6 of Law on Entrepreneurship of Georgia; according to this article the personal responsibility will be assigned to the shareholder with limited liability (implies partners of limited partnership, shareholders of LLC and JSC) if he/she misuse legal forms of limited liability. It has to be noted, that first edition of law on Entrepreneurship was providing the possibility for the interpretation of misuse of legal forms of limited liability. Namely, the following was considered as abuse: "first of all, confusion of company property with other properties or failure to comply with the requirement of initial of capital".[108] Hence, proceeding from the law terminology there could be other forms misuse. As a result of changes made in 1999 the terminology has changed and misuse has been explicitly considered the violation of maintenance rules of accounting books, as a result of which it becomes impossible to define who owns the property and what liabilities are borne by the company.[109] As a result of amendments made in 2008 year the definition of term misuse has been removed. This method of regulation is justified as it is impossible to comprehensively describe all cases in the law. Provision without specification of notion provides the court with the opportunity to flexibly interpret the concept and based on the specific circumstances of the case make a judgment. Unfortunately, there is no precedent of the above in the court practice of Georgian Supreme Court.

To summarise, we shall note that based on the historical definition of misuse of legal forms of limited liability it is straightforward that the above mentioned basis falls under the key preconditions considered by the doctrine of corporate veil piercing.

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[106] This term considers the case, when the employer violates the law in relation to the employee. This is one of the principles encountered in USA. For example: National Labour Relations Act (Enacted by 74th United States Congress, 1935) Article 8 provides the list of unfair practices.

[107] *Presser S.,* Piercing the Corporate Veil, 2011 Edition, 1413.

[108] Law on Entrepreneurs, article 3.4 (In Georgian).

[109] Law of Georgia on changes and amendments to the law of Georgia on Entrepreneurs, 09 June 1999, №2073–IIS, article 3.4 (In Georgian).

4. "Misuse of Legal Forms of Limited Liability" – Assessment Standard

Assessment of misuse of forms of liability limitation shall be made via the standards, by which this mechanism will not be interpreted widely. The approach of courts of leading countries shall be used, according to which piercing the corporate veil is admitted only in exceptional cases. "Simplification" of veil piercing will cause irreversible process, which will have negative effect over the economic relationships. The case shall be considered as extreme if the shareholder uses the company, as the legal mechanism for avoiding the liabilities against the third party, in other words the case, when as a result of "unlawful" actions of shareholders creditor is left without satisfaction for the reason that volume of company liabilities exceeds its financial assets so that the company does not have creditworthiness to fulfill or guarantee the claims of creditor at least through using the financial tools (such as loan). The situation of creditor shall not have alternatives. Georgian doctrine shall grant the mechanism of corporate veil piercing only to the contractual or lawful creditors. Piercing the corporate veil shall not be extended over the tax disputes in favour of the state, as the state already has resources to impose the responsibility over the person authorised for the management via the criminal law procedures. Accordingly, the court shall first of all check the legal status of the creditor. The burden of proving the non-creditworthiness of the corporation must be borne by the partner, as creditor with no access to the company documentation with the exception of public information, cannot undertake the burden to prove the above circumstances. Accordingly shareholder is interested in the retaining of corporate veil must confirm that the company has sufficient funds to fulfill the claims of creditors. If the shareholder is not able to confirm the above, then the court shall move to the assessment of the basis for piercing liability. In the process of evaluation of evidences provided by the shareholder for the confirmation of proprietary condition of the company the court shall focus on the nature of the properties named by the defendant. Only the property with the long term liquidity shall be taken into account. If the shareholder confirms the above, then the court shall reject the satisfaction of claim submitted by the claimant. Accordingly, the claimant will be left with the opportunity to start dispute with the public. Indeed, in this case there is a risk that for the moment of the dispute of claimant with the public the above property is not any more available; however, such regulation is justified as it restricts the abusing of rights by the creditor.

If the defendant (partner) cannot confirm the existence of sufficient funds of the company, the court shall assess whether the precondition for the corporate veil piercing is in place. Namely, what type of relationship was between the company and partner; whether there was in place such level of control that the shareholder was using the existence of company in a form of legal subject as a "shield". The above shall be proved via the interconnection of several facts. First of all, it has to be checked whether the company was adequately capitalised. The court shall not focus on the initial capital (more so as the legislation does not set the obligation of the shareholder for the creation of initial capital); the attention should be focused on the further capitalisation of the company. In the process of evaluation of company capitalisation using the relevant criteria the nature of the company activities shall be taken into consideration; how relevant is the capital invested by the shareholder in the company with the possible risks accompanying the business activities. The court based on the expediency shall check each transaction of the company (or action in general) which caused reduction

of the capital. For the purpose of analysis of economic meaning of transactions the court must also assess the level of diligence of person equipped with the decision making authorities. Corporate veil shall only be pierced if the unjustified and untargeted transactions were implemented and then followed by the insolvency of the company.

The misuse of company as a legal form can also be revealed in the confusion of properties of the shareholder and company with the aim to mislead the creditors. For this case the responsibility shall be raised on the ground of commingling of assets, which resulted in the insolvency) of the company. According to the analogous rule the non-adherence to the corporation formalities shall be evaluated which shall not be reviewed separately without consideration of unlawful intention as an independent and sufficient precondition for the corporate veil piercing.

In the light of Georgian law, the doctrine of veil piercing can be established (similarly with the French experience) via the extension of rules on the voidance of deals over the shareholders relationships, which may include the cases of premeditated establishment of companies with the goal to avoid the liability. However, the rules on the voidance of deal shall be only used in the section of justification and its outcomes shall not be extended directly. Piercing of corporate veil implies consideration of shareholders with limited liability as personally liable subjects. The principle of voidance of hypocritical deals provides such possibility. Agreement executed by the shareholders is a contract [110] If such contract is concluded with the only goal to enable the partners to avoid liability via the utilisation of legal forms of limited liability and factually there are no signs of entrepreneurship activities envisaged under the law, then shareholder's agreement satisfies the notion of hypocritical deal and accordingly, parties (shareholders) of such deal can be considered as personally liable solidary debtors.

It also should be discussed how to solve the liability issue in case of companies established by the dominant and minority shareholders. In such case for the determination of liability the decisive factor should be the following – whether the minority shareholder is passive voluntarily or is objectively deprived the opportunities to act. The action implies, for example, the right of minority shareholder to raise the issue of responsibility of dominant shareholder for the violation of fiduciary liabilities.[111] In USA in such cases the attention is drawn to the fraudulent and unfair actions. These very factors determine the responsible persons and liability. If fraudulent and unfair action has been implemented only by the shareholder, and any "wrong" doing from the passive shareholder is excluded, then personal liability will be imposed only over the dominant shareholder.[112]

Finally, the judgment of Tbilisi Appeal Court, Chamber of Civil cases dated 22 January 2013 has to be mentioned.[113] Above mentioned judgment represents the only precedent of assessment of veil

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[110] *Zubitashvili N.,* Withdrawal of Shareholder from Limited Liability Company, collection of works on corporate law, edited by *Burduli I.,* Vol. II, 2014, pp.140-141 (In Georgian).

[111] *Zubitashvili N.,* Withdrawal of Shareholder from Limited Liability Company, collection of works on corporate law, edited by *Burduli I.,* Vol. II, 2014, 152-163(In Georgian).

[112] *Gevurtz F.,* Corporation Law, 2nd ed., 2010, 78.

[113] The private claim on the above judgment has not been admitted for the processing based on the judgment Noas-286-272-2013, dated 13 May 2013. Accordingly, decision of appeal court remained valid (In Georgian).

piercing responsibility mechanism in the Georgian court practice. Mentioned decision is interesting due to several important circumstances. First of all, the court straightforwardly defined that according the law of Georgia on Entrepreneurship it is possible to impose personal liability over the shareholder. Despite the fact that the court for the given case has not satisfied the claim of the appellant on the assignment of personal liability, the arguments of Appeal Court are based on justified reasoning. In particular, the court drew attention to the fact that appellant represented voluntary creditor, which unlike the other contractual creditors had possibility to consider the financial condition of the defendant preliminarily. Namely, the right of claim (exercise of this right was requested against the parent company of the personal debtor) has been transferred to the claimant as a result of assignment of claim (contractual creditor of subsidiary company assigned right of claim to the claimant); moreover, claimant was representing institution operating in the banking sector, and ordinary activities of such institutions is always based on the diligent examination principle (due diligence, often applied by the banks). In the given case management of appellant has not demonstrated due diligence, has not used the existing opportunity; accordingly the risks related to entering the legal relationship with the financially weak company were fairly transferred to the appellant. In the end, the court rejected satisfaction of claim as there were no other preconditions of the piercing responsibility confirmed by the evidences except for the inadequate capitalisation.

5. Conclusion

For summary purposes, we can distinguish number of thesis based on the comparative analysis of Veil Piercing Responsibility:

- Doctrine on veil piercing responsibility covers the cases of misuse of forms for the limitation of responsibility; the above is confirmed via the historical analysis of legal regulation of the above factor. Hence, in the process of evaluation of misuse of forms for the limitation of responsibilities it is possible to use the standard established by the veil piercing responsibility doctrine which is more or less common for all developed legal systems.
- Georgia must share the experience of leading countries and admit the piercing responsibility in the form of exceptional mechanism only for cases where there are no other effective alternatives in place benefiting the creditor. Moreover, above mentioned factual circumstances shall be evaluated in inter-relationship and not separately. Accordingly, doctrine of veil piercing shall be applied only under the existence of adequate circumstances.
- It is expedient to regulate concern rules under the law of Georgia on Entrepreneurs in the way to include veil piercing within the group of corporations.

Eka Kavelidze*

Vote of No-confidence as the Form of Government's Political Responsibility

1. Introduction

It is acknowledged that separation of power is one of the fundamental principles for the successful functioning of state organism and constitutional order. Above mentioned provision was formulated as early as in 1789 by the French "Declaration on Human and Citizen Rights", and has been numerous times confirmed by various doctrines and practices.[1]According to the principle of power distribution, executive, legislative and court powers are separated from each other with the authorities, however the above does not mean that these powers do not have contact/relationship with each other.[2] Mentioned link is manifested in the mutual-support as well as inter-control, which is reflected in the "Checks and balances" principle. The state is democratic, when the branches of powers (especially the legislative and executive branches) are balancing each other. One of the forms of inter-control is the accountability of the government to the parliament and based on the above – government's political responsibility to the parliament. There are several forms of political responsibility in the constitutional law; however for the purposes of present article we will only discuss the vote of no-confidence, as the form of government's political responsibility. "Legislative government must be supreme" – was declaring one of the classics of power distribution John Lock. According to this idea, practically all parliaments possess the competence of control over the executive government. Differences in the above authorities for the various country parliaments are represented only in volume terms, depending on the form of state governance.[3]

Application of vote of no-confidence as the mechanism of political responsibility depends on many factors discussed in the present article.

2. Separation of Responsibilities

2.1. Concept of Government's Political Responsibility and its Meaning

2.1.1. History of Political Responsibility

The responsibility of the government as the supreme body of executive power is inevitable and necessary for the existence of democratic society. The government for the fulfillment of its functions and

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* Doctoral Student, TSU Faculty of Law.

[1] *Kverenchkhiladze G.,* Executive Power and Constitution of Georgia of 1921 year, At the Beginning of Georgian Constitutionalism – 90 Years' Jubilee of 1921 Year Georgian Constitution, Batumi, 2011, 169 (In Georgian).

[2] See *Hall D.P., FeldmeierJ.E.,* Constitutional Values*,* Governmental Powers and Individual Freedoms, Miami University, Hamilton, Wright State University, upper Saddle River, New Jersey, Columbus, Ohio, 2009, 32.

[3] *Rukhadze Z.,* Georgian Constitutional Law, Batumi, 1999, 271 (In Georgian).

duties, implements political as well as legal activities, accordingly its political and legal responsibilities differ. The issue of political responsibility finds its origins in Britain. It may sound strange, but uncontrolled power of the King has created kind of basis for the development of mentioned mechanism. In the beginning of XIX century the main constitutional problem was how to control the King – as the issue of his responsibility could not be raised at his personal level or at the level of head of the executive government. For this very purpose the ministries responsible to the parliament were created. In the first decade of XIX century the liberal opposition was urging to establish such ministries. Almost until the end of the Second World War, in the most European Monarchies the King was remaining the head of the executive power. However the King, according to the Constitution of France of 1791 year could not act without the consent from the ministers, who had gained the confidence from the Parliament.[4]

2.1.2 Meaning of Political Responsibility

In practical terms, political responsibility considers the duty of the government to always act in accordance with the position of parliamentary majority (especially with the consideration of the fact that government is the "creation" of the parliament). Such duty considers that whole cabinet or specific ministers shall resign if their activities are not supported by the representatives of people.[5] Solidarity of government political responsibility means that in case of non-acceptance of policy implemented by the government all members of the governments shall resign, including those members who have not participated in the process of decision making for certain issues or were against such decisions in the process of review of such issues at the government meetings. Principle of solidary responsibility is explained, as the duty of all members of the government to defend government's decision despite his/her personal position; it is not allowed to discuss publicly the disagreements between the parties. If such takes place, the above causes resignation of relevant member of the government.[6]This is the main difference between the legal and political responsibilities of the government – the government may act legally correctly, its activities may be legally justified, however such activities could be politically incorrect. We shall separate the political responsibility from the legal responsibility, as these two concepts have different reasons and preconditions.

2.1.3 Reasons of Political Responsibility

The forms of political responsibility of the government to the parliament among others include the following: vote of no-confidence and unconditional vote of no-confidence.[7]vote of no-confidence to

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4 *Shaio A.,* Self-Restriction of Power, Introduction to Constitutionalism, With Introduction by *Holms S.,* Translated by *Maisuradze M.,* Edited by *T. Ninidze,* IRIS Georgia, Tb., 2003, 103 (In Georgian).

5 *Melkadze O.,* Constitutionalism, Series of Political-Legal Literature, Book XXI, "Universal", Tb., 2008, 344 (In Georgian).

6 See the same, 343-344.

7 *Kverenchkhiladze G.,* Constitutional Status of Georgian Government (Comments to the Article 78 of Constitution), Modern Constitutional Law, Edited by *G. Kverenchkhiladze* and *D. Gegenava,* Book I, Davit Batonishvili Institute of Law, Tb., 2012, 27 (In Georgian).

the government is considered as the form of political responsibility. The reasons for activation of above mentioned mechanisms are not preliminarily known and are not detailed in the constitution of any country. The reason for the above is the politics – it is impossible to preliminarily estimate, in which country and when the parliament declares no-confidence to the government. The mechanism is activated based on the specific political processes taking place in the specific country. This is why the vote of no-confidence is the form of government's political responsibility – its activation depends on the political processes and not on the legal basis.

Government's political responsibility is mainly conditioned with the principle of government solidary responsibility, meaning that government as the integral body made "insolvent" political decision, due to which it has to be held responsible with its whole team. Solidary, in other words collective responsibility of the government is the norm existing in the parliamentary state, according to which the members of the government are holding joint and equal responsibility for the policy carried out by the government. The member of the government who is against the policy of the government has to immediately resign from the occupied position. Vote of no-confidence by the parliament to one of the members of the government, generally, causes resignation of the whole government.[8]

2.1.4 Individual Political Responsibility

The political and legal responsibilities of the government and its members are distinguished. The latter is extended to the government members individually. Political responsibility of the government and its any member is submitted to the head of the parliament or the head of the state. Political responsibility to the parliament for the incorrect policy is in place under the parliamentary and some mixed type governances. The political responsibility to the head of the state is presented in case of presidential governance and in some republics with the mixed form of governance.[9] Despite the principle of government's solidary responsibility, the individual, political responsibility of specific minister may take place. For example, in Great Britain both the collective as well as individual responsibilities are allowed. However, due to the fact that the government is considered as one integral team, in most cases members demonstrate the collective responsibility, even if any member of the government is against the implementation of given political direction and does not share the position of the government as a whole. We have to note, that prime minister him/herself decides whether to dismiss the government as a whole or dismiss specific member of the government, against whom the chamber of commons has declared no-confidence. Political responsibility of the government is only discussed by the chamber of commons and only the chamber of commons can make decision on the vote of no-confidence.[10] According to the article 159 of the Constitution of Poland, Sejm has right to declare no-confidence to the minister. Not less than 69 members of the parliament have right to submit the application on no-confidence; and the president dismisses the minister, for whom the Sejm with the majority of total composition has

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8 *Tsnobiladze P.,* Constitutional (State) Law, Reference Book, Tb.,1998, 90 (In Georgian).

9 *Melkadze O.,* Constitutionalism, Series of Political-Legal Literature, Book XXI, "Universal", Tb.,2008, 344 (In Georgian).

10 *Melkadze O.,* Constitutional Law of Foreign Countries, Collection I, Vol., VIII, Tb., 2008, 117 (In Georgian).

declared no-confidence.[11] Political responsibility which is raised directly to the head of the state may end with the resignation of the government or the minister.[12] If in administrative terms, each minister enjoys so called "operative freedom", which is extended specifically within the framework of the minister's competence, in political terms, minister is liable to obey to the position of the government as a whole. The principle of political responsibility is effective in this case. The minister is responsible for the policy implemented by the government, shall obey to it and if not – shall resign.[13]Despite the individual responsibility, principle of solidary responsibility of the government is the founding principle of parliamentary governance. "Principal of parliament dismissal" is the necessary component for the parliamentary governance and according to the classical French doctrine is considered as the main composing element of parliamentarism,[14] as on the one hand, declaring no-confidence to the government by the parliament and on the other hand, dissolving the parliament by the executive government determine interdependence and balance between the branches of power.[15]

2.2. Concept of Government's Legal Responsibility and its Meaning

2.2.1. Meaning

Unlike the political responsibility, the reason and basis for the legal responsibility are not always envisaged by the laws/ constitution. The ideological and legal basis of Government's legal responsibility is the principle of supreme power of the law,[16]meaning that legal responsibility is in place, when in relation to the key area of minister's activity[17]any legislative norm is violated. The constitution of Belgium of 1831 year has become the example for the liberals, as the constitution was simply defining the need for the consent of the minister for any monarchical act. The constitution text also included the principle of minister's responsibility; namely, if in the process of execution of the order issued by the King the minister violated the law via the signing to the legal document, then he/she would be assigned the criminal law responsibility and the King would not be entitled to pardon him.[18]

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[11] Constitution of Poland, See <http://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm>.

[12] *Melkadze O.,* Constitutionalism, Series of Political-Legal Literature, Book XXI, "Universal", Tb., 2008, 343 (In Georgian).

[13] *Melkadze O.,* Constitutional Law of Foreign Countries, Collection I, Vol., VIII, Tb., 2008, 330 (In Georgian).

[14] *Lovo P.,* Parliamentarism, Tb., 2005, 105 (In Georgian).

[15] *Kverenchkhiladze G.,* Executive Power and Constitution of Georgia of 1921 year, At the Beginning of Georgian Constitutionalism – 90 Years' Jubilee of 1921 year Georgian Constitution, Batumi, 2011, 175-176 (In Georgian).

[16] *Romzek B., Dubnick M.,* Accountability in the Public Sector: Lessons from the Challenger Tragedy, Public Administration Review, 1987, 236, <http://www.jstor.org/discover/10.2307/975901?uid=3738048&uid=2&uid=4&sid=21103240227677>, [04/01/2014].

[17] *Melkadze O.,* Constitutionalism, Series of Political-Legal Literature, Book XXI, "Universal", Tb., 2008, 343-344 (In Georgian).

[18] *Shaio A.,* Self-Restriction of Power, Introduction to Constitutionalism, With Introduction by *Holms S.,* Translated by*Maisuradze M.,* Edited by *T. Ninidze,* IRIS Georgia, Tb., 2003, 103 (In Georgian).

Legal responsibility is extended over the members of the government individually, it is used on the specific law violation fact and is mainly realized via the impeachment procedure. According to John Godring, only the rough and justified violation of administrative competence may lead to the dismissal of the minister and in the worst case to the dismissal of the government as a result of pressure from the parliament.[19]

As for the political responsibility, it has solidary nature; accordingly in case of unacceptability of policy implemented by the government, all members of the government shall resign.[20]In case of legal responsibility – the principle of individual and not solidary responsibility is effective; as for the legal responsibility, in this case the principle of individual responsibility rather than solidary responsibility is valid – for the law violation committed by the specific minister relevant minister is responsible individually and not the whole government team. It is not imaginable otherwise – it is not possible to raise the legal responsibility against other innocent members of the government for the law violation committed by one minister, the above contravenes with the general justice and criminal law principles. Legal responsibility against the member of the government may be raised under all form of governance, with the exception for absolute and dualist monarchies.

2.2.2. Examples

In Italy the individual responsibility of ministers is demonstrated in their resignation from the occupied positions. The resignation of the minister from the occupied position does not cause resignation of the whole government, if by the above step the political balance existing in the governmental coalition is not seriously damaged. For the offence committed by the minister in the process of fulfillment of his direct functions, the ministers are responsible against the court with general jurisdiction in accordance with the ordinary rules.[21]Ministers are collegially responsible for the activities of the board of ministers, and individually - for the activities of specific Ministries.

Based on the basic law of Spain, the chairman of the government and its members are responsible under the criminal law against the Supreme Court, chamber of criminal law cases for high treason or actions directed against the security of the state. Only the absolute majority of congress (of members) has right to lay claim against the accused person under the initiative of ¼-th of the members.[22]In practice the responsibility for the criminal law offences of the public officials rarely takes place.[23]The identification of ministers' responsibility is based on the norm according to which the political responsibility of ministers is in place when the ministers are collegially responsible for the

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[19] *Goldring J.,* Public Law and Accountability of Government, For 36th Conference of the Australasian Universities Law Schools Association Held At Macquarie University, August, 1981, 9.

[20] *Kverenchkhiladze G.,* Constitutional Status of Georgian Government (Comments to the Article 78 of Constitution), Modern Constitutional Law, Edited by *G. Kverenchkhiladze and D. Gegenava,* Book I, Davit Batonishvili Institute of Law, Tb., 2012, 26 (In Georgian).

[21] *Melkadze O.,* Constitutional Law of Foreign Countries, Collection I, Vol. VIII, Tb., 2008, 224 (In Georgian).

[22] See bid, 152.

[23] See ibid.

activities of the cabinet of ministers and individually responsible for the deficiencies and violations in the activities carried out within the subordinated establishment.[24]

Like Italy, according to the article 95 of the constitution of Lithuania, ministers are collegially responsible for the activities of cabinet of ministers; and individually – for the activities of subordinated ministry. The law defines organization of cabinet presidium, the number of ministries, their functions and organization.

The constitution of Poland[25]also considers responsibility of the cabinet of ministers to the state tribunal for the violation of the constitution and the laws, as well as for the offences committed in relation to the occupied position. The decision on the responsibility of the member of cabinet of ministers to the state tribunal is made by Sejm, based on the statement of the president and at least 115 members of Sejm, with the 3/5th majority of the total number of Sejm members. According to article 157, members of the cabinet of ministers are also individually responsible to the Sejm for the activities belonging to their competence or for the activities assigned by the chairman of the cabinet of ministers.

Based on the review of the above provided examples of several countries it is clear that legal responsibility is radically different from the political responsibility and the reason for the legal responsibility is only the legal violation or deviation unlike the political responsibility.

3. Government Functioning under the Condition of Vote of No-confidence

3.1. Political-legal Status of Government and its Formation Rules

3.1.1. Formation Rules

Government is the supreme collegial executive body of the state. Rules for the government formation depend on the form of the governance; for the definition of place of the government in the state mechanism and constitutional model it is necessary to review the constitutional status of the government, issues related to its formation and political responsibility, level of participation of the government in the legislative processes and characteristics of its relationship with other branches of power in the light of principles acknowledged under the constitutionalism.[26] Executive power is a mechanism with complex hierarchy and construction, constitution of which depends on the form of state governance and territorial-political organization of the state.[27] In the parliamentary countries the government is formed by the political party which got majority of seats in the one-chamber parliament or in the lower chamber of the two chamber parliament. Government bears collegial responsibility to the parliament (in case of two chamber parliament - to the lower chamber), meaning that in case of

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[24] See ibid, 224.

[25] Constitution of Poland, Article 156, <http://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm>.

[26] *Demetrashvili A., Kobakhidze I.,* Constitutional law, Tb., 2010, 303 (In Georgian).

[27] *Kverenchkhiladze G.,* Constitutional status of Georgian Government (Comments to the Article 78 of Constitution), Modern Constitutional Law, Edited by *G. Kverenchkhiladze* and *D. Gegenava,* Book I, Davit Batonishvili Institute of Law, Tb., 2012, 12 (In Georgian).

dissolution of the parliamentary majority the government must resign or head of the state has to dissolve the parliament and must urge for the early parliamentary elections.[28]The composition of government, as the collegial body in terms of political parties in the parliamentary systems generally reflects the correlation of political parties in the body.[29] In the countries with mixed type governance, the president as well as the parliament, participates in the formation of the government, depending on the type of mixed governance model. The republics are characterized with the government responsible to the parliament, which could mean that the government becomes dependent on the parliamentary majority. The mechanisms of confidence-no-confidence and parliament dissolution are valid in this case.[30]Executive government represents the system of state bodies which are connected horizontally and vertically,[31]which must be the independent branch of power and the government must have the status of supreme body of executive power.[32]

3.1.2 Status of the Government

According to the power distribution theory, the executive authority is restricted and balanced by the legislative and court powers and this triad inside the state mechanism create system of "restriction and balancing". The executive authority itself, in terms of government role and place, indicates to its subordinated status in the system of state bodies and its position, the formula equivalent to the above looks like the following – executes but does not decide. However, this formula neither in the past nor today was /is reflecting the actual situation; the above is even more valid for the future situations. According to Edmund Bork, "Government is the creation of human mentality; therefore human beings are fully entitled to use it in the way they think." This full right is represented in the fact that, in number of foreign countries the role of government is constantly changing – come to the front of the state governance body system and often subordinates legislative and executive powers, which in turn, of course, causes significant restriction of democratization in the country.[33]

Since the mid XX century, the idea of dominant position of legislative government among the branches of power, proceeding from the present political-legal relationships has been weakened at some extent and the executive power gained leading role in the government triad. The above was conditioned by the fact that in relation to other branches of power, the financial, material-technical, technological, organizational, human and other resources are more concentrated in the area of

[28] *Tsnobiladze P.,* Constitutional (State) Law, Reference Book, Tb., 1998, 89 (In Georgian).

[29] *Demetrashvili A., Kobakhidze I.,* Constitutional Law, Tb., 2010, 294 (In Georgian).

[30] *Melkadze O.,* Constitutionalism, Series of Political-Legal Literature, Book XXI, "Universal", Tb., 2008, 336 (In Georgian).

[31] *Kverenchkhiladze G.,* Constitutional Status of Georgian Government (Comments to the Article 78 of Constitution), Modern Constitutional Law, Edited by *G. Kverenchkhiladze* and *D. Gegenava,* Book I, Davit Batonishvili Institute of Law, Tb., 2012, 11 (In Georgian).

[32] *Gonashvili V., Demetrashvili A., Kverenchkhiladze G., Jvania V.,* Constitution of Georgia and 2010 Year Constitutional Reform, Tb., 2010, 54 (In Georgian).

[33] *Melkadze O.,* Constitutionalism, Series of Political-Legal Literature, Book XXI, "Universal", Tb., 2008, 319 (In Georgian).

competence of executive power.[34]According to the well-known saying of Rothschild dynasty "The one possessing information, owns the world." Observation over the power branches makes it clear that the government has special role in the state system. It carries out control over the financial and other physical resources of the state; via the administrative staff spread all over the country territory has the possibility to use the coercion. Therefore, it is distinguished from other state bodies with the significant and wide competences; in other words actually unlimited areas, wide range of issues are under its competence; moreover it is equipped with the political support and executable authorities.[35]The government is collegial body of executive power with the general competence; it is a central unit of the whole state governance system, which via the assigned executive-ordering activities ensures management of state governance, leads the whole administration of the state, the state staff, state finances, international relations, armed forces are under the management of the government[36] - in other words, the whole executive government. Although the government is responsible and accountable to the parliament or lower chamber of parliament, but the fact that it is supported by the parliamentary majority, creates essential opportunities for the government to play leading role in the legislative processes. Practice reveals that majority of draft laws discussed by the members of parliament are introduced under the government's initiative. For example, in Germany out of total number of draft laws up to 80% are initiated by the government.[37]Andrash Shaio describes the strength of present executive authority in the following words: "Executive authority is kind of centaur: the lower part of its body is the bureaucracy, state administration, and the higher part of the body – politicians from the political parties, who thanks to electors, parliament and first of all the most influential members of their party express the state interests. The strong lower part of the body makes the executive authority the strongest branch of power, which has highest chances to achieve its objectives."[38]"Position that the government is willing to execute the laws adopted by the legislative body (the establishment was created for the above purpose) is less relevant at present, as government became the highest political body, which leads public administration and implements general national governance. Increase of government functions and level of indolence of the government in the modern states, determined the development of specific forms of control over the government activities in the form of political-legal responsibility of the government and based on the "restriction-balancing" established in the constitutionalism".[39]

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[34] *Kverenchkhiladze G.,* Constitutional Status of Georgian Government (Comments to the Article 78 of Constitution), Modern Constitutional Law, Edited by *G. Kverenchkhiladze* and *D. Gegenava,* Book I, Davit Batonishvili Institute of Law, Tb., 2012, 10 (In Georgian).

[35] *Demetrashvili A., Kobakhidze I.,* Constitutional Law, Tb., 2010, 303 (In Georgian).

[36] *Melkadze O.,* Constitutionalism, Series of Political-Legal Literature, Book XXI, "Universal", Tb., 2008, 318 (In Georgian).

[37] See ibid, 134.

[38] *Shaio A.,* Self-Restriction of Power, Introduction to Constitutionalism, With Introduction by *Holms S.,* Translated by*Maisuradze M.,* Edited by *T. Ninidze,* IRIS Georgia, Tb., 2003, 235 (In Georgian).

[39] *Kverenchkhiladze G.,* Constitutional Status of Georgian Government (Comments to the Article 78 of Constitution), Modern Constitutional Law, Edited by *G. Kverenchkhiladze and D. Gegenava,* Book I, Davit Batonishvili Institute of Law, Tb., 2012, 12 (In Georgian).

3.2. Accountability of the Government

3.2.1. Definition/Meaning of Accountability

Issue related to the government accountability, first of all, depends on the form of governance. In classical terms, John Lock, one of the founders of doctrine on separation of state powers was of the view that "in the constitutional state, which acts for the purpose to maintain the integrity, there can be only one supreme authority – legislative, and the other authorities must and do obey to it, as legislative government represents the government equipped with the trust."[40] Above mentioned principle is acting even harsher in the parliamentary states and countries with mixed governance. The accountability of the government to the parliament means that the government reports to the parliament on the implemented activities provides information on requested/ important issues. In other words, government is liable to make the body, which "created" the government, aware. In Great Britain, as early as in 1918 year, the committee report on the mechanism of state governance has defined following functions of the cabinet of ministers, these function are still valid: submitting to the parliament the final version of political course, control over the actions implemented by the executive government, in order to ensure that the actions are implemented in line with the political course defined by the parliament.[41]Any executive government is responsible, due to the democratic governance rules, according to which the one governing shall be responsible to one to be governed.[42]

3.2.2.Government's Accountability or Responsibility?

Majority of constitutions define that executive authority is accountable to the parliament.[43] For example, according to the article 104 of Moldova Constitution, government is responsible to the parliament and provides parliament, its commissions and members with the necessary information and documents; members of the government have right to attend parliament meetings. In case of necessity, the attendance of government members is mandatory. The government and all members of the government are obliged to respond to the questions and queries from the members of parliament. On the other hand, the parliament can make resolution, which expresses the position of the parliament regarding the queries.[44] In Croatia, the government is formed based on the purely parliamentary rules – its composition is fully determined by the balance of political powers in the "Sabor" and the government has political responsibility only to the "Sabor".[45] According to the article 114 of Croatian constitution, the government is accountable to the Croatian Sabor. The prime

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[40] Ibid, 10.

[41] *Melkadze O.,* Constitutional Law of Foreign Countries, Collection I, Vol.,VIII, Tb., 2008, 118 (In Georgian).

[42] *Bradley A., Ewing K.,* Constitutional and Administrative Law, Harlow, 2007, 107.

[43] *Born H.,* Parliamentary Control over the Security Sector, Principles, Mechanisms and Practice, *GenevaD.,* 2003, 34 (In Georgian).

[44] Constitution of Moldova<http://www.president.md/eng/constitution>.

[45] *Melkadze O.,* Constitutional Law of Foreign Countries, Collection I, Vol.,VIII, Tb., 2008, 491 (In Georgian).

minister and other members of cabinet are responsible for the decisions made by the government based on the team principle, and personally – within their competences.[46]

The constitutions of above mentioned countries directly consider the government accountability issue and describe in detail the notion of accountability and accountability results. In the constitutions of some countries, unlike the constitutions of Moldova and Croatia, the term “responsibility” is used, which at first glance is “heavier” liability than “accountability”. However after getting familiar with the relevant articles of the constitution, it is clear that accountability and responsibility are used in the same context. For example, according to the article 68 of Hungarian constitution, government is responsible for its actions to the chamber of members (of parliament) (however, despite the above record, the real tendency for the strengthening of the executive power in the country, fully deserved the evaluation provided by the Hungarian constitutionalist Shaio regarding the parliamentary system in general – the government leads the parliament, government does not even ask the parliament what type of political course has the government to implement[47]). In France, the government has political responsibility only to the national assembly. There are several forms of such responsibilities. Prime minister can raise the issue on the responsibility of the government concerning its programme or key policy after the discussion of issue at the board of ministers;[48]moreover, after the discussion at the board of ministers, prime minister can raise the issue of government responsibility to the national assembly in relation to the specific draft law. In this case the national assembly raises the issue of government responsibility via the censure resolution, which has to be signed by at least 1/10th votes of members of the national assembly. If the national assembly adopts censure resolution or approves programme and declaration on the key program, the prime minister must approach the president with the statement on the government resignation. To state simply, accountability of the government (in some cases –responsibility) is demonstrated via the fulfillment of some liabilities; in the event of breaching of such liabilities, the responsibility of the government is inevitable. Responsibility of the government is often manifested via the Vote of no-confidence or imposing legal responsibility.

3.2.3. Government’s Accountability and Term of Authority

The fact that with the expiry of parliament authority (term) the authority of the government also expires and government is re-formed by the newly elected parliament is also proceeding from the government accountability;[49] the above is quite natural occurrence.[50] In other words, existence of the government is automatically connected with the existence of the parliament. Article 101 of the basic

[46] Constitution of Croatia <http://www.constitution.org/cons/croatia.htm>.

[47] *AleqsidzeT., Demetrashvili A., Inauri G. and Others,* Responsible editor *Jibghashvili Z.*, Constitutions of Eastern European Countries, Book I, Tb., 2005, 393 (In Georgian).

[48] Constitution of France, Article 49, <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/english/constitution/constitution-of-4-october-1958.25742.html>..

[49] For this reason almost no country’s constitution contains the indication on the term of government authority – specific years, unlike the term of parliament authority.

[50] *Persson T., Roland G., TabelliniG.,* Separation of Powers and Political Accountability, The Quarterly Journal of Economics, Oxford University Press,Vol. 112, No.4 (Nov. 1997), 1163-1202, <http://jstor.org /stable/2951269>, [20/04/2014].

law of Spain is confirming the above; according to the article, the authority of the government is terminated as a result of next parliamentary election; moreover, in the mentioned case the government continues functioning until the enactment of the new government.[51] In Poland the chairman of board of ministers makes statement at the first meeting of newly elected Sejm on the resignation of the board (of ministers). The president of republic accepts the resignation of the board of ministers and until the appointment of a new board of ministers assigns to the former one to continue the implementation of its functions.[52] The constitution of Moldova directly states that the government implements its authority until the announcement of validity of new parliamentary elections; until the new government makes an oath the former government fulfills the function of managing only the public affairs.[53] Moreover, it has to be taken into account that body, which has the authority to appoint cabinet and declare the confidence, also has the authority to terminate the authority of the cabinet;[54] accordingly, the whole executive power is held by the government, which is responsible and accountable to the parliament or to the lower chamber of the parliament.[55]Therefore it is deemed that representatives of people – members of parliament- are authorized to observe the activities of the government and carry out relevant measures in relation to the above.[56]

As J. Rawls states in his "Theory on civil disobedience", the modern constitutionalism differs from the medieval period with the fact that in medieval period the supremacy of law was not protected with the institutional control. The society was partially or fully restricted in its right to inspect the governor, who in his decisions and orders was contravening the law.[57]Today it is considered that accountability is the key characteristic of the society, where there is an agreement between the members of the society on the justice principles. Responsibility of the government is based on the concept of "moral society", which generates expectations, rules, norms and values for the social relationships. The above can be considered as the form of social relationships of the moral society.[58]

3.3. Parliament's Confidence as the Guarantee of the Government's Functioning

In order to enable the government to fulfill its liabilities, first of all it must have the confidence from the parliament. Existence of the government (formation and functioning) depends on the parliament, which can dismiss the government, the above characterizes the parliamentary

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51 *Melkadze O.,* Constitutional Law of Foreign Countries, Collection I, Vol.,VIII, Tb., 2008, 151 (In Georgian).

52 Constitution of Poland, Article 162, <http://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm>.

53 Constitution of Moldova, Article 103, <http://www.president.md/eng/constitution>

54 *Bartole S.,* Parliamentary Control over the Executive Authorities, Research Thesis Prepared by "IRIS" Georgia, Constitutional Organization of State, Material of International Scientific-Practical Conference (Tb.,18-19 May), Tb., 2004, 36 (In Georgian).

55 *Melkadze O.,* Constitutionalism, Series of Political-Legal Literature, Book XXI, "Universal", Tb., 2008, 134 (In Georgian).

56 *Melkadze O., Makharadze O.,* Organization of Political Power in the Countries with Parliamentary System (Regarding the Georgian Problems), 2001, 27 (In Georgian).

57 *Rawls J.,* Theory of Civil Disobedience, Philosophy of Law, Edited by *Dvornik R.,* 2010, 125 (In Georgian).

58 *DubnickM.J,*Seeking Salvation for Accountability, Annual Meeting of the American Political Science Association, The American Political Science Association, Boston, 2002, 6, <http://mjdubnick.dubnick.net/papers/2002/salv2002.pdf>, [01/10/2014].

republic.[59]According to the constitutional legislation of the parliamentary republic, birth as well as being –not being in the power of the specific government is related mainly with the establishment and legislative functions of the parliament.[60] Based on the above it is straightforward that confidence of the parliament is the guarantee for the existence of the government. In countries, where following the parliamentary elections the issue on the confidence to the newly appointed cabinet is raised, the relationships between the parliament and the government provide a good picture of the confidence declaration establishment. When the parliament declares confidence to the cabinet of ministers, it approves the programme presented by the cabinet, expresses its willingness/readiness to collaborate with the government with the objective to implement the program and undertakes the liability to control the process of implementation of relevant measures by the government. Existence of such relationship between the above two bodies facilitates their collaboration; if the parliament does not have expectation that the government will act in accordance with the parliamentary decisions, and the cabinet cannot receive support from the parliament for the presented draft laws, the above will cause appointment of a new cabinet.[61]

We can define the parliamentary confidence in two ways: 1. When the parliament declares confidence to the newly formed government and 2. When the parliament does not any more trust already functioning government and starts the procedure of vote of no-confidence. It is key to have the parliament with the confidence to the government – expressed at the moment of its formation or during its existence. The fact that the government got the confidence of the parliament at the stage of formation does not mean much, as in many cases this is only formal procedure (of course, if we are not dealing with the radically opposing political powers). It is the most important for the government to function for the whole term with the continuous support from the parliament which is manifested via its confidence. If in the process of government functioning parliament does not use vote of no-confidence, the above means that the parliament trusts the executive power and is mainly satisfied with its activities. Responsibility of the government and its dependence on the confidence from the parliamentary majority today are the traditional factors, which in the relationships between the parliament and the government reflect the rights and duties of each of them, more so when they are involved in the parliamentary system of governance, especially when they are involved in the constitutional-legal relationships.[62]

Based on the above relationship, parliament may declare no-confidence to the government, meaning that the supreme legislative body does not any more trust supreme executive body. The above is regulated in different ways in the constitutions of different countries. For example, in Estonia, the parliament is authorized to declare no-confidence to the government; in other words the activities of the government fully depend on the mandate of confidence from the state assembly.[63] Mechanism of

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[59] *Demetrashvili A., Kobakhidze I.,* Constitutional Law, Tb., 2010, 111 (In Georgian).

[60] Ibid, 290.

[61] *Bartole S.,* Parliamentary Control over the Executive Authorities, Research Thesis Prepared by "IRIS" Georgia, Constitutional Organization of State, Material of International Scientific-Practical Conference (Tb.,18-19 May),Tb., 2004, 37 (In Georgian).

[62] *Melkadze O.,* Constitutionalism, Series of Political-Legal Literature, Book XXI, "Universal", Tb., 2008, 344 (In Georgian).

[63] *Aleqsidze T., Demetrashvili A., Inauri G., and Others,* Responsible Editor *Jibghashvili Z.,* Constitutions of Eastern European Countries, Book I, Tb., 2005, 106 (In Georgian).

confidence is valid in Spain too. However, the above mentioned procedure is not only the guarantor of the government functioning, but also ensures some level of stability of the government. Mentioned stability is conditioned by the difficulty to nominate alternative candidate of the chairman of government as well as by the difficulty to gather the absolute majority supporting the denouncing resolution. In the event of adoption of denouncing resolution the government shall either resign or the chairman of the government shall offer to the monarch to dissolve the lower chamber of the parliament or the whole Cortes Generalles. If in the process of government formation none of the candidates for the position of the chairman of government acquires confidence from the parliamentary majority during the period of two months, the Cortes is dissolved and new elections are scheduled.[64]

Based on the analysis of records in the constitutions of various countries it becomes clear that existence of the government depends on the parliament. If the parliament is instable, the executive body may be left without leader, which in turn creates threat for the functioning of the state.[65] Confidence of the parliament directly determines functioning of the government and represents the guarantee for its existence; and the loss of the confidence is expressed via the voting for no-confidence with the logical result – parliament dissolution.[66]

3.4. No-confidence as the Mechanism of Parliamentary Control over the Government

Vote of no-confidence is the political mechanism, which is used for the implementation of parliamentary control over the government. As mentioned above, the government is accountable/responsible to the parliament, equipping the parliament with the right to implement oversight over the government. It is necessary to provide members of the parliament with the oversight authority by the constitution or resolutions made by the legislative bodies. Parliamentary control implies inspection of activities implemented by the cabinet of ministers. However, such control mainly has political function, meaning that in the process of control implementation the parliament uses political criteria for the evaluation of activities related to the fulfillment of set goals by the executive power with the support of parliament. However we cannot avoid traditional English experience which affirms that parliamentary control can also be the mean for the protection of rights and freedoms of citizens. In this case the parliament responds to the complaints from citizens and in the process of evaluation of activities implemented by the executive authority the parliament considers legal criteria, for example the constitution or legislation.[67]Constitutional justice considers various forms of parliamentary control; however the key form is the Motion of no-confidence. Existence of mentioned mechanism on the one hand reinforces the influence of the parliament over the government and on the other hand, "forces" the government to act in accordance with the course defined by the parliament; otherwise the

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[64] *Melkadze O.,* Constitutional Law of Foreign Countries, Collection I, Vol.,VIII, Tb., 2008, 149 (In Georgian).

[65] See ibid, 225.

[66] *Izoria L.,* Presidential, Parliamentary or Semi-presidential? Way Towards the Democratic Consolidation, Tb., 2010, 20 (In Georgian).

[67] *Bartole S.,* Parliamentary Control Over the Executive Authorities, Research Thesis Prepared by "IRIS" Georgia, Constitutional Organization of State, Material of International Scientific-Practical Conference (Tb.,18-19 May), Tb., 2004, 39 (In Georgian).

government will be "punished"; however the above also depends on the specific political situation. Generally the mentioned mechanism is the most effective mean for the government control, as even initiation of vote of no-confidence is sufficient for "warning" the government.

Examples of Several Countries

Various countries offer their versions of vote of no-confidence; however all of them have one objective: to implement parliamentary, political control over the government manifested in the possibility of losing political status by the supreme body executing the executive authority. For example, Corset Generalles implement control over the government via the various forms. In this respect the most important is the authority granted to the congress of members of the parliament. Both chambers of Cortes and their commissions are entitled to request any type of information from the government, request the members of the government to attend the meetings. Members of the chamber have right to approach the members of the government with questions and interpellations. However, only the congress of members (of the parliament) have right to force the government to resign.

In lower chamber of Spain procedure for the adoption of censure resolutionis similar to the mechanism valid in the national assembly of France and is directed towards ensuring the stability of the government. Resolution shall be proposed by 1/10th of chamber members and at the same time, the resolution shall also name the new candidacy on the position of government chairman. If the resolution is not adopted, its initiators lose right to again propose resolution at the same session. Support of absolute majority of congress members is necessary for the adoption of above resolution.[68]

In Switzerland, there is no constitutional control over the government acts; however, there is a parliamentary control in place. Distinctive type vote of no-confidence can be declared for the government only after expiration of 4 years' period, meaning that former members of the government are not appointed for the second term. However, practice shows that duration of occupying one position by one person varies between 10-12 years to thirty years' period. Vote of no-confidence in Switzerland differs from classical vote of confidence, however it still achieves the purpose – parliamentary control is implemented by the fact that mentioned persons cannot become again the members of the government and parliament will not declare confidence to them, more so as they would have been retaining positions for quite long period.

The constitution of Moldova also considers legislative control over the exertive authority by the parliament via the approved forms and scope.[69] In Croatia, Saborforms the government and implements control over the activities of the government via the questions, interpellation (which might be followed with the raising issue on vote of no-confidence), Motion of no-confidence and other forms.[70]

Constitutions of all countries do not directly formulate the right on government control and such right can be read indirectly in the provisions of the constitution or regulations or other normative acts.[71] The main function of the parliament, in addition to the implementation of legislative activities, is

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68 *Melkadze O.,* Constitutional Law of Foreign Countries, Collection I, Vol.,VIII, Tb., 2008, 149 (In Georgian).
69 Constitution of Moldova, Article 66, <http://www.president.md/eng/constitution>.
70 *Melkadze O.,* Constitutional Law of Foreign Countries, Collection I, Vol.,VIII, Tb., 2008, 488 (In Georgian).
71 *Rukhadze Z.,* Georgian Constitutional Law, Batumi, 1999, 272 (In Georgian).

oversight over the executive authority[72] and control over its activities.[73] Prof. Avtandil Demetrashili considers the vote of no-confidence as the most effective mechanism for the control over government activities, which has strategic importance for the functioning of the state under the democratic regime.[74]None of the branches shall be provided with the possibility to become the center for the excessive concentration of power. Deterring the drive towards the power is possible only if the person with such desire is not simultaneously the one controlling the means for the achievement of the desire.[75]Therefore no-confidence, according to the constitution is the radical legislative tool by which the parliament is practically implementing the mentioned authority. However it has to be noted that specific procedures of constructive vote of no-confidence established by the constitution have less influence on the effectiveness of the mechanism held by the parliament for the control of the government, as it fully depends on the firmness of coalitions (political party system). In other words the constitution defines only procedures, as for the contents and results – they are defined by the balance of political powers in the state assembly at the specific moment.[76]

4. Vote of No-Confidence types and its Purpose

4.1 Destructive Vote of No-confidence

4.1.1 Definition

There are two forms of vote of no-confidence: constructive and destructive. English word "destructive" in Georgian means destroying, annihilating, harmful, damaging – at some extent expresses the meaning of destructive vote. Destructive form of vote of no-confidence means the vote of no-confidence, under which the existing government is dismissed without naming the candidate of the future prime-minister, in the process of vote of no-confidence the dismissal of existing government as well as declaring confidence to the head of a new government are voted for. The word "vote" – is a Latin word and means will, desire. In the parliament practice of states with parliamentary type governance, generally, the lower chamber declares confidence or no-confidence to the political direction, draft law proposed by the government or specific minister.[77]Vote of no-confidence to the government actually causes resignation of acting government and formation of a new government (i.e.

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72 *Born h.,* Parliamentary Control over the Security Sector, Principles, Mechanisms and Practice, Geneva, 2003, 80 (In Georgian).

73 *Giorgadze G., Tordia V., Khmaladze V.,* Constitutional Law of Georgia, Tb., 2001, 63 (In Georgian).

74 *Demetrashvili A.,* Constitutional Chronicles of Georgia, Constitutional Reform in Georgia in 2009-2010 years, Regional Centre for the Research of and Support to the Constitutionalism, Batumi, 2012,31 (In Georgian).

75 *Shaio A.,* Self-Restriction of Power, Introduction to Constitutionalism, with Introduction by *Holms S.,* Translated by*Maisuradze M.,* Edited by *T. Ninidze,* IRIS Georgia, Tb., 2003, 90 (In Georgian).

76 *Aleqsidze T., Demetrashvili A., Inauri G., and Others,* Responsible editor *Jibghashvili Z.,,* Constitutions of Eastern European Countries, Book I, Tb., 2005, 393 (In Georgian).

77 See *Bucur C.,* Who Fires Ministers? A Principal-Agent Approach Ministerial De-selection, School of Law and Government, Dublin City University, September, Dublin, 2013.

government crisis) or dissolution of the parliament (lower chamber) and holding early (extraordinary) parliamentary elections. According to the second option the government has opportunity to blackmail the parliament with the threat of dissolution and by this way introduce unpopular draft laws.[78] Political meaning – vote of no-confidence is the rudiment of parliamentary regime in the specific framework of the Fifth Republic, where it has acquired completely new meaning.[79]

4.1.2. Collective and Individual Vote of No-confidence

There is collective vote of no-confidence against the prime minister or the whole government and vote of no-confidence against one minister.[80]Some countries have only collective responsibility of the government; in other countries both forms are widely spread.[81]In case of collective vote of no-confidence, constitutions of some former socialist countries grant the president with the right to decide whether to dismiss the government or to dissolve the parliament.[82]In countries, where the government is separated from the head of the state, parliament directly participates in the appointment of the government head and cabinet of ministers; however in their further relationships, in the most of the countries the vote of no-confidence, so called destructive no confidence motion is used, which often causes the governmental vacuum. In this regard, several norms of the German basic law are quite important, by which the stabile regime of government activities is ensured. First of all, this is an idea of constructive voting.[83]In the event of destructive vote of no-confidence, there is real danger for the creation of government crisis. When the parliament raises the vote of no-confidence against the government, the above means that parliament is opposing the government openly, in other words there is a tense political situation in the country. In the event of taking the vote of no-confidence to completion, in most cases, the president shall make decision – to dismiss the government or dissolve the parliament.[84]In any case, the result is negative at some extent – the country is left without the parliament or the government, which is already a type of crisis; in the event of government resignation – the governmental crisis is inevitable. It is even more relevant under the condition that some period is required for the formation of a new government; under such circumstances time has negative impact over the events. Therefore, according to some authors, destructive vote of no-confidence increases the possibility to bargain for the political parties, as no government can be established without the formal

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78 *Tsnobiladze P.,* Constitutional (State) Law, Reference Book,Tb., 1998, 47 (In Georgian).

79 *Pakte P., Melen – Sukramanian F.,* Constitutional Law, Translated by *Kalatozishvili G., Edited by* Demetrashvili A., 2012, 725 (In Georgian).

80 For example Croatia: Constitution considers Vote of no-confidence against the member of the government as well as against the whole government.

81 *Gauli V.,* Development and Adoption of Constitution in Georgia (1993-1995), Translated by *Kublashvili K.,*Tb., 2002, 154 (In Georgian).

82 *Melkadze O.,* Constitutionalism, Series of Political-Legal Literature, Book XXI, "Universal", Tb., 2008, 154 (In Georgian).

83 See ibid, 328.

84 With the exception of unconditional no-confidence – generally requiring such a large number of votes that it is often impossible to achieve.

and public support from the parliamentary majority.[85] If the vote of no-confidence is not accepted, the above reinforces the government's position, which would be politically weakened if the number of abstaining parliament members would be high in the ordinary situation. And finally if the vote of no-confidence is accepted, this may facilitate formation of a new government based on the distinguished majority. However achievement of such result is possible if the majority is united and constructive and does not represent the incidental aggregation of controversial opposing groupings.[86] The executive authority may also have the means for the counter-maneuvering. Based on some models, if the parliament declares no-confidence to the government, then the executive authority "dies", but before the final decease it can dissolve the parliament. In several countries and under some circumstances executive authority does not enjoy the right for such dissolution, however if for a long period of time it is not possible to form the government, then the parliament is dissolved via some automatic mechanisms and new elections are scheduled.[87]

4.1.3. According by several Countries

Procedures for the vote of no-confidence differ in different countries. In Estonia, State meeting can, based on its resolution, supported by the vote of the majority of the meeting composition, declare no-confidence to the government, prime minister and minister of the republic.[88] According to the article 106 of Moldavian constitution, parliament based on the proposal of no less than 1/4th of the members can declare no-confidence to the government with the absolute majority of votes. In Hungary the Motion of no-confidence is discussed based on the written proposal submitted by no less than fifty members of the parliament.[89] In Croatia raising the issue of no-confidence against prime-minister and certain members of the government, or the whole government is based on the initiative of no less than 1/5 members of the Sabor.[90] Mentioned proposal is discussed at the parliament of Moldova in three days' time after submission,[91] as for the Sabor, it discusses and votes on the issue of confidence in no less than 7 days following the submission of the proposal. It is not permitted to discuss and vote for the issue of confidence in the Sabor after the elapse of 30 days from proposal submission.[92] Above discussed terms are not long, with the consideration of the fact that after raising the issue on the vote of no-confidence everything must be executed in a very short time, in order to exclude political games

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85 *ShugartM.,*Investiture and Constructive No-confidence Votes, posted on 16/05/2006, http://fruitsandvotes.wordpress.com/, <http://fruitsandvotes.wordpress.com/2006/05/16/investiture-and-constructive-no-confidence-votes/>, [01/10/2014].

86 *Pakte P., Melen – Sukramanian F.,*Constitutional Law, Translated by *Kalatozishvili G.,* edited by *Demetrashvili A.,*2012, 723-724 (In Georgian).

87 *Shaio A.,* Self-Restriction of Power, Introduction to Constitutionalism, with Introduction by *Holms S.,* Translated by *Maisuradze M.,* Edited by *T. Ninidze,* IRIS Georgia, Tb., 2003, 102 (In Georgian).

88 Constitution of Estonia, Article 97, <http://www.president.ee/en/republic-of-estonia/the-constitution/>.

89 Constitution of Hungary, Article 21 .

90 Constitution of Croatia, Article 115, <http://www.constitution.org/cons/croatia.htm>.

91 Constitution of Moldova, Article 106, paragraph 2, <http://www.president.md/eng/constitution>..

92 Constitution of Croatia, Article 115, <http://www.constitution.org/cons/croatia.htm>.

and danger for the creation of political crisis. According to the article 72, constitution of Hungary for the decision on the Motion of no-confidence the consent of more than half of the members is required.

The objective of vote of no-confidence is dismissal of the government.[93] In Moldova, the government resigns if the proposal of the vote of no-confidence, which is submitted within three days after the presentation of programme, statements of general political nature or draft project, is received in compliance with the article 106. If government does not resign, the presented draft project is considered as adopted, and the program and statement of general political nature – mandatory for the government.[94] In Israel vote of no-confidence is followed by the dismissal of the government and formation of a new government by one of the members of Knesset in two days' time. If the government could not be formed, or it could not get the confidence then the parliament is dissolved.[95] In Croatia if the Sabor does not declare confidence to the prime minister or the whole government, both of them shall resign. If Sabor does not declare confidence to the new government within 30 days, then chairman of Croatia Sabor notifies the president of Croatia; following such notification the president immediately makes decision on the dismissal of the Sabor and scheduling of new elections. If Sabor declares no-confidence against one member of the government, prime minister nominates new candidate or together with the government makes decision on resignation. In Estonia parliament is equipped with the right to declare vote of no-confidence to the government or its member; however it has to be noted that in this case government has effective means and according to the article of constitution it can approach the president with the request to hold extraordinary parliamentary elections.[96]

4.2. Constructive Vote of No-confidence

4.2.1. Definition

Constructive vote of no-confidence is one of the best achievements of the constitutional justice. This is a mechanism, by which the political responsibility of the government is announced and simultaneously the head of the new government is elected. The above mentioned is implemented via one voting and with the exclusion of political and governmental crisis. The concept of "rationalized parliamentarism" established in the constitutional justice system goes back to the constitution of Weimar as its origin. Later the valid German constitution enriched the rationalized parliamentarism with the powerful weapon of constructive vote of no-confidence.[97] Main idea of constructive vote of no-confidence was established by the article 67 of the basic law of 1949 year. The objective was to protect the government from the sudden dismissals. The German constitution guaranteed the stability of the cabinet without rejection of fundamental principles of parliamentary system. Therefore, it is not

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93 However, in some cases it may end with the dissolution of parliament.

94 Constitution of Moldova, Article 106[1] ,<http://www.president.md/eng/constitution>.

95 Constitution of Israel <https://www.knesset.gov.il/description/eng/eng_mimshal_hoka.htm>.

96 *Aleqsidze T., Demetrashvili A., Inauri G. and Others,* Responsible editor *Jibghashvili Z.,* Constitutions of Eastern European Countries, Book I, Tb., 2005, 104 (In Georgian).

97 *Melkadze O.,* Constitutional Law of Foreign Countries, Collection I, Vol.,VIII, Tb., 2008, 86 (In Georgian).

surprising that other countries decided to adopt articles similar to the article 67.[98] Many countries realized the advantages of mentioned article and they made decision to have the similar regulation; such countries include Spain, Hungary, Slovenia, Poland.[99] The composition of mentioned and so "popular" article 67 of the main German law is as follows: "Bundestag is entitled to declare no-confidence to the federal chancellor by the election of his/her successor by the majority of members and then with the request to dismiss the federal chancellor apply to the federal president. Federal president is liable to satisfy mentioned request and appoint the elected person. 48 hours shall elapse between the submission of proposal on the vote of no-confidence and elections."[100] There is one record in the mentioned article, which makes its ordinary contents extraordinary: prime-minister in the event of constructive vote is confronted with the rivalry candidate. Constructive vote of no-confidence supports the maintenance of state stability, as there is no authority vacuum created – the position does not become vacant,[101] as it is immediately occupied by another public official.[102]

4.2.2. Procedure, Conditions

There are diverse formal and informal criteria and procedures, according to which the parliament is authorized to declare no-confidence to the cabinet of ministers or directly specific minister (vote of no-confidence to specific minister is generally followed by the dismissal of the government cabinet as a whole). In case of two-chamber parliament, such authority is generally granted to the lower chamber only. Generally no-confidence to the government cabinet is declared via the ordinary majority of votes. In such cases until the formation of a new government cabinet the governmental functions are carried out by already resigned government. In some cases the constitution for ensuring the stability of government, provides only the absolute majority of parliament members with the right to dismiss the government. In Spain, Belgium and Germany vote of no-confidence to the government cabinet by the lower chamber of the parliament is implemented via the election of a new candidate on the position of the head of government based on the valid constructive vote of confidence As for the terms, based on the essence and purpose of mechanism, procedure shall take as short time as possible and the decision must be made in as short time as possible. In Poland for the adoption of resolution on the vote of no-confidence to the board of ministers, the proposal submitted to the Sejm shall be voted for no earlier than 7 days after the submission;[103] In Spain the issue of no-confidence is voted for no earlier than 5 days following its submission to the parliament.[104] The shortest period is allocated in Germany – interval between the submission of proposal to discuss the issue and voting is

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98 *Maciej P.,* German and Polish Constructive Vote of No Confidence. Governance or Divergence?Jagiellonian University in Krakow, Poland, Vilniausuniversetetas, Vilnius, 2013, 254.

99 Ibid, 256.

100 *Gonashvili V.,* Constitutions of Foreign Countries, Section III, "Tbiliselebi", Tb., 2006, 90-91 (In Georgian).

101 *Melkadze O.,* Constitutionalism, Series of Political-Legal Literature, Book XXI, "Universal", Tb., 2008, 133 (In Georgian).

102 Ibid, 154.

103 Constitution of Poland, Article 158, <http://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm>.

104 *Melkadze O.,* Constitutional Law of Foreign Countries, Collection I, Vol.,VIII, Tb., 2008, 152 (In Georgian).

only 48 hours. Definition of maximal time for the voting has the advantage that if there is no decision made on the issue within the indicated period, the issues are removed from the agenda after the expiration of the term.[105] However, for example German and Poland constitutions do not determine deadlines for the parliament for the review of submitted statement. Moreover, constitution of Poland stresses the need for the prompt action from the parliament, making it impossible for the parliament to attempt and derange the processes.[106]

As mentioned above, in some countries the individual vote of no-confidence is considered. Germany does not have examples for the constructive vote of no-confidence against the specific minister.[107] In Poland, the parliament has right to declare no-confidence to the specific minister, the above generally finishes with his resignation. This solution is related to the accountability of board of ministers to the parliament. One of the professors, Stanislaw Gebetner assumed that we could end up with many votes of no-confidence against certain ministers and not one constructive vote of no-confidence against the whole government.[108]

4.2.3 Government's Stability

Generally, vote of no-confidence may also ensure the stability of the government, in other words protect it. Basic Law of Germany has considered several norms-guarantees providing the stability of government. In the event of mistrust between the Bundestag and government instead of ordinary, negative voting, the idea of "constructive vote" is introduced.[109] In Hungary, the objective of constructive vote of no-confidence as introduced by the amendment made in 1990 was to bring discipline to the partners of coalition; later the same norm was restricting the influence of parliament over the government. It is objectively considered as one of the best means for the protection of government in case of instable political party systems, which were relevant for the Hungary at the stage of transitional democracy. Based on the above, ensuring the stability of government coalition required cautious approach. Neutralization of above mentioned potential threat via the constructive vote of no-confidence opened doors for the personalisation element in the system of authorities and each parliamentary election actually became indirect elections of prime minister.[110] In Spain, the above mentioned mechanism was introduced for the prevention of governmental vacuum; the above indicates on the desire of legislator to establish one more element of so called rationalized parliamentarism and to avoid chronic governmental crises.[111]

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[105] *Aleqsidze T., Demetrashvili A., Inauri G., and Others,* Responsible editor *Jibghashvili Z.,* Constitutions of Eastern European Countries, Book I, Tb., 2005, 393 (In Georgian).

[106] *Maciej P.,* German and Polish Constructive Vote of No Confidence. Governance or Divergence? Jagie llonian University in Krakow, Poland, Vilniaus universetetas, 2013, 258.

[107] Ibid, 255-256.

[108] Ibid, 260.

[109] *Melkadze O.,* Constitutional Law of Foreign Countries, Collection I, Vol.,VIII, Tb., 2008, 74-75 (In Georgian).

[110] *Aleqsidze T., Demetrashvili A., Inauri G., and Others,* Responsible editor *Jibghashvili Z.,* Constitutions of Eastern European Countries, Book I, Tb., 2005, 393 (In Georgian).

[111] See *Melkadze O.,* Constitutional Law of Georgia, Collection I, Vol.,III, Tb., 2008, 153.

Despite the above, there are some assumptions that some political "bargaining" could be used in the process of application of such mechanisms. For example, Schugart is of the view that constructive vote of no-confidence may also reduce the number of tools used by the small political parties in achieving their goals; such parties will not be able to vote for the dismissal of the cabinet without offering to new coalition the majority required.[112]According to Schugart, constructive vote of no-confidence provides parliament with the following choice: already functioning cabinet of ministers or starting the bargaining for the formation of new cabinet.[113] This is the reason for prohibition of withdrawal of already fixed vote, which makes any preliminary oppression upon the members of parliament meaningless.[114] Despite all the above mentioned, Andrash Shaio has following position regarding the vote of no-confidence: "Vote of no-confidence is a bomb, which may be exploded in the hands of engineer who constructed such bomb[115] (referring to scheduling new parliamentary elections in such circumstances).

5. Results of Political Responsibility – Examples of European Countries

Outcomes of application of no-confidence vote differ for each specific case and depend on the political situation in the country. In some cases the application of above mechanism is the only way out, however in some cases the problem is aggravated with the utilization of the mechanism.

In Germany in 1950 year, when the basic law had been effective for 1 year, Hans Schneider has mentioned article 67 among the most noteworthy topics. There were only 2 attempts for the change of chancellor using the above mentioned article. In 1972 the attempt of Reiner Barzel representing Christian Democratic coalition to change chancellor, Willie Brandt was unsuccessful; however in 10 years' time Helmut Kolle managed to receive the support of Bundestag's majority against Helmut Schmidt.[116] For the reinforcement of government's and through the government executive authority's trust, especially after the Second World War, the legislators tried to complicate the application of vote of no-confidence in Germany. Unlike 1982 year, in 1972 year the vote of no-confidence was not executed in Germany.[117]

In this regard France has diverse political past. In France voting for the government program is more the tool used by the functioning government than the manifestation of government's responsibility to the parliament. The government of France uses this tool when its policy becomes disputable

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[112] See *Shugart M.,*Investiture and Constructive No-confidence Votes, posted on 16/05/2006, http://fruitsandvotes.wordpress.com/, <http://fruitsandvotes.wordpress.com/2006/05/16/investiture-and-constructive-no-confidence-votes/>, [01/10/2014].

[113] Ibid.

[114] See *Maciej P.,* German and Polish Constructive Vote of No Confidence. Governance or Divergence? Jagiellonian University in Krakow, Poland, Vilniaus universetetas, Vilnius, 2013, 258.

[115] *Shaio A.,* Self-Restriction of Power, Introduction to Constitutionalism, with Introduction by *Holms S.,* Translated by*Maisuradze M.,* Edited by *T. Ninidze,* IRIS Georgia, Tb., 2003, 116 (In Georgian).

[116] *Maciej P.,* German and Polish Constructive Vote of No Confidence. Governance or Divergence?Jagiellonian University in Krakow, Poland, Vilniaus universetetas, Vilnius, 2013, 255-256.

[117] *Shaio A.,* Self-Restriction of Power, Introduction to Constitutionalism, with Introduction by *Holms S.,* Translated by *Maisuradze M.,* Edited by *T. Ninidze,* IRIS Georgia, Tb., 2003, 225 (In Georgian).

in the society.[118] In 35 years' period the responsibility of the government has been raised at least 40 times regarding the text of draft law; the above process was especially intensive in the period of governance of Prime Minister Michael Rofale, socialist government.[119] With the consideration of the above mentioned mechanism it is not surprising that French and German governments have managed to retain the power so firmly. Since 1958 only one government has been dismissed in France. The above took place when the president punished recalcitrant national assembly. Such stability, with the consideration of over 60 votes of no-confidence and simple mechanisms for the dismissal of governments during the past regimes, is undoubtedly noteworthy.[120] Since 1958 in the only case when the national assembly used vote of no-confidence, the president has provided consent on the resignation of prime minister with two months delay. On 05 October 1962 the denouncing resolution against J. Pompidou's first government was adopted, which was immediately followed with the government statement on the government resignation. General De Gaulle approved this statement only on 28 November 1962. This was very long time contravening the articles 49 and 50 articles. However, in this specific case the delay is explained with the fact that on 9th October, on the day of statement form the government on resignation, the president dissolved the assembly and some time was required to hold referendum on 28 October 1962, and later on 18 and 25 November – the parliamentary elections.[121] 280 members of the parliament have supported the only vote of no-confidence held on 05 October 1962 which was successful.[122]

In England, in the process of annual review of government programme the opposition often uses the right to raise the issue of no-confidence against government and in such situation the fate (future) of government fully depends on the majority supporting prime minister in the chamber of commons. If the chamber of commons accepts vote of no-confidence, then prime minister is faced with two choices: he has to resign and the whole government will follow him or he has to advise monarch to dissolve the chamber of commons; the monarch can exercise this right at any time. Prime ministers apply to this last resort when they have hope that their party can win in the elections. This mechanism of influencing the chamber of commons has balancing rather than practical function. The above is confirmed with the fact that vote of no-confidence has been used only twice in 1924 and 1979 years during the XX century.[123]

Parliaments of all eastern European countries have right to declare no-confidence against prime minister or against the whole composition of the government, as a result of such vote of no-confidence the government shall resign. In some countries (Hungary, Slovenia, Albania, and Poland) dismissal of government via the motion of no-confidence is complicated via so called constructive vote of no-confidence; in the remaining countries absolute majority of parliament is required. Simple majority is sufficient in Lithuania and Romania. In practice, dismissal of government via this procedure does not

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[118] Ibid, 226.

[119] Ibid,227.

[120] Ibid, 228.

[121] *Pakte P., Melen – Sukramanian F.,* Constitutional Law, Translated by *Kalatozishvili G.,* Edited by *Demetrashvili A.*, Tb.,2012, 717 (In Georgian).

[122] Ibid, 725.

[123] *Melkadze O.,* Constitutional Law of Foreign Countries, Collection I, Vol.,VIII, Tb., 2008, 116-117 (In Georgian).

happen often and it has more preventive nature. Prime ministers often, due to the influence from his own supporters or in case of dissolution of coalition, make decision on resignation or change of the government composition, by which they avoid the procedure of vote of no-confidence. Motion of no-confidence by the parliament against specific ministers is possible in Estonia, Latvia, Lithuania, Slovakia, Croatia, Poland and Serbia.[124]

As mentioned above, some political forces avoid the vote of no-confidence and leave the executive authority with their own initiative, as it happened in Croatia in July 2002, when the continuous tension existing between the prime minister Rachan and vice prime minister Budisha reached the culmination, the coalition has been divided; the above forced the government to resign. Budisha recalled from the government the members of his party, then the party left the coalition and liberal group with the modest representation replaced the above members in the coalition.[125]

Hungary has also avoided the vote of no-confidence; there are no cases of constructive vote of no-confidence in the constitutional practice of the country. When in summer of 2004 the coalition was divided, and Prime Minister Medesh lost the support of majority, he resigned and therefore the need for constructive vote of no-confidence disappeared. Without Medesh's resignation the coalition would collapse, which would be followed with the early (extraordinary) elections. In this case based on the defeat against own coalition resignation of government would cause significant reduction of political rating of allied parties in the coalition which would presumably end with the defeat of coalition.[126]

In Estonia in December 2001 after 2.5 years stability, political forces were suddenly re-grouped; reformatory party has dissolved the coalition and un-expectantly for the partners created coalition with the left wing centrist party. This was wide scale and unprecedented coalition agreement between two ideally different political parties. Accordingly, the government of Laar has resigned and in 2002 based on the new coalition the state assembly approved new government; the similar situation was created in 2005 year, when the grouping between the coalitions took place.[127] Political force with its resignation attempts to save its political future in order to retain some chances for the future elections, which is almost unimaginable in the event of its dismissal via the vote of no-confidence.

Good election and political party system is not sufficient for the long term stability of the government. At present, constructive vote of no-confidence, as constitutional condition/ norm may not be adopted and change without the review of basic laws, which is quite difficult. Therefore, formulations similar to the article 67 may be the best barriers against the destabilization in case of attacks of any opposition forces. On the other hand, political accountability of the government - the noteworthy characteristic of parliamentary system – remains the component of the constitutional system. The only precondition for the replacement of criticized cabinet is the attaining the support from the opponent of chancellor. The Helmud Schmidt's case (1982) is the confirmation of real and non-fictive nature of parliamentary accountability.[128]

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[124] *Izoria L.,* Presidential, Parliamentary or Semi-presidential? Way towards the Democratic Consolidation, Tb., 2010, 41(In Georgian).

[125] *Melkadze O.,* Constitutional Law of Foreign Countries, Collection I, Vol. VIII, Tb., 2008, 492 (In Georgian).

[126] *Aleqsidze T., Demetrashvili A., Inauri G., and Others,* Responsible editor *Jibghashvili Z.,* Constitutions of Eastern European Countries, Book I, Tb., 2005, 392 (In Georgian).

[127] Ibid, 106.

[128] *Maciej P.,* German and Polish Constructive Vote of No Confidence. Governance or Divergence?Jagiellonian University in Krakow, Poland, Vilniausuniversetetas, Vilnius, 2013, 256.

6. Conclusion

Why is the control of government necessary? What is the best mechanism for such control? Answer to this dilemma or answer on the issue of control over the whole government is not clear and simple. This is a question, which is as old as political system or human nature, and this issue is raised within any political system.[129] According to the prominent American scientist, A. Dali "The fundamental and key problem of the politics is avoiding the autocratic governance".[130] Mechanisms of political responsibility of the government are directed towards this objective, especially - the vote of no-confidence. Vote of confidence or no-confidence represents the fundament for the control exercised by the parliament over the executive authority. However, its implementation depends on the political strategy of parliamentary majority concerning the executive power. Mentioned authority depends on the desire of majority to allow the cabinet to retain the authority or to terminate such authority. There is possibility that execution of the above mechanism does not comply with the interests of the public. Attention of the majority is often directed towards the internal conflicts and relationships;[131] However in the process of appointment of executive authorities there is no time for arrangements and agreement between the parliament and executive bodies, as the electorate is given the possibility to dismiss the government during the parliamentary elections.[132] Supreme representative body is equipped with the formation function and right to permanently control the activities of the government. The diversity of tools of control over the government is the indicator of opportunities held by the parliament.[133] Mentioned tools are diverse; however the most effective among them is vote of no-confidence, as it causes termination of government authority. In addition to the dismissal of government, this mechanism has other basic function – the co-existence of vote of no-confidence and parliament dissolution is the manifestation of interrelationship and inter-balance between the government and parliament.[134] The mechanism of confidence-no-confidence has gained preventive function and prior to its necessary activation this mechanism maintains balance between the parliament and government.[135] The above means that under the "fear" for the activation of vote of no-confidence, governing

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[129] *Persson T., Roland G., Tabellini G.,* Separation of Powers and Political Accountability, The Quarterly Journal of Economics, Oxford University Press, Vol. 112, No. 4 (Nov. 1997), 34, <http://jstor. org/stable/ 2951269>, [20/04/2014].

[130] *Born H.,* Parliamentary Control over the Security Sector, Principles, Mechanisms and Practice, Geneva, 2003,18 (In Georgian).

[131] *Bartole S.,* Parliamentary Control over the Executive Authorities, Research Thesis Prepared by "IRIS" Georgia, Constitutional Organization of State, Material of International Scientific-Practical Conference (Tb., 18-19 May), Tb., 2004, 38 (In Georgian).

[132] See *Persson T., Roland G., Tabellini G.,* Separation of Powers and Political Accountability, The Quarterly Journal of Economics, Oxford University Press, Vol. 112, No. 4 (Nov. 1997), 1195, <http://jstor. org/stable/ 2951269>, [20/04/2014].

[133] *Melkadze O.,* Constitutionalism, Series of Political-Legal Literature, Book XXI, "Universal", Tb., 2008, 32 (In Georgian).

[134] *Izoria L.,* Presidential, Parliamentary or Semi-presidential? Way Towards the Democratic Consolidation, Tb., 2010, 20 (In Georgian).

[135] *Melkadze O.,* Constitutionalism, Series of Political-Legal Literature, Book XXI, "Universal", Tb., 2008, 345 (In Georgian).

political force will maximally try to avoid making and implementation of incorrect political decisions; and the above facilitates democratic and correct governance.

Despite the above, politicians have opportunity and intention to use the separation of power for the confusion or to make the responsibility related to the complex decisions ambiguous, gain benefits from the political success and avoid the responsibility for the political failure.[136] It is possible to avoid the above mentioned again via the restriction and balancing system, which ensures that each opposing branch is encouraged to observe and hinder the erroneous behaviour of another party; the above can be perceived as the systemic form of responsibility.[137] The systemic responsibility means that all branches of the power are responsible for the incorrect political processes taking place in the country, as during the implementation of their activities there must be connection between the separation of power and values.[138] Breaking of such balance causes the raising of political responsibility.

Although the procedures for the vote of no-confidence are legally defined in the constitution; however in reality this is political establishment and its activation is based on the political situation; accordingly its application means implementation of parliamentary control over the government. Today the parliamentary regime became the regime of political parties. The same political party or coalition establishes government and at the same time holds majority at the parliament. Here the integrity of the power and concentration of power rather than its separation is represented.[139] In reality, separation of power takes place between the governmental majority and parliamentary opposition and not between the power branches.[140] Analysis of dynamics of constitutionalism reveals that executive authority compared with the legislative authority takes the dominating position in the latter sphere with the motive, that it is better equipped for responding to the generated requirements, more so as the requirements of society often require immediate decisions.[141]

In any case, for claiming the existence of democratic society the authority must have desire and ability to base its actions in the process of society management on the principles of power distribution, be guided by the constitution saturated with the principles of constitutionalism and establish constitutional order.[142]

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136 *Nzelibejide O., Stephenson M.,C.,* Complementary Constraints: Separation of Powers, Ration Voting, and Constitutional Design, The Harvard Law Review Association, Vol. 123, No. 3 (Jan. 2010), 639, <http://www.jstor.org/stable/40379811>, [20/04/2014].

137 *Levinson J.D., PildesR.h.,* Separation of Parties, Not Powers, The Harvard Law Review Association, Vol. 119, No. 8 (Jun. 2006), 2343, <http://www.jstor.org/stable/4093509>, [20/04/2014].

138 *NourseV.,* The Vertical Separation Of Powers, Duke Law Journal, Duke University School of Law, Vol. 49, No 3 (Dec. 1999), 766, <http://www.jstor.org/stable/1373085>, [20/04/2014].

139 *Pakte P., Melen – Sukramanian F., Constitutional Law,* Translated by *Kalatozishvili G.,* Edited by *Demetrashvili A.,*2012, 226 (In Georgian).

140 *Izoria L.,* Presidential, Parliamentary or Semi-presidential? Way Towards the Democratic Consolidation, Tb., 2010, 20 (In Georgian).

141 *Melkadze O.,* Constitutionalism, Series of Political-Legal Literature, Book XXI, "Universal", Tb., 2008, 324 (In Georgian).

142 *Eremadze K.,* Semi-Presidential System of State on the Example of Georgia, Research Thesis Prepared by "IRIS" Georgia, Constitutional Organization of State, Material of International Scientific-Practical Conference Tb.,18-19 May, Tb., 2004, 103 (In Georgian).

Tamta Mamaiashvili*

Bank and Credit (Loan) Agreement and Court Settlement for the Violation of Credit Liabilities

1. Introduction

In Georgia, the economic growth is accompanied with the desire of individuals to improve their life standards; in this desire the finances have driving force; the source for attraction of these finances – is the Banking sector. The above is well understood by the banking sector and it offers to consumers various types of products. Accordingly, day by day the number of consumers increases, product varieties are improved and novelties are introduced at a high speed. However, such developments are at their initial stage, as this type of relationships requires thorough accuracy, maximal attention, control and continuous focus on the results. Accordingly, monetary-credit relationship bears the risk.[1] Based on these actual risks, the settlement, as the factual and legal finalization of the case is considered as the legal regulation of the relationship.

Legislators and law critics often underline the fact that violation of legal relationships is often a result of low legal and public awareness. Parties to the monetary obligation type relationships are the active members of the society; they are not ones with the low legal and social awareness, moreover they are equipped with the special and comprehensive legal knowledge.

At first glance, at the initial stage of relationship, everything is set in line with the requirements of law and consideration of the will of parties – this is the relationship "framed" with the above factors. Later the relationship suffers some changes. Despite the fact that the rights and liabilities of the parties to the agreement are strictly defined, the parties often are not able to get the benefits – the Bank is not able to get equivalent to the benefit issued based on the good will of the consumer; consumer in this situation tries to find the ways to repay the indebtedness or the ways to avoid such repayment. Under such circumstances, the bank is often the initiator of approaching the court, as bank is faced with the risk to incur financial losses. We have to also consider interests of the debtor, as the justice system shall ensure the fairness and balance of opposing interests.[2]

In the process of civil-legal regulation of public relationships, equipping participants with the definite rights and liabilities determines their behavior within the boundaries of legal relationships.[3] At present, when the time seems to run faster, the values have lost their price; the society is driven towards the establishment of relationships,[4] which will simplify existing "problematic" situations. Settlement is the mean/way for regulation of such situation in accordance with the rules envisaged under

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* Doctoral Student, TSU Faculty of Law.

1 See *Ramishvili A.,* Private Law Mechanisms for the Protection of Consumer Rights in the Consumer Credit Agreement, "Journal of Law", TSU Publishing", Tb., #2, 2011, 174 (In Georgian).

2 See *Chanturia L.,* Law on Credit Securitization, Tb., 2012, 56 (In Georgian).

3 *Todua M., Willems H.,* Obligation Law, Tb., 2006, 7 (In Georgian).

4 Implies the Process of Transformation of One Relationship into the Other.

the law; and this is kind of "achievement" in the monetary-obligation type relationships. In other, direct understanding there is no "best" outcome for any party.

The banks are the large financial institutions. However, they also become the parties to the disputes originating from several-page agreements. Their purpose is to achieve continuous dynamics of monetary-obligation relationships, which is directed towards the generation of profits as well as establishment of healthy financial and social relationships, which would be beneficial for the whole banking system. For this purpose, it can be stated that in the most cases, the party initiating the settlement is the bank and therefore, the banks deserve the bold critics from the public.[5] The situation is aggravated with the complex and long process of reviews of disputes at the courts. The specific nature of these relationships is more evident at the court hearings in the court halls. It seems that regulation of relationships in this way does not find the way out, which is the regulation of relationship and not the recovery of the debt or relieving from the debt.

The legislative and practical situation at present encourages the parties to the monetary-obligation type relationship to apply the settlement method. Court settlement is the most effective legislative mean for the resolution of disputes, in which the settlement act, result of negotiations and agreements between the parties become the means for the regulation of relationship. Despite the gradually established practice, it is necessary to improve the mutual mechanisms for the regulation of relationships under the dispute and to actively increase possibilities for the alternative resolution of disputes.

2. Monetary - Obligation Relationship

In II –I centuries before Christ, Rome was the state of global importance. One of the important parts of Roman civil law – obligation law has started development at that time. Development of commodity-monetary relationships created various types of deals, including a loan.[6] Roman law was strict with the insolvent person. Obligation or "obligation" was described in the establishments of emperor Justinian as legal shackles, which forced persons to act in line with the laws of the state.[7]

Volume three of Civil Code of Georgia (CCG) is devoted to the obligatory law. It includes contract standards on fulfillment, termination of obligation, reimbursement of damage and other issues in a form of general section and on the other hand – specific aspects and features of the specific contract – in the form of private section.[8]

Civil legal obligation, defined legal relationship, by virtue of which, one person – debtor is liable against the second person – creditor to carry out certain actions (transfer the property, carry out works, repay the debt and etc.) or to abstain from the fulfillment of such actions. Creditor has right to request from the debtor fulfillment of obligations. The obligation law regulates the relationships related to the obligation, for violation of which the debtor might be assigned fulfillment of liabilities or reimbursement of damage via the court.[9]

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5 More Precisely, Activity of the Banks Directed Towards the Fulfillment of Obligation.

6 See *Nadareishvili G.,* Roman Civil Code, Tb., 2001, 102 (In Georgian).

7 Ibid, 103.

8 Articles 316-476, CCG (In Georgian).

9 *Todua M., Willems H.,* Obligation Law, Tb., 2006, 14 (In Georgian).

In the common system of the general section of obligation law, separate chapter is devoted to the fulfillment of monetary obligation; this obligation is distinguished with the certain characteristics from other obligation type relationships.[10] The legislator deemed it necessary to separate such features as expression of monetary liabilities,[11] rule for the recourse of paid amount without obligation, [12] place for the fulfillment of monetary obligation,[13] sequence for the repayment of monetary obligation,[14] priorities for the repayment of court expenses,[15] repayment of monetary obligation in case of change of exchange rate for the monetary unit.[16]

The monetary obligation may have independent nature and may be related to the obligation created from the disbursing the funds in the form of the loan or may be the integral part of the main obligation, such as payment obligation which is generated as a result of sale-purchase agreement.[17] Additional characteristic of the monetary obligation is caused with the fact that money is general means for the definition of value of any material or intangible proprietary good.[18]

The contents of the monetary obligation is the debtor's obligation to transfer to the creditor certain number of monetary notes into the ownership, which can be defined precisely or parties may agree on the rules of its definition.[19] Money is the specific object of civil legal relationship which facilitates exchange of goods. Monetary notes must be maximally capable to participate in turnover. This specific feature of the subject of the obligation determines the fact that the monetary obligation is separated and regulated under the special norms, which are used only for this type of liabilities.[20]

The subject of legal theory on objects is the object or object of material world, which has objective economic value, expressed in the price and not in its practical usefulness. Usefulness is subjective category, price – is the expression of object's/item's objective economic value. According to the views widely spread in the Western legal literature, in legal terms, objects are the items; in wide understanding item can be everything, which might be subject of the execution of human being's legal power. In the process of study of object of legal relationship, it is important to set boundaries for the possible areas for its implementation.[21]

In general, monetary obligation is expressed in the national currency. Moreover, if not prohibited by the law, the parties can determine the obligation in foreign currency as well.[22] In this case, the foreign

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10 Vol. 3, Chapter 2 of CCG (In Georgian).

11 Section 1, Article 383 of CCG (In Georgian).

12 Article 385 of CCG (In Georgian).

13 Article 386 of CCG (In Georgian).

14 Article 387 of CCG (In Georgian).

15 Article 388 of CCG (In Georgian).

16 Article 389 of CCG (In Georgian).

17 See *Akhvlediani Z.,* Law of Obligations, Tb., 1999, 51 (In Georgian).

18 See *Dzlierishvili Z., Tsertsvadze G., Robakidze I., Svanadze G., Janashia L., Dzlierishvili Z.,* Contract Law, Tb., 2014, 252 (In Georgian).

19 See *Dzlierishvili Z.,* Legal Nature of Agreement on Transfer of Property into Ownership, Tb., 2010, 24 (In Georgian).

20 See *Dzlierishvili Z., Dtsertsvadze G., Robakidze I., Svanadze G., Janashia L., Dzlierishvili Z.,* Contract Law, Tb., 2014, 251-252 (In Georgian).

21 See *Bichia M.,* Object of Civil Legal Relationship, "Journal of Law", TSU Publishing, Tb., #1-2012, 35-36 (In Georgian).

22 Article 383 of CCG (In Georgian).

currency is the currency of debt, and the national currency – is the payment currency.[23] For one of the cases the cassation chamber defined that in order to express the payment of obligation in USD it was necessary that the parties to the agreement expressed their will in the agreement, in other words the monetary obligation should be defined in the foreign currency.[24]

In practical terms, for the fulfillment of monetary obligation such issue as change in the foreign currency exchange rate (the buying power) from the moment of generation of monetary obligation to the moment of its fulfillment is important.[25] If the parties have considered the possible changes in the exchange rate, they can protect themselves from the negative impact of such change through various provisions in the agreement.

Location for the fulfillment of monetary obligation is defined according the general rule on location of fulfillment; however, if there are some doubts, then the obligation shall be fulfilled at the creditor's location. Doubts related to the location of fulfillment consider the cases, when the fulfillment location is not defined under the law or the agreement and cannot be defined under the given circumstances.[26] In terms of fulfillment location, there is a position in the legal literature, according to which fulfillment of such obligation is possible via the transfer of funds to the creditor's account.[27] In case of bank credit relationships "location" for the fulfillment of the obligation on the repayment of credit is the account of debtor; the bank "deducts" funds from the above account for the repayment of debt. Hence, the legislator provides the debtor with the additional possibility to fulfill the monetary obligation via the transfer of the funds to the creditor's bank account.[28]

In the monetary-credit relationships creditor is the legal person disbursing the credit (loan), and the debtor – physical or legal entity receiving the credit (loan). The party with the obligation to disburse the credit is referred to as the "credit disburser" in the CCG-I.[29] Creditor is holder of the claim.[30] Creditor can be mortgage holder,[31] if the claim is secured with the immovable item. Creditor can also be the pledger,[32] if the claim is secured with the movable item.

Credit disburser can be only the entity defined under the Georgian legislation and licensed by the National Bank of Georgia – commercial banks, microfinance organizations and credit unions.[33] Commercial banks are so strong institutions for the economy of any country, that freedom of their

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23 *Nachkebia A.,* Definitions for the Civil Law Norms in the Supreme Court Practice (2000-2013), Tb., 2014, 134, See Case #AS-870-1138-05, 09.03.2006 (In Georgian).

24 Ibid, 133. See Case #3K-667-03, 30.07.2003 (In Georgian).

25 See *Dzlierishvili Z.,* Fulfillment of Obligation, Tb., 2006, 110 (In Georgian).

26 Ibid,103.

27 Article 386 of CCG (In Georgian).

28 See *Dzlierishvili Z.,* Legal Nature of Agreement on Transfer of Property into Ownership, Tb., 2010, 318 (In Georgian).

29 Section 2, Article 370 and Article 867 of CCG (In Georgian). See *Ramishvili A.,* Private Law Mechanisms for the Protection of Consumer Rights in the Consumer Credit Agreement, "Journal of Law", TSU Publishing, Tb., #2,2011,176 (In Georgian).

30 Article 199 of CCG (In Georgian).

31 Section 3, Article 286 of CCG (In Georgian).

32 Article 254 of CCG (In Georgian).

33 See *Gabisonia Z.,* Banking law, Tb., 2012, 173 (In Georgian).

actions may cause the severe results not only for the economy of the country, but also for the financial condition of any citizen.[34] The main function of the creditor is disbursement of loans.

One of the main subject of the bank law is the commercial bank. In modern terms the bank is special finance-credit institution, main function of which is accumulation of temporarily free funds and disbursement of these funds in the form of credits.[35]

The word "Bank" was first created in XII century in Genua. The coin exchangers sitting at small desks in the market square were implementing the simplest financial transactions. They got the name of bankers. Later the monetary transactions got more frequent and diverse forms. Italian traders with the purpose to get rid of money-lenders were creating credit associations and were providing loans to their members under the concessional terms. Financial activities have spread quickly. The special institutions – banks – were opened. With the development of monetary and commodity relationships the financial activities of such institutions fell under the state control and legal regulation.

The law of Georgia on the "Activities of Commercial Banks" represents the key normative act regulating the activities of commercial banks. Commercial bank is defined as the legal entity licensed by the National Bank of Georgia, which receives the deposits and using the deposits on its behalf carries out banking activities determined under the Georgian legislation.[36] Commercial banks are banking institutions of universal nature.[37] They serve majority of population and entities of private law. The commercial banks are allowed to carry out only the activities listed in the law on the "Activities of commercial banks",[38] including disbursement of loans, including consumer, mortgage, non-secured and other credits.[39]

Physical person using the services of banks is referred to as the "consumer". "Consumer" is defined as citizen using, buying, ordering the goods (works, services) for the personal needs or the citizen having such desire.[40] Accordingly, "consumer" and "citizen" are perceived as identical and hence "consumer" is associated with the physical person.

There are to signs qualifying the subject as consumer: a) physical person and b) purpose of his/her action; the first is a simple criterion, and the second is the criterion with the wide application. One of them is "business", which also considers the term "creditor". Fundamentally it includes two main aspects: a) Business can be physical person as well as legal entity, and b) he shall be acting with the purpose of self-employment, generally for the activity or for professional purposes.[41] The notion of "business" itself, in self-employment in the professional or trade forms is considered as business, result oriented concept, with the key objective to generate the profit. However, "*animo lucri*" ("objective to generate profit") generally is

[34] Ibid, 81.

[35] See *Shengelia R.,* Finance Law, Tb., 2004, 360 (In Georgian).

[36] See Paragraph "z", Article 1, Law on "Activities of Commercial Banks" (In Georgian). See in Detail *Gabisonia Z.,* Banking Law, Tb., 2012, 78 (In Georgian).

[37] See *Shengelia R.,* Finance Law, Tb., 2004, 362 (In Georgian).

[38] See Article 20, Law on "Activities of Commercial Banks" (In Georgian).

[39] See Section 1, Paragraph "b", Article 20, Law on "Activities of Commercial Banks" (In Georgian).

[40] See and Compare *Zaalishvili V.,* Systemic Characteristics of Regulation of Consumer Private Law Relationships in the Georgian Legislation, "Journal of Lawl", TSU Publishing,Tb., #1-2, 2010, 66 (In Georgian).

[41] Ibid, 60.

not the determining criterion, as it enables the relevant party to manipulate.[42] The supreme law of the country considers protection of consumer interests, indicating that regulation of this issue at the highest legislative level is the interest of the state.[43]

It is possible to have more than one person on the side of consumer; in such even we are dealing with the solidary obligation. In the modern economic relationships the number of liabilities with only two participating parties gradually reduces. It is not rare to have number of parties to the obligation; however, this complicates the legal nature of obligation, especially when we are dealing with the bilateral liabilities.[44] According to the article 464 of CCG, the solidary obligation is generated by the contract, law or by indivisibility of obligation subject.[45]

3. Loan and Bank Credit Agreement

3.1. Introduction

After the Old Roman Law, the classification of contracts is carried out in different ways. One of the above is loan agreement. According to the Roman law subject of the loan was money or item defined with the patrimonial sign, which had to be returned in the form of the same item with the interest or without such interest. Non-interest bearing loan was abolished gradually and only the interest bearing loans were established. Moreover, the item transferred based on the loan agreement was becoming the property of the person receiving the loan; however, its loss or death was generating responsibility against the creditor.46

Contract - is the most widely spread basis for the generation of obligation, which, first of all, is the result of free expression of will of participants of the civil relationship, expression of principle of autonomy of parties, by virtue of which parties undertake obligation to fulfill or not to fulfill one or other action. The essence of the above is that each person is free to enter into the exchange relationship with any person he wishes and define the contents of the relationship. Moreover, autonomy of the will of parties does not liberate the parties from the obligation to consider the protecting interests of each other.47

CCG refers to the loan relationship in two chapters. Chapter nine is devoted to the loan, and chapter twenty-one discusses bank credits and deposits. In the first case the law discusses norms, used for all types of loan relationships; in the second case the law discusses specific norms, which are related to the loan relationships between the credit institution and the customer. It is possible to use general

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42 Ibid, 61. With the following Indication EC Consumer Law Compendium, Comparative Analysis, Edited by *Schulte-Nölke H.* in co-operation with *Twigg-Flesner Ch.* and *Ebers M.,* Universität Bielefeld, April 2007, 734, <http://www.eu consumer law. org/study_en.cfm>.

43 See Section 2, Article 30, the Constitution of Georgia (In Georgian).

44 See *Tsertsvadze G., Robakidze I., Svanadze G., Janashia L., Dzlierishvili Z., Tsertsvadze G.,* Contract Law, 2014, 45 (In Georgian).

45 See *Mariamidze G.*, Obligation Law (Contract Law), Tb., 2013, 157 (In Georgian).

46 See *Nadareishvili G.,* Roman Civil Code, Tb., 2001, 110-111 (In Georgian).

47 *Todua M., Willems H.,* Obligation Law, Tb., 2006, 16-17 (In Georgian).

norms regulating loans also in case of bank credits.[48] Loan agreement is considered in the articles 623-628 of CCG; however these articles are not distinguished with high number and detailed legal regulations and are limited to the regulation of central issues relevant to the loans. It is also possible to use loan regulating norms for the Bank credits.[49] Under the loan agreement, lender transfers to the borrower into the ownership money or other items, and the borrower undertakes the obligation to return same type, quality and quantity of items.[50] Loan relationship is monetary-obligation relationship and the general obligation norms as well as general specific norms for the monetary liabilities apply for these relationships.

The "group of experts" based on the study of national legislations of EU member states established the general concept of the loan agreement. In general, loan agreement is an agreement according to which creditor transfers to the debtor agreed items for use with the condition that debtor within the agreed term returns the items. Subject of the loan agreement may be item for temporary use or cash funds with the specific purpose or without such purpose; the loan can be disbursed with interest or without any interest.[51]

Credit institution carries out loan transactions; loan disbursement and receiving loans are the statutory duties of the credit institution. It is possible to apply norms regulating loans for the bank credits.[52] There are various types of bank credits; each of them unlike the commercial credit, which is expressed in the form of goods, considers monetary liabilities. Therefore, main provisions characteristic to the loan agreements are applied for them.[53]

Word "credit" in Latin means loan and it is disbursed in the form of money or commodities. It considers allocation of cash funds or commodities for some interest and determined time in the form of loan. Crediting is carried out based on the main principles accepted generally. These principles are: maturity and recovery, expediency, purpose, tangible security, utilization of differentiated regime of crediting, reimbursement and etc. There are various forms of credits, including: commercial, consumer, credit, bank, mortgage, agricultural, export, international credit and etc.[54] Microcredit is the cash funds issued by the microfinance organization to the borrower or group of borrowers with the maturity, recovery, pricing and purpose terms defined in the credit agreement.[55] There are long-term and short term credits. Short-term credit may be transformed into the long-term credit trough number of prolongations.[56]

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[48] See *Shengelia R.,* Legal Nature of Borrowing and Loan, Tb., 1999, 25 (In Georgian).

[49] See *Shengelia R.,* Comments to the Civil Code of Georgia, Book 4, Vol. 1, 2001, 227 (In Georgian).

[50] Article 623 of CCG (In Georgian).

[51] *Shotadze T.,* Mortgage as a Mean for Securing the Bank Credit, Tb., 2012, 130. With the Following Indication On the Types and Legal Nature of Loan Agreements – See *Donnelly M.,* The Law of Banks and Credit Institutions, Dublin, Round Hall Sweet & Maxwell, 2000, 369-379.

[52] See *Shengelia R., Kakhadze M., Chikvashvili Sh., Chitoshvili T., Khetsuriani J., Dzlierishvili Z., Tsiskadze M, Zambakhidze T., Ninidze T., Sukhitashvili D., Shengelia R.,* Comments to the Civil Code of Georgia, Book 4, Vol. 1, 2001, 227 (In Georgian).

[53] *Shengelia R.,* Credit and Settlement Legal Relationships, Tb., 2002, 41 (In Georgian).

[54] See *Shengelia R.,* Finance Law, Tb., 2004, 365 (In Georgian).

[55] See Section 1, Article 5, Law of Georgia on "Microfinance Organisations" (In Georgian).

[56] See *Shengelia R.,* Finance Law, Tb., 2004, 366 (In Georgian).

It has to be noted that credit agreement is very similar to the loan agreement. Moreover, article 867 of CCG directly indicates that credit disburser provides the borrower with the bank credit in the form of the loan. Hence, subject of credit relationship is the provision of financial services, in other words, allocation of funds. In case of consumer credit, financial service is represented with the allocation of cash funds in the amount envisaged under the credit agreement, in other words – in the possibility to temporarily utilize the funds.[57]

There is no clear difference between the "loan" and "credit" in the special banking legislation. Terms are also used as analogous terms in the law on the "Activities of commercial banks". The subject of activities of commercial banks is disbursement of loans.[58] The same law defines what the word credit implies.[59] The similar approach is used in the law on "Microfinance organisations", which uses both terms – loan and credit. As for the credit unions, in this case the term "loan" is used. Namely, the loan is the obligation allocated by the non-bank deposit institution to its member based on the principles of maturity, repayment and pricing.[60]

As a result of study of European civil code carried out by the commission it is considered that rules regulating the loans are not extended over such contracts as credit, factoring, leasing and "instalment loans", as this type of contracts have special subject matter (legal nature).[61]

Analysis of Georgian legislation reveals that there is no clear separation between the notions – "credit" and "loan" – defined by the legislation. However, in parallel to the above mentioned, there is a view, that neither the norms regulating loans nor the regulations regulating the bank credits contain the indicative norms on the application of norms for the second agreement analogically, raising the issue on the separation of these two agreements. [62]

3.2. Loan Agreement

Loan agreement is one of the forms of monetary liabilities, as the subject of the loan agreement is money. Articles 623-628-s of CCG consider norms regulating loan agreement. According to the loan agreement, one party to the loan agreement – lender transfers into the ownership to the second party – borrower the cash funds or items defined under the group signs, and the borrower undertakes the obligation to return the same amount of cash or same type, quality and quantity of items.

For one of the cases the cassation chamber defined that at the moment of conclusion of loan agreement the parties must agree on the subject of agreement as it is the essential condition of the agreement and in case of non-achievement of agreement on the above condition the agreement is not considered as concluded. In the event of existence of agreement of parties agreement on the conditions

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57 See *Ramishvili A.,* Private Law Mechanisms for the Protection of Consumer Rights in the Consumer Credit Agreement, "Journal of Law", TSU Publishing, Tb., #2, 2011, 179 (In Georgian).

58 See Section 1, Paragraph "b", Article 20, Law on "Activities of Commercial Banks" (In Georgian).

59 See Section 1, Paragraph "t", Article 20, Law on "Activities of Commercial Banks" (In Georgian).

60 See Paragraph "e", Article 1, Law of Georgia on "Non-Bank Deposit Institutions – Credit Unions" (In Georgian).

61 *Shotadze T.,* Mortgage as a Mean for Securing the Bank Credit, Tb., 2012, 133 (In Georgian).

62 See *Gabisonia Z.,* Banking Law, Tb., 2012, 172 (In Georgian)

becomes the integral part of the agreement and proper implementation of rights and liabilities of parties will depend on the adherence to the above conditions.[63]

With its legal nature, loan agreement is real and unilateral agreement. Real implies that loan agreement becomes effective immediately after the transfer of items and funds. The agreement is considered as concluded from the moment of fund transfer and promise on the implementation of such action does not mean conclusion of the agreement.[64]

On one of the cases, chamber of appeal court guided by the section one, article 316, section one, article 317, article 327, article 623, article 328 considered it realistic that the agreement is considered as concluded not at the moment of reaching the agreement, but after the actual transfer of item. Accordingly, loan agreement is considered as concluded, when the lender transfers into ownership to the borrower the subject of the agreement. According to the appeal chamber, oral agreement cannot be considered as conclusion of loan agreement, as for such the actual action is required. In the event of dispute created on the conclusion of oral agreement, the party shall prove not the existence of loan agreement but the actual transfer of funds in the form of loan. The court indicated that with the conclusion of written agreement the parties create more guarantees for the protection of their rights; in case of written agreement, the loan agreement shall be presented as the evidence, which reflects the fact of actual transfer of the loan. Appeal chamber defined that agreement provision: "I have borrowed the amount" – was confirming the fact of allocation of funds in the form of the loan.[65]

Real agreement is also the unilateral agreement.[66] Classification of agreements in this way does not depend on will of how many persons are expressed; it depends on how the rigths and liabilities are distributed among the parties to the agreement. Agreement is mutually obligatory, if each party to the agreement has rights and liabilities. The agreement is unilateral when one party has rights and another party has only liabilities. The lender of the loan is entitled to request return of the item allocated in the form of the loan, and the borrower is liable to return the item received in the form of the loan.[67]

Loan agreement can be concluded orally and in the written form.[68] Issue on the utilization of one of the forms of the deal shall be defined under the law; and if the law does not define it then the parties shall choose the specific form.[69] Conclusion of loan agreement orally is not desirable due to the difficulty to define the fact of agreement conclusion and its conditions in the event of dispute between

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63 *Nachkebia A.,* Definitions for the Civil Law Norms in the Supreme Court Practice (2000-2013), Tb., 2014, 1197. See case #AS-858-807-2010, 16.05.2011 (In Georgian).

64 See *Shengelia R., Kakhadze M., Chikvashvili Sh., Chitoshvili T., Khetsuriani J., Dzlierishvili Z., Tsiskadze M, Zambakhidze T., Ninidze T., Sukhitashvili D., Shengelia R.,* Comments to the Civil Code of Georgia, Book 4, Vol. 1, 2001, 227 (In Georgian).

65 Decision of Chamber of Civil Cases, Supreme Court of Georgia dated 18 July 2011 on the Case #AS-756-812-2011 (In Georgian).

66 *Shotadze T.,* Mortgage as a Mean for Securing the Bank Credit, Tb., 2012, 131 (In Georgian). With Further Indication see – *Khakselberg B.L., Rovni V.V.,* Consensual and Real Agreements in Civil Law, Statute, MSK, 2004 (In Russian).

67 See: *Dzlierishvili Z.,* Legal Nature of Agreement on Transfer of Property into Ownership, Tb., 2010, 345 (In Georgian).

68 Article 624 of CCG (In Georgian).

69 See *Shengelia R.,* Legal Nature of Borrowing and Loan, Tb., 1999, 36-37 (In Georgian).

the parties.[70] It is defined under the law that in case of oral agreement other evidences shall be presented.[71] For one of the cases the cassation chamber defined that legislator had not considered the mandatory form for the conclusion of loan agreement; however the law defined the criteria for the acceptance of evidences. In particular, in case of oral loan agreement the validity of loan agreement cannot be detected via the testimonies of witnesses, meaning that the witness testimonies are considered as insufficient evidences in this case.[72]

The deals which are executed immediately after their conclusion are mainly oral. The written form of agreement can be simple and complex.[73] For the relationships, where the lender or even the legal entities acting as lenders participate, conclusion of loan agreement without following the written form is technically impossible.[74] The agreement confirmed with the notarial form does not have superior power over the agreements concluded in the simple written form.[75] Generally, the oral form is not used in the banking practice and if oral form is used in the private relationships it is used for the creation of additional guarantees in case of disputability of the loan. For the promise of loan, unlike the loan agreement, law requires to formulate the agreement in the written form[76], such agreement is rare in practice, and even if concluded, this is not loan agreement.[77]

The purpose of loan agreement is acquiring ownership right on the borrowed funds or items. The lender hands over to the borrower the cash or other items into the ownership. In particular, the borrower has right to manage the borrowed property upon his discretion.[78] Loan agreement grants the borrower with the right to use the item, but also right to spend it.[79] Moreover, loan agreement is such agreement on the transfer of property into the ownership, where the lender after elapse of certain time returns the property transferred into the ownership to the borrower.[80]

For one of the cases the chamber defined that amount received in the form of loan may not directly serve the personal objectives of the borrower. The borrower may borrow the amount based on the interests of the third person, transfer it to the third party, and third party may receive it instead of the borrower. However, in the loan relationship, participation of the person as the borrower, itself implies his obligation to return borrowed funds despite the purpose of the loan, as the agreement is

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70 See *Chechelashvili Z.,* Contract Law, Tb., 2008, 284 (In Georgian).

71 See *Akhvlediani Z.,* Law of Obligations, Tb., 1999, 144 (In Georgian).

72 *Nachkebia A.,* Definitions for the Civil Law Norms in the Supreme Court Practice (2000-2013), Tb., 2014, 196. See case #AS-294-278-2011, 03.11.2011 (In Georgian).

73 See *Shengelia R., Kakhadze M., Chikvashvili Sh., Chitoshvili T., Khetsuriani J., Dzlierishvili Z., Tsiskadze M, Zambakhidze T., Ninidze T., Sukhitashvili D., Shengelia R.,* Comments to the Civil Code of Georgia, Book 4, Vol. 1, 2001, 229 (In Georgian).

74 Ibid, 230.

75 See and compare *Shengelia R.,* Credit and Settlement Legal Relationships, Tb., 2002, 20 (In Georgian).

76 Article 628 of CCG (In Georgian).

77 See *Shengelia R.,* Legal Nature of Borrowing and Loan, Tb., 1999, 26 (In Georgian).

78 Ibid 27.

79 See *Chanturia L.,* Credit Securitisation Law, Tb., 2012, 20 (In Georgian). With Additional Reference to: *Brox/Walker,* Besonderes Schulderecht, 35. Aufl., 2011, §17, Rn.3.

80 See *Dzlierishvili Z.,* Legal Nature of Agreement on Transfer of Property into Ownership, Tb., 2010, 345 – (In Georgian).

considered as concluded if parties agreed on all essential conditions of the agreement.[81] According to the article 397 of CCG, borrower is responsible for the fulfillment of obligation even if such fulfilment was expected from other person.[82]

Loan agreement may consider charge or be free of charge depending on the agreement of parties.[83] Conclusion of bank credit agreement with any borrower is made with the expectation that the bank will receive the profit considered under the agreement. Based on the agreement of parties the interest for the loan might be considered.[84] CCG does not provide any definition for the interest. Based on the definition accepted in practice interest is periodic fee for the use of capital, the rate of which is defined based on the share in the capital. Interest obligation is always the additional obligation. If the principle obligation has not been generated or was declared as void, then the interest obligation is not generated.[85] Whether the loan is issued with a charge (interest bearing)[86] or free of charge (non-interest bearing) shall be decided in line with the agreement of parties.

Term of loan agreement is also determined under the agreement of parties and at the maturity the loan shall be repaid. The law considers alternative for the loan repayment, which is determined under the conditions of agreement termination and loan repayment.[87] If the loan maturity is not defined, then the loan shall be returned at the termination of the agreement by the creditor or debtor. The term for the agreement termination is three months. The law has expressed the specific features of loan agreement in the right to immediately claim the loan repayment and defined that lender has right to immediately request repayment of the loan, if the proprietary condition of the borrower is essentially worsening, by which the claim on the loan repayment is under risk.[88] This right exists even in case when the worsening of proprietary condition of the borrower precedes conclusion of the agreement, and this became known to the lender only after the conclusion of the agreement. Repayment of the loan represents the action determining the contents of the obligation, which is based on the loan relationship, which requires return of not identical but similar type, quality and quantity of items.[89]

3.3. Agreement on Bank Credit

Importance of loan agreement goes beyond the normal circumstances. It includes circle of financial relationships, participation of banks, investment companies, industrial enterprises and even the State. For all the above relationships the loan agreement is fundamental type of agreement. The

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81 Decision of Chamber of Civil Cases, Supreme Court of Georgia dated 18 July 2011 on the Case #AS-756-812-2011 (In Georgian).

82 Decision of Tbilisi Appeal Court, Chamber of Civil Cases, dated 17 January, 2012, Case #2b/4187-11 (In Georgian).

83 See *Shengelia R.,* Legal Nature of Borrowing and Loan, Tb., 2002, 21-22 (In Georgian).

84 Article 625 of CCG (In Georgian).

85 See *Dzlierishvili Z.,* Fulfilment of Obligation, Tb., 2006, 106 (In Georgian).

86 See and Compare *Chanturia L.,* Credit Securitization Law, Tb., 2012, 22 (In Georgian).

87 Article 626 of CCG (In Georgian).

88 Article 627 of CCG (In Georgian).

89 See *Shengelia R.,* Legal Nature of Borrowing and Loan, Tb., 1999, 28 (In Georgian).

special role played by the bank in the credit relationships determined separation of one type loan agreement, which is referred to as the Bank credit in the CCG (articles 867-873 of CCG).[90]

Credit agreement considers precise information on the parties – the bank and customer - to the agreement, credit terms including information on the date of credit disbursement, maturity, volume and currency, as well as final date of utilisation, repayment dates and tranches.[91]

Contents of specific credit agreement, first of all, is based on the statements and warranties, according to which at the moment of agreement conclusion the party to the agreement shall be capable, and the agreement shall be concluded voluntarily. It is important for the bank that for the given moment customer does not participate in any disputes, as such disputes may create risks for the customer's property and fulfilment of liabilities undertaken under the agreement. It is important that for the whole period of agreement validity the customer adheres to the agreement between him and the bank as well as other agreement conditions, does not violate legislation, does not commit criminal, administrative or entrepreneurial offences, which could have negative impact over the proper fulfilment of undertaken liabilities against the bank.[92]

On 13 May 2011, based on the resolution of the President of National Bank of Georgia No 35/04 the "Rules on the provision of necessary information to the consumers in the process of provision of banking services" were approved. Above mentioned instruction regulates provision of full, necessary, clear and timely information to the consumers in the process of disbursement of credits and provision of deposit services in a consistent manner. The objective of above rules is ensuring reinforcement of market disciplines in the country, improvement of trust of consumers to the banking sector, protection of consumer interests and transparency of information on the products offered by the banks. The above facilitates active consumption of financial products by the consumers as well as reduction of credit risks.[93]

Bank credit is the key bank product offered by the financial institutions. Bank credit agreement is an independent deal, which must be concluded in the written form, otherwise such agreement will be deemed as void. Credit agreement conclusion would be meaningless without another agreement execution of which is the purpose of credit agreement.[94] Credit agreement is indirect accessory type agreement and it is connected with other agreements (with charge).[95] However, its accessory nature is more reflected in its economic connection rather than legal and is considered as inter-related deal and economic unity.[96] Under the bank credit agreement the lender provides or is obliged to provide the

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90 See *Chanturia L.,* Credit Securitization Law, Tb., 2012, 28 (In Georgian).

91 See and Compare *Shengelia R.,* Credit and Settlement Legal Relationships, Tb., 2002, 44 (In Georgian).

92 Agreement clearly considers that the customer shall not be involved in the trade/ production of prohibited goods, must not use the labor of immature persons or forced labor in its activities, must ensure healthy working environment.

93 See *Gabisonia Z.,* Bank Law, Tb., 2012, 176 (In Georgian).

94 See *Chanturia L., Zoidze B., Chanturia L.,* Comments to the Civil Code, Book 3, 2001, 301 (In Georgian).

95 Mortgage – Purchase Agreement or Simultaneous Agreement on Loan, Mortgage and Purchase.

96 See *Chanturia L.,* Comments to the Civil Code, Book 3, 2001, 301 (In Georgian).

borrower with the credit for some charge in the form of loan.[97] Credit considers any obligation related to the disbursement of cash funds based on the repayment, charge, security and maturity principles.[98]

Bank credit is a specific form of loan relationship. However, it is characterized with certain features differentiating bank credit from the loan. In particular, special subject, credit purpose, charges related to credit, obligation to provide information, subject of the agreement, provisions on the use of security.[99] In addition to the above, one party to the bank credit – the lender – is always a bank or other credit institution; Bank credit is allocated with preliminarily determined purpose, and the borrower is liable to use the credit for such purpose;[100] Subject of bank credit agreement is always money or other item.[101] This is the main difference of bank credit from the ordinary loan agreement.[102]

By its legal construction bank credit is integral agreement. However, in financial terms and based on the purpose of its allocation bank credit may be divided into several types. There are mainly three types of bank credits distinguished in the Georgian banking sector: business credit, mortgage and consumer credit.[103]

Business credit is allocated for the financing of business transaction only to the entrepreneurial entities. The enterprise must have operational business and the business has to be profitable.[104] Mortgage type credits can be allocated for any non-entrepreneurial physical person, either resident or non-resident. Mortgages are disbursed for the purchase of immovable assets or for repairs to immovable assets. Immovable asset, purchase or repairs of which are financed under the credit are usually used as the security for the above type of credit. Besides the purpose of the credit, attention is drawn to the legal revenues of the borrower. It is natural that the higher are the revenues of the borrower, the larger amount is provided by the bank.[105] Consumer credit is one of the highest revenue generating credit products of commercial banks and other credit institutions. Consumer credit agreement is the credit agreement between the enterprise or professional lender and the consumer.[106] The purpose of such credit is free use of funds without any specific purpose. The volume of consumer credits is generally lower and such credits are quite comfortable in practice.[107]

Any obligation generated under the civil law is subject to securitization.[108] The most widely

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97 Article 867 of CCG (In Georgian).

98 See Paragraph "g", Article 1, Law on "Activities of Commercial Banks" (In Georgian).

99 See *Chanturia L.,* Credit Securitization Law, Tb., 2012, 28-30 (In Georgian).

100 See *Shengelia R., Kakhadze M., Chikvashvili Sh., Chitoshvili T., Khetsuriani J., Dzlierishvili Z., Tsiskadze M, Zambakhidze T., Ninidze T., Sukhitashvili D., Shengelia R.,* Comments to the Civil Code of Georgia, Book 4, Vol. 2, 2001, 194 (In Georgian).

101 See *Akhvlediani Z.,* Law of Obligations, Tb., 1999, 221 (In Georgian).

102 See *Chanturia L.,* Credit Securitisation Law, Tb., 2012, 29 (In Georgian).

103 See *Gabisonia Z.,* Bank Law, Tb., 2012, 186 (In Georgian).

104 Ibid, 188-189.

105 Ibid, 195.

106 *Chanturia L., Zoidze B., Chanturia L.,* Comments to the Civil Code of Georgia, Obligation law, General Part, Book 3, Tb., 2001, 300 (In Georgian).

107 See *Gabisonia Z.,* Bank Law, Tb., 2012, 198 (In Georgian).

108 See *Akhvlediani Z.,* Law of Obligations, Tb., 1999, 76-77 (In Georgian).

spread form of security utilization is loan (bank credit) security.[109] Unlike the ordinary loans, bank credits, generally are disbursed with the condition of use of security. The bank actually does not allocate loan, if it is not properly secured.[110] It has to be noted that, generally, bank credits are issued based on collateral (mortgage, pledge) or personal (warranty) security. In practice there are rare cases when the unsecured credits are allocated. Such credits are referred to as blank credits in the bank law. Blank credits are mainly allocated for the borrowers which are well known to the bank and are considered as low risk bearing customers.[111]

Agreement can be concluded for indefinite term; however, this does not mean that agreement liabilities can continue to exist for indefinite term. Non-limitation of liabilities in time can be considered as infringement of freedom. It is not acceptable to have situation where the obligation undertaken by the borrower once becomes permanent burden for the borrower and that the borrower does not have lawful means to get rid of such liabilities.[112] Article 364 of CCG enables the borrower to fulfill the obligation before the maturity, if creditor does not refuse to do so based on the justified reasons. Often the term falls under the common interests of the creditor and debtor and none of them have right to unilaterally reject such term.[113] In the process of obligation fulfillment the assumed terms are also widely used. These terms are defined in the article 265 of CCG. In particular, the article discusses the cases when "there is no time defined for the fulfillment of liabilities and such time period cannot be detected based on other circumstances." Other circumstances can be numerous and they are based on the trade habits and traditions. Maturity assumed in the agreement always depends on the presumable intention of parties to the agreement. There are cases, when such term is borne by the nature of obligation type relationship.[114]

Quite often, there are cases when the same borrower enters into several loan agreements with the same lender. In many such cases the agreement conditions are not the same. The specific nature of these liabilities is that fulfillment of liabilities by the borrower is not sufficient for the repayment of all liabilities.[115] According to the section one, article 387 of CCG, if the debtor is liable before the creditor for several similar liabilities and the one obligation fulfilled is not sufficient for the repayment of all liabilities, then the obligation chosen by the borrower, and if the borrower does not make such choice, then the debt with the earliest maturity will be covered. If the dates on which claims mature occur simultaneously, then the claim which is the most burdensome for the debtor shall be covered the first.[116] Debtor is provided with the opportunity to decide him/herself which of the burdens he prefers

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[109] See *Chanturia L.,* Credit Securitization Law, Tb., 2012, 16 (In Georgian).
[110] Ibid, 30.
[111] See *Gabisonia Z.,* Bank Law, Tb., 2012, 185 (In Georgian).
[112] See *Zarandia T.,* Location and Terms for the Fulfillment of Contractual Obligation, Thesis Work, Tb., 2002, 74 (In Georgian).
[113] Ibid, 76.
[114] See *Zarandia T.,* Location and Terms for the Fulfillment of Contractual Obligation, Thesis Work, Tb., 2002, 77 (In Georgian).
[115] See *Dzlierishvili Z.,* Legal Nature of Agreement on Transfer of Property into Ownership, Tb., 2010, 322 (In Georgian).
[116] Section 2, Article 387 of CCG (In Georgian).

to get rid of. It might not fall under the interests of the creditor, but it is not allowed to give priority to the creditor's claims over the right of choice granted to the debtor, as the debtor knows the best which of the debts are the most burdensome for him and recovery of which would free him from the additional costs.[117] When all claims are equally burdensome, the valid civil legislation first of all protects interests of creditor and not debtor, reflected in the fact that first of all those liabilities shall be covered, which are less secured.[118]

4. Basis for the Termination of Bank Credit (Loan) Agreement

Social-economic and cultural development of Rome's state was influencing the improvement of obligation law norms. Development of commodity-monetary relationships raised the issue of debtor's responsibility for the faulty non-fulfillment of obligation.[119] Number of factors determines the violation / non-fulfillment of obligation – legislative, objective and subjective.[120]

Generally, repayment of bank credit is not implemented at once and bank credit gives birth to the long term relationship. For the borrower the above means that he returns the loan during the whole period of the agreement, in other words the total loan amount is divided over the number of months, the interest is added and the loan is repaid gradually. Fulfillment of loan agreement means the exhaustion of rights and liabilities by the parties. Proper fulfillment together with other factors is related to the time for fulfillment. Loan repayment term can be precisely defined under the agreement. In this case borrower is obliged to return money received in the form of loan, and without prior determination, the loan shall be returned following the agreement cancellation; the above mainly takes place under the claim of the creditor and 3 months are acknowledged as the time for the repayment of the loan.[121] If the borrower himself wants to repay the debt, in case of non-interest bearing term agreements, the borrower can always repay the loan before the maturity; as for the repayment of interest bearing debt before maturity – borrower can repay it with the consent of the creditor, as without such consent repayment of debt before maturity causes the loss of future interest payables for the creditor.[122]

The obligation is violated if it is not fulfilled or fulfilled improperly. Non-fulfillment of obligation is manifested in the debtor not implementing the actions required for the fulfillment of undertaken obligation and therefore creditor does not get expected. In the event of improper fulfillment the obligation is fulfilled, however with the conditions less favorable for the creditor. Improper fulfillment is sometimes considered as non-fulfillment.

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[117] See *Dzlierishvili Z., Tsertsvadze G., Robakidze I., Svanadze G., Janashia L., Dzlierishvili Z.,* Contract Law, Tb., 2014, 256 (In Georgian).

[118] Ibid, 108.

[119] See *Nadareishvili G.,* Roman Civil Code, Tb., 2001, 107-108 (In Georgian).

[120] See *Begiashvili N.,* Impossibility to Fulfill the Obligation (Comparative, Legal Analysis), "Journal of Law", TSU Publishing, Tb., 2011, 9 (In Georgian).

[120] See *Chanturia L.,* Credit Securitisation Law, Tb., 2012, 23 (In Georgian).

[121] See *Shengelia R., Kakhadze M., Chikvashvili Sh., Chitoshvili T., Khetsuriani J., Dzlierishvili Z., Tsiskadze M, Zambakhidze T., Ninidze T., Sukhitashvili D., Shengelia R.,* Comments to the Civil Code of Georgia, Book 4, Vol. 1, 2011, 232-233 (In Georgian).

[122] Ibid, 233.

In the event of obligation violation creditor can claim reimbursement of incurred loss. If obligation violation is related to the overdue fulfillment of the obligation by the debtor creditor can allocate necessary time for obligation fulfillment, and in case of obligation non-fulfillment in the allocated time request the reimbursement of incurred loss instead of bligation fulfillment. It is not necessary to allocate additional time, if it is evident that such allocation will not have any result or when there are special circumstances, which with the consideration of interests of both parties justify the immediate use of claim for loss reimbursement.[123]

The explanation of the appeal chamber on one of the cases is related to the correctness of the will expressed by the customer, which may become one of the reasons for the agreement termination. Appeal chamber defines that only existence of the will does not cause conclusion of the deal, the will shall be directed towards the generation, change or termination of legal outcome. The chamber is of the view that expression of the will directed towards certain legal outcome is related to the generation of rights as well as duties. Accordingly, before the confirmation of opposite it is assumed that the will expressed by the person complies with his/her real will. Above mentioned presumption is abolished, if it is confirmed that the will was expressed under the conditions which exclude the compliance of expressed will with the real will.[124] With the voluntary signing of the agreement the party expresses his/her consent to the agreement terms and conditions, and it is assumed that agreement terms and conditions were known to him/her from the beginning. Accordingly, signatures on the disputable agreement implies expression of real will by the parties and that such deficiency of will expression, which could be considered as the basis to consider that the agreement was concluded with deception, does not exist.[125]

Breach of debtor's trust by the creditor is one of the bases for the violation of conditions of credit relationship. Accordingly, protection of creditors from the arbitrariness of debtors is an important goal. In one instance, debtor tries to avoid obligation fulfillment, in other instances the debtor fulfills the obligation improperly or with the violation of terms, or tries to avoid debt repayment, changes the location without notifying the creditor and etc.[126]

One of the widely spread breach of obligations is overrunning the defined term by the debtor. Loan maturity can be precisely defined by the agreement. In this case the borrower must return the money or item received as a loan at the maturity. If the time for loan repayment is not indicated or is defined with the moment of claim, then loan shall be repaid at the moment of agreement termination by the creditor or debtor.[127] The law also considers the case, when the obligation is not deemed as violated due to the overrunning of the term, and such overrunning is associated with the circumstances, which are not caused by the debtor's fault. In case of debtor's fault, the debtor is

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[123] See *Akhvlediani Z.,* Law of Obligation, Tb., 1999, 55-56 (In Georgian).

[124] Decision of Tbilisi Appeal Court, Chamber of Civil Cases, Dated 17 January, 2012, Case #2b/4187-11 (In Georgian).

[125] Decision of Chamber of Civil Cases, Supreme Court of Georgia dated 21 February 2012 on the Case #AS-1220-1240-2011 (In Georgian).

[126] See *Chanturia L.,* Credit Securitization Law, Tb., 2012, 34 (In Georgian).

[127] See and Compare *Shengelia R.,* Legal Nature of Borrowing and Loan, Tb., 1999, 45 (In Georgian).

responsible even for the carelessness and accident.[128] For one of the cases the appeal chamber defines that the term of the obligation fulfillment is violated if the debtor is inactive, and if even after the warning issued by the creditor after the maturity the debtor does not fulfill the obligation. Warning itself implies the reminding and without such warning the debtor is not considered as one violating the terms.[129]

There are three preconditions for the claim for loan repayment: a) loan agreement; b) disbursed loan; and c) maturity of the loan.[130] The most significant factor for the debt repayment is the maturity, which is the culmination of obligation fulfillment (and in case of non-fulfillment – fulfillment request). Lender has right to claim debt repayment at the maturity (expiration) of the agreement,[131] if the maturity term is not defined – at the moment of unilateral termination (cancelation)[132] and for the significant basis – in the event of worsening of proprietary condition.[133]

The annex to the credit agreement, in the form of standard conditions considers responsibility of parties, according to which the parties undertake the obligation to reimburse the losses incurred as a result of full or partial non-fulfillment of agreement or improper fulfillment in line with the rules envisaged under the legislation or the agreement. Reimbursement of losses does not release the customer from the fulfillment of liabilities undertaken under the agreement. Moreover, for ensuring the full and proper fulfillment of undertaken liabilities, the bank reserves the right to determine the sequence of payments, before the full and proper recovery of the matured payments, to block any type of accounts held by the customer without acceptance, deduct all payments from the accounts without requirement for acceptance, issue overdrafts or/ and increase the existing overdraft limits, and direct the relevant amounts for the repayment of the payments due; the above actions shall be implemented in line with the valid rules.[134]

The obligation of the turnover participant to properly fulfill the obligation is based on the reality, which is known to him/her and he/she must have fair attitude towards such reality. Obligation for the fair behavior is based on the assumption on fairness which is generally effective in the law. This assumption determines the general direction for the development of legal relationships.[135]

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[128] See *Akhvlediani Z.,* Law of Obligations, Tb., 1999, 60 (In Georgian).

[129] *Nachkebia A.,* Definitions for the Civil Law Norms in the Supreme Court Practice (2000-2013), Tb., 2014, 142. See Case #3j-/614-01, 18.01.2001, (In Georgian).

[130] See *Chanturia L.,* Credit Securitization Law, Tb., 2012, 24 (In Georgian). With Additional Reference to Schelhammer, Schuldrecht, Rn. 311.

[131] Article 626 of CCG (In Georgian).

[132] Article 626, Article 405 and Article 399 of CCG (In Georgian).

[133] Article 627 of CCG (In Georgian).

[134] Extract from the Annex to the Credit Agreement – Standard Terms and Conditions (In Georgian).

[135] *Nachkebia A.,* Definitions for the Civil Law Norms in the Supreme Court Practice (2000-2013), Tb., 2014, 128, See Case #3 k-1133-02, 20.12.2002 (In Georgian).

5. Settlement Process with the Purpose to Regulate the Credit Relationships

5.1. Essence and Objective of Court Settlement

Everything starts with the violation of credit relationship between the bank and the customer, disputable relationship and so called “credit conflict”. “Conflict” is the relationship established between two or more persons loaded with negative emotions. Law dictionary defines the term “conflict” (dispute) as the disagreement, which is the basis for initiating the specific case processing.[136]

Dispute between the bank and customer, first of all, is subject to internal regulation at contractual as well as legislative levels and includes address and warning. As soon as the bank exhausts all internal resources existing for the resolution of disputes, approaching the court remains the unconditional mean for the dispute settlement.

Under the existence of dispute, the parties may change their positions; find relevant resources for the resolution of dispute. Under such circumstances, the main requirement is to discuss and pursue the dispute resolution in a peaceful manner.[137]

Dispute between the bank and customer shall be defined as the disagreement of specific nature, which is related to the bank credit, credit history, facts of payment, credit agreement and law, as well as banking policy.

Holding negotiations and processing the case at the court differ significantly from each other. Negotiation is a process, when the parties maintain maximal control over the dispute, as for the case processing, court takes control over the dispute and the final decision is made by the court.[138] For the resolution of dispute via negotiations it is necessary that the bank and debtor both believe that the benefits of the agreement outweigh the losses. If their interests are radically different, then agreement requiring from one party to compromise everything or/ and to compromise majority of positions is not reachable. Hence, if the negotiations around the key issues of the dispute are hindered, then the parties may agree on the resolution of dispute via the processual means.[139]

The apparent, severe financial condition of debtor is the clearly confirming that the negotiations held without court involvement will not have results. Accordingly, although it could be very “undesired fact” for the debtor, the bank has to approach the court for the regulation of dispute. For the above purpose the bank choses the specific way for the regulation of case - review of the case at the court. Hence, disputable credit relationships created due to the non-fulfillment of obligation moves into the court. The right to apply to the court is valid during the limitation period,[140] in other words three years from the moment in time when the lender learnt that the borrower was not repaying the debt, in other words his right was infringed.[141]

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[136] See *Garner B. A.,* Black’s Law Dictionary, USA, 2004, 505.
[137] See *Merrills J.G.,* International Dispute Settlement, New-York, 2005, 1.
[138] Ibid, 18.
[139] Ibid, 12.
[140] Articles 129-130 of CCG (In Georgian).
[141] See *Shengelia R.,* Legal Nature of Borrowing and Loan, Tb., 1999, 56 (In Georgian).

The starting point of the civil case is the claim submitted to the court by the parties for the protection of violated or disputed rights and lawful interests. Claim proceedings are the key form of civil proceedings, as majority of claims proceeds from the disputes related to the rights.[142] The claim is the key and fundamental document for the review of case at the court. The claim defines and establishes the request, the essence of violated rights and complaints of the claiming party.[143]

According to the legal definition the civil process is the aggregation of norms, which is regulating the rules on the review of civil case and making relevant decision, defines rights and duties of the parties, provides protection of legal rights and interests of physical and legal entities.[144] As confirmed by the court practice, in the most cases, the bank represents the claimant and initiator of the review of the dispute at the court, the procedural –legal outcome of submission of the claim by the bank is that following the acceptance of claim for processing the civil process on banking activity starts. The parties – bank and debtor – become the participants of civil procedural relationship and acquire procedural rights and liabilities. In parallel to the above the court is assigned the obligation to review the bank dispute and make relevant decision. Court carries out number of measures for the preparation of the case for discussion to be held during the main hearing at the court.

Often the review of the bank case at the court does not finish with the court decision. According to the Civil Procedural Code of Georgia one of the forms of completing the case processing at the court is the termination of the case.[145] The party can reach agreement, settlement at the court and terminate the case based on the relevant approval issued by the court. The advantage of settlement approved by the court is that none of the parties wins or loses the case; the parties can regulate all legal relationships until such regulation is possible via the litigation.[146]

It has to be noted that it is possible to finish the case processing with the settlement at any stage of the case. However, for the achieving of legal outcome it is desirable that the process does not cross specific legal boundaries, after which settlement is not possible. Namely, settlement is possible until the legal basis for the issuing court resolution is not matured. For example, before the essential review of the cassation appeal by the Supreme Court the parties have agreed, such agreement became the basis for the completion of case with settlement.[147]

For the bank as well as the debtor the finalization of court case with the settlement is the form of completing litigation bearing the same importance as the issuing the resolution on the case. Finalization of court case with settlement is the voluntary choice of parties. The parties can finish the case hearing with settlement.[148] For the completion of case processing with the settlement there is a

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142 See *Kurdadze Sh.,* Review of Civil Cases at the First Iinstance Court, Tb., 2005, 422 (In Georgian).
143 Ibid, 429.
144 See *Shushanashvili Al.,* Legal Dictionary, Tb., 2000, 61 (In Georgian).
145 See Article 272 of CCG (In Georgian).
146 See *Werner F.E., Matthew W.F., Kluver C.H. B.,* Introduction to German Law, The Hague-London-Boston., 1996, 369.
147 Decision of Chamber of Civil Cases, Supreme Court of Georgia, dated 22 January, 2010, On the Cases #AS-1003-1278-09; #AAS -1003-1278-09-X-dze, (In Georgian). <http://www.supremecourt.ge/default.aspx?sec_id=191&lang=>[01.10.2014].
148 See CPCG, Article 3, Section 2 (In Georgian).

need for relevant legal preconditions; such preconditions are not straightforwardly defined in the legislation and it is desirable to make their classification based on the specific features. Preconditions of settlement can be divided in terms of case processing and characteristics of settlement. In each case there are subjective and objective factors present. In the first case it is necessary to have a dispute between the creditor bank and debtor and the will on the settlement must be expressed by the parties, in the second case – there is a need for holding negotiations between the parties – the bank and consumer and to develop settlement act, following which the court terminates the case if parties reach the agreement.[149]

Indeed, the bank and debtor are entitled to dispose the subject of dispute (based on the disposition principle), the court holds the leading position at the hearing, as it represents the state authority and parties obey to this authority. Actions of the parties are directed towards providing the starting point for the court activities and provide the court with the basis for making relevant decision.[150] Accordingly, the role of the court / judge is equally important for the settlement. The settlement is implemented by the court; the above is reinforced with the term "court settlement".[151] The case processing considers the court regulation of relationship which became disputable and accordingly, the case processing may only finish with the court settlement.

The court shall, by all means, support and implement all actions envisaged under the law to finish the case with the settlement between the parties.[152] The judge shall review each specific case with attention, spending required time (not in rush), with the responsibility and must be patient, attentive and convincing for the parties.[153] The judge has the opportunity granted by the law to delay the case temporarily and provide the parties with the reasonable time for the finalization of case with settlement, time enabling them to think thoroughly about their positions and prospects. Moreover, the judge shall necessarily offer to the parties the settlement in the simple way and make such offer in the way which is directed towards the settlement. In particular, each sentence addressed to the party shall express the goal of the settlement and in the event of non-achievement of settlement shall describe the expected outcomes. At this stage the activity to be implemented as a minimum is provision of consultations to the parties. The practical value of consultations is the provision of useful information at the most important time before the implementation of any action. If such information is provided late, this can be perceived as oppression.[154]

Any action implemented by the court is based on the requirements, initiatives of the parties and the issues under dispute are discussed with the facts which are provided by the parties to the court. The raised questions are also discussed based on the facts which are provided by the parties to the court.[155] The court does not carry out litigation without the initiative from the interested parties. The court starts

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[149] See CPCG, Article 272, Sub-Paragraph "d" (In Georgian).

[150] See Chrestomathy on the Civil Litigation, MSK, 1996, 62 (In Russian).

[151] *Marsh S.R* ., Current Issues in Court Annexed Mediation, <http://adrr.com/adr2/essayq.htm> [01.10.2014].

[152] SeeCPCG, Article 218, Section 1 (In Georgian).

[153] See *Khurcidze N., Matiashvili M., Moliterno J., Zambaxidze T., Tsiskadze M., Joxadze G.,* Ethical Issues in Legal Professions, Tb., 2009, 94 (In Georgian).

[154] See *Merrills J.G*., International Dispute Settlement, New–York, 2005,3.

[155] See *Treushnikova M.K.,* Chrestomathy on the Civil Litigation, MSK, 1996, 63 (In Russian).

litigation process only based on the appeal from the parties and the judge should not go over the requirements of parties, should not look for the facts and evidences, which were not submitted or stated by the parties. The judge is not entitled to look for and obtain evidences. Accordingly, the court must deal with the management of settlement process with care. The rights and liabilities of each party comply with the rights and liabilities of the court. The court, as the body equipped with the public power, is not interested in any party; it is interested in the correct resolution of dispute on the basis held by the court. Both parties shall be equal for the court.[156]

Despite all the above mentioned, the court cannot force either bank or debtor to finish the case with settlement. If parties can't reach agreement on the conditions and terms of the deal the court hearing continues in line with the defined rules. Generally, it has to be noted that application of alternative means for dispute resolution is perceived by part of the judges with skepticism. They are of the view that court process has already proved its effectiveness and hence, it is not necessary to look for novelties in this area, more so as the court is never against the settlement and can approve the conditions reached based on the agreement of parties.[157]

5.2. Settlement Attempts and Approval of Settlement Act

At any stage of litigation it is possible to have initiative from the parties and agreement on the settlement. The informal starting point of settlement process is the conflict created between the bank and debtor, which complicates the business as well as personal relationship between them. At the initial stage there are only few facts which are not clear for the parties, later the situation is aggravated and it becomes necessary to use such court processes as court settlement.

Settlement process, first of all, starts with the settlement attempt; the necessary precondition of the above attempt is existence of conflict between the parties. Contact shall imply exchange of healthy views and must be directed towards the mutually beneficial end. In particular, the reasonable offer on the settlement shall be proposed. Offer must be effective and serve the resolution of dispute. The offer shall improve the bank's, as the credit institution's and the debtor's, as the potential customer's attitude to each other and to the business with the purpose to better manage it and achieve certain results. The form of contact is the continuous communication of parties; such communication shall be managed with caution and in line with the determined form in order not to lose the slightest chances for settlement. It is necessary to continuously maintain the contact, requiring intensive management of negotiation process and exchange of ideas.

The active part of the settlement attempt is the development of settlement conditions. There is no time factor for the development of settlement conditions; the most important is the result. However, the negotiations continued for the years look more like the attempt to waste time and not as an action directed towards the real results. Regulation of credit relationships requires short period of time. The development of settlement conditions by the bank and debtor considers the factual and legal circumstances; development of the above circumstances in the form of settlement offer is the

[156] Ibid, 64.

[157] *Tsertsvadze G.,* Mediation, Alternative Form of Dispute Resolution, Tb., 2010, 167 (In Georgian).

precondition for the approval of settlement act. Settlement negotiations are different from the ordinary negotiations. In case of settlement negotiations, each word and action shall be straightforwardly directed towards the settlement. The disputing parties shall try to understand essence of the dispute, its positive and negative features, the winning and losing nature of their positions, assess the future tendencies of the dispute discussion and based on the proposal of legally strong positions develop the draft settlement act. There is a possibility that at the initial stage the positions simply acceptable for the parties are not evident, however the essence of the dispute resolution could be distinguished, hence elaboration of positions is only matter of time and further negotiations. At this stage it is expedient to prepare the agreement framework in advance. Development of the project will facilitate concentrated discussions, revealing of the issues, which could be missed out in other cases; moreover, it helps the parties to avoid future confusions and misunderstandings.[158]

In the process of development of settlement conditions the volume/quantity of the liabilities to be implemented shall be considered. We have to separate several, depending on each other liabilities generated from the credit relationship – for such liabilities it is possible to determine the sequence of liabilities based on their priorities and to offset, pardon less important liabilities[159] and the liabilities which is the result of several simultaneous liabilities.[160] In the process of development of settlement conditions, we have to also consider the general principle of sequence of fulfillment of liabilities. From the payment made by the debtor, which is not sufficient for the repayment of total matured payment the court expenses are covered at first, then - the principle amount and finally - accrued interest.[161]

In the process of development of settlement conditions the proprietary status of the borrower shall be considered. The law considers the right to immediately claim the debt;[162] worsening of proprietary situation of the debtor is considered as the basis for such claim, such worsening creates the risks for the fulfillment of claim on the repayment of loan.[163] In the process of development of settlement conditions, the above mentioned condition is indirectly related to the fact that the bank shall take into account the fact of worsening the proprietary situation of the borrower and realistically asses the circumstances which could be considered in the settlement conditions. However such situation may have essential impact over the settlement conditions. In the process of development of settlement conditions one should also consider the legal measures used for securing the debt, existence and adding of which may improve the debtor's condition.

Generally, there are four ways for negotiations: light, heavy, intermediary and principle. Each type of negotiations is distinguished with certain characteristics and they are gradually becoming

[158] See *Gogishvili M., Sulkhanishvili M., Meskhishvili K., Jinoria Kh., Gelashvili R.,* Relationships in the Court Hall, Communication and Legal Aspects of Court Process Management and Settlement of Parties, Supreme Court of Georgia, Tb., 2010, 92 (In Georgian).

[159] Such form in the banking practice is - Restructuring.

[160] Such form in the banking practice is - Penalty, Accrued Interest.

[161] See *Akhvlediani Z.,* Law of Obligations, Tb., 1999, 53; Article 388 of CCG (In Georgian).

[162] Article 627 of CCG (In Georgian).

[163] Claim to repay the loan or repayment of loan itself. Creditor is implementing the right to claim the repayment of loan and worsening of proprietary condition of the debtor cannot create threat for the claim right.

complex with the straining of inter-relationship between the parties. It has to be noted that the heavy settlement method is characterized with the following – the parties to the dispute are competitors, they do not trust each other and consider only him/herself as the winner party and expect from other party the maximal compromise and solution of issues based on their own view. We are faced with deception and hiding of the main objective of negotiations. In this case, position of one party is dominating; the objective of the party is not settlement, but the victory.[164] Settlement process shall be carried out under the equal conditions for parties. For the settlement the unilateral compromise is not acceptable, the bilateral actions, bilateral interest and accordingly mutual compromises are necessary.

Art of negotiation is very important for the settlement process. It must be based on the cautious, clear and targeted communication. Selection of correct way of negotiations depends on many factors. Before the selection of method it is desirable to understand the mental condition of parties, as the parties have different perception of the events and in the most cases, their positions are based on the personal attitudes. For negotiations it is necessary to achieve that parties can perceive the facts objectively, based on the rules envisaged under the law and not in the way important for them. Moreover, it has to be noted that art of settlement is also related to the management of emotions of parties. Sometimes the emotions are more important than the conversations.[165]

If the bank and the debtor agree, the court approves the settlement act. Settlement act is the written document on the management of civil rights and liabilities by the parties. The document indicates the will of the parties, which considers mutual compromises for the achievement of mutually beneficial outcome. After the agreement of parties on the settlement, their rights and duties are defined in accordance with the conditions provided in the mentioned settlement act and not according to the liabilities which were valid prior to the settlement.[166]

The settlement act shall be prepared in the written form and it must contain conditions related to the resolution of all disputable issues. In particular, the contents of the act should be based on the factual circumstances of case under dispute and should be directed towards the dispute resolution. Moreover, the conditions put forward by both parties shall satisfy the requirements and interests of counter-party. It shall contain agreement conditions, special provisions, procedural costs and final provisions.[167] The text of settlement act shall indicate the court reviewing the case, title of the case, identities of parties and their representatives, claims, to which claims do the parties agree, which actions shall be implemented by the parties with the indication of time, the distribution of court expenses between the parties. At the end of the settlement act the statement of the parties addressed to the court on the approval of the act and termination of litigation process shall be provided.

It is necessary to approve the settlement act with the consideration of legislative requirements. Need to fulfill and comply with the above conditions is based on the fact that settlement conditions are

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[164] See *Gogishvili M., Sulkhanishvili M., Meskhishvili K., Jinoria Kh., Gelashvili R.,* Relationships in the Court Hall, Communication and Legal Aspects of Court Process Management and Settlement of Parties, Supreme Court of Georgia, Tb., 2010, 55 (In Georgian).

[165] Ibid, 58–59.

[166] See *Chanturia L., Zoidze B., Chanturia L.,* Comments to the Civil Code, Book 3, Tb., 2001, 264-265 (In Georgian).

[167] See Decision of Chamber of Civil Cases, Supreme Court of Georgia, Dated 22 January, 2010, On the Case #AS-1269-1527-09, 2010, <http://prg.supremecourt.ge/CaseCivilResult.aspx> [01.10.2014] (In Georgian).

defined by the parties, and the free will of the parties may neglect the law requirements. Settlement conditions shall not contravene with the morale and public order. Hence, the court is responsible to control the legality of the settlement act prior to its approval. Accordingly, if settlement act conditions include the interest of the state and the person, not participating in the process, restricts the rights and lawful interests of parties, then it is not permissible to approve such settlement act. As early as in the Roman law, if the actions of the person were against the good habits and traditions of Romans, the money issued for the implementation of actions which were against the habits and traditions, had to be returned by the recipient.[168]

Court issues the resolution on the approval of settlement act, which is not formally different from decisions with other contents and comprises of sections defined by the law for the decision form. Above mentioned resolution does not generate any rights and duties of parties. Resolution is the mean for ensuring legal strength of the act and the mean for its approval. Resolution issued on the approval of settlement act is the final document of court settlement process.

The advantage of settlement is manifested in the economic benefits via the reduction of direct losses and saving the energy.[169] One of the problems of present justice system is related to the number of cases and overloading of the judge. The above naturally influences the quality of litigation processes and additionally causes fair un-satisfaction of society with the delays in the reviews of cases. The court should not think about the violation of terms due to the "drawn cases", but should be concentrated on the correct interpretation of the law and make correct decisions on the specific cases.[170]

There are many reasons for the use and spreading of dispute resolution procedures. Development of human rights in the Europe facilitated adoption of number of laws, which was followed by the establishment of court institutions for the resolution of disputes related to the human rights; the above has facilitated increase of number of dispute resolution mechanisms in the area of human right protection as well as other areas of law.[171]

Alternative resolution of dispute ensures the solution of legal problem in a better way than the court process in general; as a result one can avoid the litigation process. However, it is not always expedient to apply for the alternative resolution of dispute. For some types of disputes and purposes the court litigation is the best process, as in some situations only the court decision ensures correct legal indications to the parties; in cases when the alternative dispute resolution is the most accepted method, it is desirable to use the mechanism in an optimal manner without rejecting use of the court resolution.[172]

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[168] See *Nadareishvili G.,* Civil Law, Tb., 2001, 124 (In Georgian).

[169] See *Chanturia L., Boeling H.,* Methodology for the Decision Making for Civil Cases, Tb., 2003, 89 (In Georgian).

[170] *Lazarashvili L.,* The Society must believe that the Court is able to Implement its Real Function – Execute the Justice, Supreme Court of Georgia, "Justice", Tb., #1, 2006, 56 (In Georgian).

[171] See *Buergenthal T.*, The Proliferation of Disputes, Dispute Settlement Procedures and Respect for the Rule of Law, UK, 2006, 495.

[172] See *Levin A.L., Shuchman P., Yamnbon C.M.,* Civil Procedure, Cases and Materials – successor ed., New-York, 1992, 543.

In case of ending the litigation process between the bank and debtor with the settlement the protracted and long court procedures are avoided and the dispute is settled in the time required for the development of settlement conditions by the parties. Unlike the essential review of the case, the dispute at the court is resolved promptly and finally, the achieved results are easily executed and the "unresolved resolution" is avoided. The costs are reduced underlining the economic nature of this form of dispute resolution. In the process of development of settlement conditions the positions are compromised and reconciled, creating the precondition for the dispute resolution. We have to stress the fact that development of conditions is carried out voluntarily via the peaceful and non-conflict ways, facilitating prompt and effective resolution of dispute as well as maintaining future healthy relationship between the parties.[173]

In the event of settlement, the will of the parties is wide and comprehensive, and the decision is – voluntary. It almost fully regulates the litigation process, justice and dictates to the court its position. Settlement is the strongest manifestation of collaboration and compromises between the parties and the court (state justice), which is also reflected in the execution of conditions approved under the settlement.

According to the above mentioned the justice is restored, which is manifested via the expressions – implementation of the will of parties. Resolution of dispute by this way is the best alternative for the dispute resolution, which also improves the court prestige, as due to this way of dispute resolution court is faced with the healthy social relationships and not with the negative emotions of defeated party. And healthy society is the primary condition for the improvement of social environment and banking sector.

6. Conclusion

Market relations are regulated based on the civil legislation. Civil legislation together with other important principles is based on the principle of contractual freedom and equality of parties at the moment of agreement conclusion. Civil relationships are built on the equal rights of parties on the relationship; in such relationship the involvement of the state is minimal. It is noteworthy that conclusion of agreement, development of its contents shall carry the nature of honesty, should not be deceptive and should not contravene the law.[174]

Development of commodity-monetary relationships created various types of deals, including loans, which consider legal relationship of two persons – creditor and debtor; for the above deal it is necessary to precisely define details of obligation type legal relationship at the agreement level. Moreover, the objective of legislation is to protect mutual interests and to regulate the relationship for this purpose; the above regulation covers regulation via the court and renewal of relationship via the settlement. Based on the analysis and summarization the following can be concluded:

- Civil-legal obligation is legal relationship, by virtue of which the debtor is liable to implement certain actions in favour of creditor or abstain from the implementation of such actions, and the

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173 See and Compare *Tsertsvadze G.,* Mediation, Alternative Form of Dispute Resolution, Tb., 2010, 47 (In Georgian). With additional reference to *Werner G.,* Mediation als auBergerichtlichesKonfliktlösungsmodell, Am Beispiel der Trennungs – und Scheidungs mediation in der Bundesrepublik Deutschland, , ~ibidem", Stuttgart, 1999, 60-61.

174 *Shengelia I.,* Contractual Freedom, as the Principle of Civil law, Essence and Significance, "Justice and Law", Tb., #4, 2009, 46 (In Georgian).

creditor has right to request the fulfillment of liabilities from the debtor. For the violation of obligation the debtor, via the court, may be assigned the obligation fulfillment or reimbursement of the loss, by which the interests of the creditor are protected.

- CCG reviews the loan relationships in two chapters. Chapter nine is devoted to the loan and chapter twenty-one is devoted to the bank credit and deposit. In the first instance, we are dealing with the general norms regulating day-to-day relationships, which may be also applied for all types of loan relationships; in the second instance we are dealing with specific type of loan, which are implemented by the credit institutions.
- The subject of monetary relationship is cash amount. According to the general legal theory on items the subject of relationship is an item, which has objective economic value, expressed in price and not in the practical usability. Use is subjective category, price – is the objective economic value of the item.
- The location of the fulfillment of monetary obligation is defined according to the general rules on the location of fulfillment. In case of bank credit relationships the "location" of obligation to repay the credit is the debtor's account, which is used for the deduction of funds, in other words for the repayment of obligation.
- In monetary-credit relationships creditor is legal entity issuing the credit, which is referred to as the "lender" in the CCG. Person using the bank credit is referred to as "consumer". "Consumer" is defined as citizen using, buying, ordering the goods, works or/and services for the personal needs or the citizen having such desire. In the bank credit relationships the consumer is represented by the physical as well as legal persons.
- Loan agreement is one of the forms of the agreement. Only one party to this agreement undertakes the obligation to implement certain actions – return of funds received from the lender, and the other party, lender has right to get back the funds lent. Accordingly, the agreement is considered as concluded from the moment of transfer of funds and promise on the implementation of this action is not considered as the conclusion of agreement. However, we have to note that when the agreement conclusion is followed with the transfer or handing over of the credit – the agreement is real; but if the credit institution under the credit agreement undertakes the obligation to transfer the credit in future, then this is consensual credit.
- The lender transfers the funds into the ownership of borrower and accordingly, loan agreement is agreement of the following type – transfer of property into the ownership, in which the lender after some time returns the property transferred into the ownership to the borrower.
- The oral form of agreement is established for the loan agreement, however it is possible to use written form of the agreement based on the agreement of parties. Agreement concluded in the written form whether it is simple or complex, or concluded with the assistance of notary, depends on the desire of parties. Generally, the complex notary form of agreement is not used in bank credits. In private relationships such agreements are used only for the creation of additional warranties.
- The term of loan agreement is defined based on the agreement between the parties, following the elapse of the term the debt must be returned. The law considers alternatives to the debt repayment. Namely, if the term for the debt repayment is not set, then the debt must be returned at the moment of termination of the agreement by the creditor or debtor.

- The promisor of loan may reject to allocate the loan, if the proprietary condition of the borrower has worsened at the level that creates risks for the repayment of debt, In case of promise to lend, unlike the loan agreement itself, the law requires conclusion of agreement in the written form. Such agreements are rare in practice; but if concluded, legally these are not loan agreements. Moreover, the lender can request repayment of already disbursed loan under the same circumstances, if the creditor got information on the bad proprietary condition of the debtor only after the conclusion of the agreement.
- Preceding from the interests of consumer the bank allocates bank credits for various purposes and with various conditions, such as mortgage, consumer and other credits. Separate chapter of CCG is devoted to the consumer credits; there are different types of consumer credits, such as standard, student, tourist, auto, salary, insurance and etc.
- Breach of creditor's trust by the debtor is one of the bases for the violation of credit relationship conditions. The willfulness of the debtor can be manifested in the different forms. In one case the debtor avoids the fulfillment of obligation, in other instances – the debtor fulfills the obligation improperly or with the violation of predetermined term, avoids repayment of debt, changes location without notification and etc.
- Obligation is violated when it is not fulfilled or is fulfilled improperly. In case of non-fulfillment the debtor does not carry out required actions; in case of improper fulfillment – the obligation is fulfilled but with the less acceptable and favourable conditions; the above sometimes is considered as non-fulfillment.
- In case of obligation violation creditor is entitled to claim reimbursement of incurred loss. If violation has the form of term overrunning, creditor can set necessary time for the obligation fulfillment. If the obligation is not fulfilled during the new time period – creditor can request the reimbursement of incurred loss. It is not necessary to allocate additional time, if it is clear that this will not be followed with any results. The law also envisages the cases, when the obligation is not considered as violated due to the term overrunning, and such overrunning is related to the circumstances which are not caused by the fault of debtor. In case of faultiness debtor is responsible even in the event of carelessness and accident.
- Creditor can apply to the court for the protection of his/her violated rights in the event of obligation non-fulfillment. Initiator of the claim, in the most cases, is the bank, which chooses the specific way for the dispute resolution – litigation. However, immediately after applying to the court, the settlement alternative is generated, which is the voluntary choice of parties and it might be implemented at all stages of the litigation process.
- Settlement implies agreement of parties and resolution of conflict; in this case the dispute does not end with the essential review of the dispute at the court, it ends with the termination of litigation. The judge shall review each specific case with high responsibility and attention, and shall by all means facilitate the parties to end the case with the settlement.
- In the process of development of settlement conditions the volume/quantity of the liabilities to be implemented shall be considered. We have to separate several depending on each other liabilities generated from the credit relationship – for such liabilities it is possible to determine the sequence of liabilities based on their priorities and to offset, pardon less important liabilities. In the process of

development of settlement conditions, we have to also consider the general principle of sequence of fulfillment of liabilities. From the payment made by the debtor, which is not sufficient for the repayment of total matured payment the court expenses are covered at first, then - the principle amount and finally - accrued interest.

- The advantage of settlement is manifested in the economic benefits via the reduction of direct losses and saving the energy. In case of ending the litigation process between the bank and debtor with the settlement the protracted and long court procedures are avoided and the dispute is settled in the time required for the development of settlement conditions by the parties.
- Development of settlement conditions is carried out through voluntary, peaceful and non-conflict means, supporting the prompt and effective resolution of dispute as well as maintaining future healthy relationships between the parties with the prospects for future. Unlike the review of the case at the court, the settlement ensures prompt and final resolution of dispute and the achieved results are executed in a simply.

Law and order ensures protection of justice and mutual interests, protection of creditor from the delinquent debtor, and debtor – from unfair creditor. What type of creditor is considered as unfair creditor – is the issue to be assessed and CCG does not contain legal definition.[175] Under the conditions of liberal market economy creditors enjoy the advantages and the law and justice attempts to promptly and effectively implement creditor's interests. Under the conditions of social market economy the situation of debtor is not left without attention and law and order also takes into account interests of debtors.[176] According to the supporters of liberal economy, creditor oriented legislation facilitates fast development of credit business, makes the credits cheaper and destroys excessive bureaucratic barriers; it is more flexible and creditor has the guarantee that he can easily return the disbursed loans.[177]

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[175] See and Compare *Chanturia L.,* Law on Credit Securitization, Tb., 2012, 56 (In Georgian).
[176] See Articles 254-285 of CCG; See *Chanturia L.,* Law on Credit Securitisation, Tb., 2012, 57 (In Georgian).
[177] See *Chanturia L.,* Law on Credit Securitization, Tb., 2012, 56-57 (In Georgian).

Ana Ramishvili[*]

The Role of Corporate Social Responsibility in Formation of Sustainable Model of Good Corporate Governance: Necessary Attributes and their Combination

1. Introduction

Sustainable development is the greatest challenge for the XXI century. Protected environment, social justice, economic progress and all the components balanced and meeting the current needs without threat to the future generations are the action plan of sustainable development. Economic, ecologic, political and cultural aspects of the social life in aggregation are the new approach developed in the course to approach sustainable development. Business and society or business in society – this is the matter to be considered separately, though it evidently indicates to the particular role and place of business in the society. Large business, taking available economic and socio-political authority into account, is to be considered in a perfect state. The large and multi-national enterprises can contribute significant mite in inculcation of the principles of sustainable development. Corporate social responsibility – is it the leverage to simplify achievement of above-mentioned?

In view of establishment of the sustainable model of good corporate governance, we need to separately consider the due regulatory basis for effective system of corporate governance on the one hand, and legal, quasi-legal and self-regulatory instruments of the corporate conduct in terms of corporate social responsibility on the other hand. Which of the characterizing elements of the regulatory environ and which level of flexibility provide establishment of such model for creation of the sustainable model of good corporate governance is revealed by means of main principles of interrelation of the corporate governance issues and development of the corporate social responsibility movement.

The hereby article provides the proof that integration of corporate social responsibility on all levels of corporate governance system by means of effective combination of necessary elements entails creation of sustainable model of good corporate governance. Discussions on the role of corporate social responsibility in creation of sustainable model of good corporate governance without definition of interpretation of the corporate social responsibility itself is, softly speaking, absurd. The chapter one strives to answer the question what corporate social responsibility is. The chapter two outlines parallels with the movement for social entrepreneurship development, as with the phenomenon with similar objectives. The hereby chapter provides brief description of the essence of social entrepreneurship and overviews the legal forms of social enterprise in various countries. The chapter three is the core of the article, which creates the general picture of interrelation of corporate governance and corporate social responsibility and possible forms thereof. Chapter four, providing the traditional dilemma of corporate governance, is the guideline to realize the essence of the problem by means of providing two basic approaches of

[*] Doctoral Student, TSU Faculty of Law.

corporate governance aim. The same chapter, taking the modern trends into account, overviews the British and common European approaches to the corporate governance. The chapter five tells us about interrelation of corporate social responsibility and law in the context of corporate accountability, which gives us the way to consideration of the essential elements of the due regulatory frameworks for creation of the sustainable model of effective corporate governance. The chapter six describes the role of codes of corporate governance in establishment of corporate social responsibility practice. The chapter seven is about approach of the fiduciary duties to the corporate social responsibility. The chapter eight underlines importance of shareholder activism in promotion of socially responsible investment. And the last, chapter nine is dedicated to the issue of risk management, related to besmirch. The conclusion provides the results of the researches held.

2. What is Corporate Social Responsibility?

2.1. Historical Roots

The concept of corporate social responsibility is the offspring of the XX century. The aim of the first social investment was improvement of the labor and living conditions for workers and employees. Active propaganda of social responsibility started in 70-s. Corporate social responsibility movement could be found in various forms, though the main leitmotif was provision of accountability of the corporations, and namely the leadership thereof towards the society, as to the whole organism, in which these corporations functioned and which was affected with the positive or negative outcomes of their behavior.[1]

The current industrial revolution, aspiration to universal welfare and the world globalization processes had the greatest impact on formation of the concept with the current context, which in aggregation, served as the foundation for consideration of the concept of corporate social responsibility in the angle of sustainable development, as of the means, which serves for achievement of goals of sustainable development.[2]

2.2. Essence

Corporate social responsibility is the multifaceted and multidimensional concept which can be explained with accumulation of various topics and issues under one umbrella. Corporate social responsibility practice implies initiatives in different directions.[3]

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[1] See the detailed overview of the initiatives for development of the corporate social responsibility movement: *Branson D.,* Corporate Social Responsibility Redux, *Tulane L.*, Rev., Vol. 76, 2002, 1207-1226; also See *Conley J., Williams C.,* Engage, Embed, and Embellish: Theory Versus Practice in the Corporate Social Responsibility Movement, "J. Corp. L.", Vol. 31, Iss. 1, 2005, 1-38.

[2] For development of corporate social responsibility concept in historical angle, See *Wells H.,* The Cycles of Corporate Social Responsibility: An Historical Retrospective for the Twenty-first Century, "U. Kan. L. Rev.", Vol. 51, 2002, 77-140; *Avi-Yonah R.S.,* The Cyclical Transformations of the Corporate Form: A Historical Perspective on Corporate Social Responsibility, "Del. J. Corp. L", Vol. 30, Iss. 3, 2005, 767-818; *Nehme M., Wee C.,* Tracing the Historical Development of Corporate Social Responsibility and Corporate Social Reporting, "James Cook U. L. Rev.", Vol. 15, 2008, 129-168.

[3] The OECD manual indicates to the following topics of the multi-national enterprises: Policy of Openness of the Enterprise, Human Rights, Labor and Entrepreneurial Relations, Environment, Combat against

Despite of all available descriptions of corporate social responsibility, the universally recognized and the only description, which would comprehensively include all the topics and issues and which would consider all possible nuances, still cannot be found. Naturally the question appears: why? M. Friedman called social responsibility of business as "fundamental diverse doctrine"[4], which can be explained with the diametrically different views, which were the guidelines upon definition of the essence of corporate social responsibility.[5] In regards with the impediments for formulation of the unified concept of corporate social responsibility, A. Carroll in 1979 noted that absence of consensus on what concept really means, is the main factor, which entails the ambiguous situation about the definition of social responsibility.[6]

A. Carroll, in the process of development of the three-dimensional conceptual model of corporate social enforcement, used the method of definition of meaning of corporate social responsibility on the basis of the simple approach. In this case, the method implied definition of business responsibilities of separate spheres and identification of concrete duties. A. Carroll classified identified duties to the economic, legal, ethic and discretionary groups. On the basis of such classification of social duties, he developed four-part definition of the corporate social responsibility. Namely, "business social responsibility includes economic, legal, ethic and discretional expectations of the society towards the organizations in the given period of time".[7]

The four-part definition of the corporate social responsibility has been further modified. Upon developing the pyramid of the corporate social responsibility, A. Carroll attributed the duties of the discretional group to the philanthropic duties and defined that the company with corporate social responsibility shall aspire to the profit, shall observe the law, be ethic and a good corporate citizen".[8]

The brief definition of corporate social responsibility is provided in the EU renewed strategy on corporate social responsibility for 2011-2014: "responsibility of the enterprises for their impact on the

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Corruption, Consumers' Interests, Science and Technologies, Competition, Taxes; ISO 26000: 2010 manual standards provide the following principles and topics of the social responsibility: Accountability, Transparency, Ethics, Stakeholder Interests, Rule of Law, Respect to International Ethics Norms and Human Rights, as well as Organizational Management, Labor Practice, Environment, Fair Activity Practice, Consumer Issues, Involvement of Society and Development.

4 *Friedman M., Friedman R.D.,* Capitalism and Freedom, 40th Anniversary ed., 2002, 133.

5 Business social responsibility implies "something, but not necessarily to be the same all the time for everything. For somebody it expresses lawful responsibility or obligation idea; for others, it means socially responsible behavior in ethic terms; for others, it is the meaning of "responsible" in causal form; many people equalize it with the charity donations; somebody uses it to mean socially conscious; many of them, anxiously using it, consider it as the mere synonym of legality in the appropriation or valid context; somebody considers it as the type of fiduciary duties, setting the higher standards of behavior for businessmen in comparison with the citizens". See *Votaw D.,* Genius Became Rare: A Comment on the Doctrine of Social Responsibility Pt 1, California Management Review, Vol. 15, Iss. 2, 1972, 25. Cited by: *Garriga E., Melé D.,* Corporate Social Responsibility Theories: Mapping the Territory, Journal of Business Ethics Vol. 53, Iss. 1-2, 2004, 52.

6 *Carroll A.B.,* A Three-Dimensional Conceptual Model of Corporate Performance, Academy of Management Review, Vol. 4, Iss. 4, 1979, 497.

7 Ibid, 500.

8 *Carroll A.B.,* The pyramid of Corporate Social Responsibility: Toward the Moral Management of Organizational Stakeholders, Business Horizons, Vol. 34, Iss. 4, 1991, 40.

society".[9]Though, such brief definition does not allow identification of concrete issues which entails necessity of specification and indicates that integration of environmental, ethic, human rights and consumer relations issues, as the part of corporate social responsibility, in the business transactions and strategy on the basis of the close relations with the stakeholders, in view of creation of the maximal benefits on the one hand for shareholders, other stakeholders and for society in total and possible negative impact identification, prevention and reduction on the other hand.[10]Establishment and development of corporate social responsibility practice beyond the minimal norms under the law for the corporations and maximization norm of the profit for shareholders entails administration of own activity, which implies that they will encounter necessity to do more, put higher stakes than it is prescribed with the product safety, labor relations regulation or environmental laws.[11] Thus, corporate social responsibility is not the concept created for profit solely. The ultimate goal thereof is to successively, with equal intensity to three directions – people, planet, profit – create benefit, which in itself, entails recognition of the concept of corporate social responsibility as the concept, by means of which business contributes own mite in development of humankind.

2.3. Good Corporate Citizen

Simultaneously with the corporate social responsibility concept, following development of relations between corporations and the society, the concept of good corporate citizen appeared, the attitude towards which can be explained with the soft approach to the definition of the role of large and multinational corporations by the society.[12]

The role of the corporations in the society means consideration of the interests of stakeholders in the narrow sense and interests of the society in the wide sense, which is included in the main target area of the corporate social responsibility movement. "Corporate citizenship" is the metaphor, expressing the character of interrelationship between the society and the business in the angel of corporate social responsibility. It is actively used as the label in relation with the sustainability concept not only by the large or multinational corporations to show that they are the responsible members of the society, realizing the expectations of the society thereby, and therefore contributing their mite in sustainable development.

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9 A renewed EU strategy 2011-14 for Corporate Social Responsibility, European Commission Communication, Brussels, 25.10.2011 COM (2011) 681 final, 3.1., 6.

10 A renewed EU strategy 2011-14 for Corporate Social Responsibility, European Commission Communication, Brussels, 25.10.2011, COM (2011) 681 final, 3.1., 6.

11 Current approach to the corporate social responsibility "more than required under justice" entailed introduction thereof as "informal truth". For details See *Buhmann K.,* Corporate Social Responsibility: What Role for Law? Some Aspects of Law and CSR, "Corporate Governance", Vol. 6, Iss. 2, 2006, 188-202.

12 The idea, according to which the activity of the company and the business in total shall be evaluated in terms of a good corporate citizen, was criticized in the economic literature in 1973. According to the words by *K. Davis,* "social responsibility starts where the law ends. The company is not socially responsible if it is the observer of the minimal norms of the law aw it is deed which shall be effectively implemented by any good citizen". See *Davis K.,* The Case for and against Business Assumption of Social Responsibilities, The Academy of Management Journal, Vol. 16, Iss. 2, 1973, 313.

2.4. Sustainable Development

In the beginning of the XXI century, the theoretical researches of corporate social responsibility concept have been substituted with the empiric surveys. The reason for such changes was the global character of the corporate social responsibility movement. Multinational enterprises acquired the greatest role in the era of globalization. The definition of the type of impact of globalization process on corporate social responsibility has been subject to active study, when both in the uninterrupted development process, are the interactive dynamic concepts.[13] According to D. Windsor, globalization is one latest argument of confirmation of corporate social responsibility[14].

Existence of the sustainable decision-making system integrated in the corporation is one of the main pre-conditions for creation of the relevant environ to facilitate the corporate social responsibility.[15] The guidelines of the development organization for the multinational enterprises underline necessity of the positive contribution to the economic, ecologic and social progress by the multinational enterprises in the sustainable development[16] context.[17] "Multinational enterprises can contribute their mites in economic, social and ecologic development and minimize the solve the difficulties emerging out of their activity",[18] as they "have the opportunity to implement the policy of the best practice for sustainable development, which aspires to provide compliance between economic, ecologic and social aims".[19]

In view to support the responsible business behavior on the global level, one of the best recommendations in the multinational corporations is establishment of the practice to use the rules of corporate governance, which, in itself, is based on the universally recognized principles of corporate governance.[20]

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13 *Ertuna Ö., Ertuna B.*, How Globalization is Affecting Corporate Social Responsibility: Dynamics of the Interaction Between Corporate Social Responsibility and Globalization, in Book: *Aras G., Crowther D.,* Gower Handbook of Corporate Governance and Social Responsibility, Gower Publishing, Farnham, 2010, 323.

14 *Windsor D.,* The Future of Corporate Social Responsibility, The International Journal of Organizational Analysis, Vol. 9, Iss. 3, 2001, 227.

15 Amongst other principles of the corporate social responsibility, stakeholder involvement, transparency, successive best practice, caution, accountability and social investment are noteworthy. For the details for classification of corporate social responsibility principles See *Kerr M., Janda R., Pitts C.,* Corporate Social Responsibility: A Legal Analysis, LexisNexis Canada, 2009.

16 According to the universally recognized explanations, "sustainable development is the development, which meets the current requirements for the opportunities of the future generations to satisfy own needs without threat". See Report of the World Commission on Environment and Development: Our Common Future (1987). <http://www.un-documents.net/wced-ocf.htm> [15.03.2014]. Also See paragraph "j" of the article 4 of the Law of Georgia On Environmental Protection".

17 OECD Guidelines for Multinational Enterprises, OECD, 2011, part II, A, 1.

18 OECD Guidelines for Multinational Enterprises, OECD, 2011, 7.

19 Ibid, 14.

20 OECD Guidelines for Multinational Enterprises, OECD, 2011, part II, A, 6.

3. Parallel to the Social Entrepreneurship

3.1. Brief Historical Resume

The corporate social responsibility movement and movement for development of social entrepreneurship aspire to the same goals. Aspiration to the better world is characteristic for both movements. During the last decades, social entrepreneurship has become of gradually increasing trend due to the simple reasons that it consists of social mission fulfillment and the aim typical for entrepreneur activity.

Historical development of social enterprises, taking the specifications of concrete countries into account, is characterized with the different dynamics. Corporate social responsibility, as well as social entrepreneurship, taking the transformations of the social relations into account, is the innovative and sustainable means of solution of the social problems in comparison with the traditional forms of charity and philanthropic activity by the business.[21]The main difference between them is evident in the ways and forms of achievement of outlined goals.

The term "social entrepreneurship" has been born in 70-s, the active usage of which started in 90-s. The first social cooperatives, as the representatives of social economics, have been established in Italy, which served as the trigger for dynamic development of social entrepreneurship in Europe. In 2011, EU onset the initiative to support social enterprises, the main objective of which is introduction of innovative ways to effectively solve the sustainable challenges which Europe encounters today.[22]

3.2. Essence of Social Entrepreneurship

Social entrepreneurship qualitatively is the entrepreneurial activity, more precisely it is the peculiar view of the entrepreneurial activity, which ultimately serves for achievement of social goals and is more realized in the new organizational forms than in existing legal forms.[23] Though, it is noteworthy that for the large corporations on the security organized market and not only for them, activities in direction of social entrepreneurship is gradually converted into the integral part of the strategic view of development.[24]

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[21] Consideration of corporate social responsibility and social entrepreneurship in terms of historical-comparative perspective revealed the role of development of corporate philanthropy in establishment of creative capitalist system. See *Rana S.,* Philanthropic Innovation and Creative Capitalism: A Historical and Comparative Perspective on Social Entrepreneurship and Corporate Social Responsibility, Alabama L. Rev., Vol. 64, Iss. 5, 2013, 1121-1174.

[22] See Social Business Initiative Creating a Favorable Climate for Social Enterprises, Key Stakeholders in the Social Economy and Innovation, European Commission Communication, Brussels, 25.10.2011, COM(2011) 682 final.

[23] American reality is taken into account. See *Page A., Katz R.A.,* Is Social Enterprise the New Corporate Social Responsibility?, Seattle U. L. Rev., Vol. 34, Iss. 4, 2011, 1353.

[24] *Kerr J. E.,* Sustainability Meets Profitability: The Convenient Truth of How the Business Judgment Rule Protects a Board's Decision to Engage in Social Entrepreneurship, Cardozo L. Rev., Vol. 29, Iss. 1, 2007, 634.

Social entrepreneurship is the phenomenon full of paradoxes, the actual expression of which is the social enterprise, striving to fill the gap between the private and public sectors. In case of social entrepreneurship, the social aim is in the foreground, and the profit gained within entrepreneurial activity of the social enterprise is predominantly served for achievement of social aims. "Social enterprise" is the wide term, comprising the aim of the profit and aspiration to achievement of social goals, which entails its intermediate state amongst the legal persons, profit-oriented and established for implementation of so-called ideal objectives. The potential of social enterprise is expressed in obtainment of the profit, penetrated with the social spirit.

3.3. Legal form of Social Enterprise

The concepts of "social entrepreneurship" or "social enterprise" are rarely found in Georgian legislation. Despite this fact, Georgian legislation does not exclude existence of such formations, which in own essence, meet the economic and social criterion characterized for social enterprises. Legal forms of social enterprise differ according to the countries. Taking the active role of civil society in development of social entrepreneurship movement into account, we can implement some activities within the scope of the form,[25] traditionally characteristic for the third sector, which is followed by the profit and which facilitates to realization of its goals. Though, at what extent the non-profit (non-commercial) legal entity fits as the due legal form for the social enterprise deriving from the circumstances that distribution of the profit gained as a result of implementation of the auxiliary entrepreneurial activity is not admissible amongst the founders and the members, which of course contradicts with the essence of social enterprise, namely the first economic criterion defining its essence. Social enterprise shall have the profit, even low for its members. Thus, social enterprise, existing on the market without the profit, cannot provide realization of outlined goals of so-called creation of social welfare and profit for the shareholders thereof at the same time.

Social enterprise can exist in any legal-organizational form of any entrepreneurial subject. However, we shall take the circumstance into account that on the one hand, mainly only joint stock and limited liability companies are to be mentioned amongst the entrepreneurial subjects, functioning in Georgia, which are more frequently selected for implementation of the entrepreneurial activity and which are actually profit-oriented. It entails their attribution to the capital type or capital producing societies. On the other hand, under the absence of specific tax-preferential legal regulation, it is hard to say which of the entrepreneurial subjects, proposed under the law of Georgia on Entrepreneurs, is best to play the role of carrier subject of social enterprise. In Georgian reality, social enterprises exist in the cooperative legal form most frequently, which can be explained with the substantive reason of this form.

In developed countries there is the trend of creation of new, particular forms. The aim of the new forms is to create the brand exclusively associated with the social entrepreneurship, which will provide awareness.[26] The issue of vogue definition of the status and form of the social enterprise

[25] For Georgian reality means non-profit (non-commercial) legal entity, which within the grant or any other financing, implements the initiatives related to the social entrepreneurship when social enterprise needs real capital investments.

[26] *Reiser D. B.,* Theorizing Forms for Social Enterprise, Emory L. J., Vol. 62, Iss. 4, 2013, 733.

undergoes the criticism in terms of tax preferences. In Georgian reality, even in case of charity organization, economic activity of auxiliary character implemented thereby is not subject to tax preferences.[27] The issue of taxation of social entrepreneurship in different regime is important in terms of creation of favorable conditions for development of social entrepreneurship in the country. Tax preferences on the profit by the social enterprise, at least existence of the differentiated approach of taxation, is important with consideration of the aims and specification of activity thereof.

On July 22, 2003 the Council of Ministers of EU passed the resolution on status of European Cooperative Society, which prescribed the legal status of social enterprises on EU level.[28] The concrete manifestations of the legal form of the social enterprise is the Flexible Purpose Corporation in various US States,[29] Benefit Corporation[30] and Low-profit Limited Liability Company (L3C)[31]. In UK, unlike USA, establishment of social enterprise is possible in the Community Interest Company[32] form[33]. The main topic of the discussions regarding the new corporation forms is the level of concord, as well as how flexible purpose corporation or the benefit corporation is attributed within the scopes of the corporate law and corporate governance main principles.[34]

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[27] See paragraph "a", part 1 of the article 99 of the Tax Code of Georgia. We shall also remember the reservation of the article 117 of the Tax Code of Georgia, though we shall consider the fact that social entrepreneurship is not charity in its classic understanding. Employees of the social enterprise mostly are the beneficiaries of the activity thereof. The idea of social enterprise is based on privilege of teaching how to fish in comparison with giving the fish.

[28] See Council Regulation (EC) No 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (SCE). OJ L 207/1, 18.8.2003.

[29] Establishment of the Flexible Purpose Corporation is possible in State of California. See Senate Bill No. 201, Chapter 740, 171.08.

[30] Establishment of social enterprise in the form of Benefit Corporation is possible in Maryland, Vermont, Delaware, New Jersey and some other States. The full list of the States, passing the relevant law on the benefit corporation can be obtained at: <http://benefitcorp.net/state-by-state-legislative-status>, [15.03.2014].

[31] Legal arrangement of the low-profit limited liability company has been made by the State of Vermont for the first time. See Vermont Corporations, Partnerships and Associations, Title 11, Chapter 21, § 3001, (27). See the full list of States at: <http://americansforcommunitydevelopment.org/laws.html>, [15.03.2014].

[32] See The Community Interest Company Regulations 2005, S.I. 2005 No. 1788 (U.K.).

[33] See Overview of the Legal Forms for Establishment of the European and US social enterprise: *Esposito R. T.,* The Social Enterprise Revolution in Corporate Law: A Primer on Emerging Corporate Entities in Europe and the United States and the Case for the Benefit Corporation, Wm. & Mary Bus. L. Rev., Vol. 4, Iss. 2, 2013, 639-714.

[34] Information about the considerations in the academic circles of USA See *Plerhoples A.,* Can an Old Dog Learn New Tricks? Applying Traditional Corporate Law Principles to New Social Enterprise Legislation, Transactions: Tenn. J. Bus. L., Vol. 13, Iss. 2, 2012, 221-265; *Callison J.W.,* Putting New Sheets on A Procrustean Bed: How Benefit Corporations Address Fiduciary Duties, The Dangers Created, and Suggestions for Change, American Univ. J. L. & Bus., Vol. 2, Iss. 1, 2012, 85-114; *Haskell M. J.,* Choose Your Own Master: Social Enterprise, Certification, and Benefit Corporation Statutes, American Univ. Bus. L. Rev., Vol. 2 Iss. 1, 2012, 1-53; *Johnson L.,* Pluralism in Corporate Form: Corporate Law and Benefit Corporations, Regent Univ. L. Rev., Vol. 25, Iss. 2, 2012-2013, 269-298; Johnson L., Unsettledness in Delaware Corporate Law: Business Judgment Rule, Corporate Purpose, Del. J. Corp. L., Vol. 38, Iss. 2, 2013, 405-451; *Lowenstein M. J.,* Benefit Corporations: A Challenge in Corporate Governance, Business Lawyer, Vol. 68, Issue 4, 2013, 1007-1038.

4. Interrelationship of Corporate Social Responsibility and Corporate Governance

4.1. For Definition of Interrelationship

Corporate social responsibility and corporate governance are the events of different purpose characterized for the corporate world. Corporate governance is the basic axis of the corporate law, obtaining the global significance in the modern world.[35] Globalization created new opportunities for activity and development and at the same time increased the scopes of responsibility thereof. The growing requirements to the corporations are no longer limited with necessity to consider the traditional stakeholder interests. They, as the subjects equipped with social, political and economic authorities, are required to take the interests of the state and international society into account.

Corporate governance, according to the all-known description, is the system by means of which leadership and control of the society is being implemented.[36] The professor *K. Hopt* notes that "leadership and control are the two milestones of corporate governance system"[37] and that's why "corporate governance is focused on the internal balance of the corporate power".[38]

Corporate governance can be defined as "construction of the rules, relations, systems and processes, within the scope of and through which corporations use and control authorities".[39] The basic provision of the corporate governance is increase of shareholder values at maximal extent and protection of their rights. Corporate governance is the "term used to describe recoating system of the legal, regulatory, organizational and contractual mechanisms, which are created to protect interests of the owners (shareholders) of the corporations and to restrict the opportunistic behavior of the corporate managers, conducting the activity of the company".[40]Besides, the term of corporate governance is frequently used to evaluate the quality of control of the leadership of the corporations with operation of the descriptions such as good or bad. The answer to the question what good corporate governance is, depends on the model of the system of the bodies, to which the question is directed in view of evaluation. The essence of good corporate governance is more important than the form thereof. Establishment of the number of principles or rules and/or any particular practice or policy does not

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35 Many initiatives indicate to importance of corporate governance on the global level, within the scopes of which the relevant principles and recommendations on corporate governance are being developed for facilitation to the international dialogue. See ICGN Global Corporate Governance Principles: Revised 2009; Global Corporate Governance and Engagement Principles, 2011, Black Rock; CalPERS Global Principles of Accountable Corporate Governance, 2011.

36 The first description of the term "corporate governance" can be found in so-called Cadbury report. See Report of the Committee on the Financial Aspects of Corporate Governance, London, 1992, 2.5, 14.

37 *Hopt K. J.,* Comparative Corporate Governance: The State of the Art and International Regulation, ECGI - Law Working Paper No. 170/2011, 6. Available at: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1713750##>.

38 Ibid, 7.

39 ASX Corporate Governance Council, Corporate Governance Principles and Recommendations with 2010 Amendments, 2nd ed., 2010, 3.

40 The IOSCO Technical Committee Task Force on Corporate Governance, Protection of Minority Shareholders in Listed Issuers, Final Report, June 2009, 4.

substitute good corporate governance and does not provide it.[41] Relevant organizational structure, strategies and control mechanisms merely support inculcation of the best practice of corporate governance not giving the guarantee to apply the best rules to the corporate life.

Along with protection of rights of shareholders and equal treatment, provision of foundation for the effective system of the corporate governance implies as well respect to rights and interests of stakeholders, openness, transparency and accountability of the Board of Directors to the corporation and the shareholders thereof.[42]Good corporate governance necessarily implies protection of stakeholders' interests which requires from it to meet the expectations by shareholders and the stakeholders as well. Comprehensive definition of effective corporate governance requires clear acknowledgement of the roles of the Board, management and shareholders, as well as acknowledgement of their interrelationships and relations with others, concerned about the corporation and the welfare thereof. The relationships of the board and the management with shareholders should be characterized by transparency and appropriate engagement; their relations with the employees – by fairness; relations with the society in which they function – by good citizenship; and relations with the Government – by a commitment to compliance.[43]

After the eminent scandals in the corporate world, the demand for good corporate governance towards all the groups of stakeholders is being manifested in necessity of moral and ethic corporate behavior. Social and environmental issues obtained even higher importance. The above-mentioned events entailed refocusing of corporate governance from the principal-agent problem to accountability of the corporation. In other words, attention in the corporation has been attached from "rules of game" to the global issues. Such change in terms of protection of interests of leadership of the corporation, shareholders and stakeholders became the ground for higher tension, in dispel of which corporate social responsibility can play significant role and create more flexible system of corporate governance.[44]

Upon consideration of the character of interrelationship between corporate governance and corporate social responsibility, the indication is made to the wider definition of corporate governance, which is provided in the OECD principles of corporate governance.[45] It is noteworthy to mention the additional indication in the preamble of the corporate governance principles to the fact that "the factors, such as business ethics and corporate acknowledgement of environmental protection and social interests of the society, in which the company is operating, can have impact on the reputation and long-term success thereof as well".[46]

Convergence of corporate governance and corporate social responsibility is based on the similar principles. Likewise the corporate governance, corporate social responsibility aspires to more transparency, accountability and increase of roles of stakeholders in decision-making process. In case

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[41] The Business Round table Statement on Corporate Governance, September 1997, 1.

[42] OECD Principles of Corporate Governance, OECD, 2004, 24.

[43] See Principles of Corporate Governance, Business Roundtable, 2012, I, 5.

[44] *Gill A.,* Corporate Governance as Social Responsibility: A Research Agenda, "Berkeley J. Int'l L.", Vol. 26, Iss. 2, 2008, 459.

[45] OECD Principles of Corporate Governance, OECD, 2004, 11.

[46] Ibid, 12

of corporate social responsibility, the difference is that transparency, accountability and participation of stakeholders comprise slightly different topics than it is implied in the context of corporate governance. Corporate social responsibility aims at sustainable business practice, conduct of socially responsible business and profitable conduct of business. Corporate social responsibility in long-term perspective serves for increase of values of the shareholders and provision of successful activity of the corporation. Corporate governance is the relevant legal basis thereto. Corporate social responsibility movement has developed the concept of corporate governance as the means, propelling the leadership to consideration of wider ethic opinions.[47]

4.2. Possible Forms of Interrelationship

4.2.1. Corporate Governance as the Main Basis

We have three concrete forms of interrelationship between corporate social responsibility and corporate governance. The first two forms are dignified with the high degree of inter-definition. The last, third form of interrelationship is manifested in co-existence of the components, composing the same continuum.

Introduction of corporate governance in capacity of the core of corporate social responsibility is considered in the context of strategic governance and implies existence of the effective system of corporate governance.[48] Human capital, stakeholder capital and positive proceeds related to environmental protection along with strategic governance are the basic cores of corporate social responsibility. M. Kiernan, when reviewing corporate social responsibility in perspective of investors, considered the above-mentioned four cores as the criterion for determination of the real value of the company and evaluation of eligibility of creation of the future values.[49] "In other words, the model consecutive with the perspective based on the resource proves that creation of value even in terms of corporate social responsibility depends on usage of human, stakeholder and environmental capital by means of good strategic governance".[50] Introduction of the model in such capacity is successive to *J. Elkington* opinion, according to which, corporate social responsibility within the triple bottom line, is the duty of the Board of Directors; and good corporate governance in its turn, is the basis for sustainable corporate social responsibility,[51] though not the only one and not enough.[52]

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[47] See reference 44, 453-454.

[48] *Jamali D., Safieddine A.M., Rabbath M.,* Corporate Governance and Corporate Social Responsibility Synergies and Interrelationships, "Corporate Governance: An International Review", Vol. 16, Iss 5, 2008, 447.

[49] *Kiernan M. J.,* Corporate Social Responsibility – the Investor's Perspective in Investing in Corporate Social Responsibility: A Guide to Best Practice, Business Planning & the UK's Leading Companies, ed. by *Hancock J.,* Kogan-page, London, 2005, 70.

[50] See reference 48.

[51] *Elkington J.,* Governance for Sustainability, Corporate Governance: An International Review, Vol. 14, Iss. 6, 2006, 524.

[52] *Cornelius P., Kogut B.,* Creating the Responsible Firm: In Search for a New Corporate Governance Paradigm, German Law Journal, Vol. 4, Iss. 1, 2003, 49.

4.2.2. Expanded Model of Corporate Governance

In the second model of interrelation of corporate social responsibility and corporate governance corporate social responsibility is considered as the dimension of corporate governance, the integral part thereof. Such expansion of corporate governance sphere in risk management is being implemented with involvement of risk management mechanisms.

According to the given model, corporate social responsibility is involved in corporate governance along with the traditional components such as composition of the Board of Directors, strategic management, structure of the capital and capital market. Hence, corporate social responsibility is considered as the integral part of corporate governance as "good corporate governance shall as well provide corporations to be administered by socially responsible means and clear existence of ethic basis for business to observe the norms, recognized in the society in which they operate".[53] Good corporate governance does not guarantee that corporate conduct completely meets the requirements, characterized for socially responsible behavior.[54] Although, on the other hand, without all the components considered above upon definition of interrelation and which in aggregate provide good corporate governance, it is less expected that corporation will be considered as the socially responsible member of the society.

4.2.3. Continuum of Corporate Accountability

Corporate social responsibility and corporate governance are introduced in capacity of the integral elements of the continuum of corporate accountability in the third model.

Continuum of corporate accountability is based on the principles of compliance by means of which the share of the corporate governance and corporate social responsibility in the final corporate enforcementalong with the components, such as corporate financial reporting and creation of stakeholder value.[55]

Hence, the main purpose of continuum is to outline the primary basics of corporate accounttability on the basis of which the role of legislative regulation and self-regulation is defined in corporate social implementation.

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53 See reference 48, 448.

54 See reference 52.

55 Ibid.

5. Approaches to Corporate Governance

5.1. The Traditional Dilemma of Corporate Governance

5.1.1. Shareholder Primacy Theory

The debates on set in the beginning in the last century between the representatives of the academic circles and practitioners regarding the corporations on the national and international level are still relevant and developed in two main directions. The first direction was concerning the issues of peculiarly corporate governance.

The debates in the corporate governance context are based on the problems of principal-agent relations, which in itself, derives from separation of property and control and is focused on fiduciary duties of the directors on the means in case of active usage of which subordination of actions by the leadership can be achieved to the interests of shareholders predominantly which is manifested in growth of the value of shares, high dividends and maximal profit for them. Protection of interests of the shareholders first of all without partial consideration of the interests of other stakeholders or total exclusion thereof in the decision-making process, as the view to the fiduciary duties, is the primary provision of Shareholder Primacy Theory.

The second direction of the debates has been developed "beyond" corporation in capacity of the corporate social responsibility movement, which actualized consideration of interests of numerous stakeholders and in wider context, the role of corporations in the society in the process of corporate governance-administration. Corporate social responsibility movement ended domination of shareholder primacy theory and entailed establishment of stakeholder theory,[56] which taking the dualist nature of corporation into account, upon evaluation of the role and the function of the corporation, was guided with expediency of consideration of the interests of other parties concerned in the process of activity and governance of the corporation in the context of achievement of long-term success. Corporate social responsibility movement, with the nature thereof, is a wider event than consideration of stakeholder interests. It in itself comprises the basic provisions of the stakeholder theory when existence of the reverse option is impossible.

At one glance at development of corporate social responsibility movement in historical angle, we can see the picture of cyclic successive progress of the debates concerning corporate social responsibility. Namely, debates on academic theatre since 1930 "Berle-Dodd debates"[57] were reflected

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[56] See *Grossman H.A.,* Refining the Role of the Corporation: The Impact of Corporate Social Responsibility on Shareholder Primacy Theory, "Deakin L. Rev.", Vol. 10, Iss. 2, 2005, 572-596.

[57] Berle-Dodd debates were promulgated in some scientific publications. See *Berle A. A.,* Corporate Powers as Powersin Trust, Harv. L. Rev., Vol. 44, Iss. 7, 1931, 1049-1074; *Dodd E. M.,* For Whom Are Corporate Managers Trustees?, "Harv. L. Rev.", Vol. 45, Iss. 7, 1932, 1145-1163; *Berle A. A.,* For Whom Corporate Managers Are Trustees: A Note, Harv. L. Rev., Vol. 45, Iss. 7, 1932, 1145-1074; *Dodd M.,* Is Effective Enforcement of the Fiduciary Duties of Corporate Managers Practicable?, U. Chi. L. Rev., Vol. 2, Iss. 1, 1934-1935, 194-207; Evaluation of the debates. See *Weiner J. L.,* The Berle-Dodd Dialogue on the Concept of the Corporation, Columbia L. Rev., Vol. 64, Iss. 8, 1964, 1458-1467. Evaluation with closer perspective: *Sommer A. A.,* Whom Should the Corporation Serve? The Berle-Dodd Debate Revisited Sixty Years Later,

in history of corporative thinking. The main topic of the debates was duties of the corporate managers. Namely, the interests of whether shareholders or stakeholders[58] shall be taken into account predominantly by the leadership of the corporation upon decision-making. The decision on the Dodge v. Ford Motor Co. triggered the debates on academic theatre, which unambiguously indicated that "entrepreneurial corporation is organized and holds activity primarily for profit of the shareholders. The authorities of the directors are used for this purpose. Discretion of the directors is expressed in selection of means to achieve this goal and does not apply to the alteration of the goal itself, reduction of profit or non-distribution of profit between the shareholders for achievement of other goals".[59]The circumstance was underlined that "the legal authorities of the Board of Directors do not include conduct of corporation affairs in the way, which entails merely the accidental profit for the shareholders and the main priority is profit for others".[60] The debates enhanced in 50s and later they became of scandal nature. Nowadays, we mostly deal with the debates of non-shareholder consistency. Each cycle of debates used new terms and revealed the essence of the problem with slightly different angle by means of development of new ideas. Despite of this fact, in the end we get the impression of déjà-vu.

Shareholder primacy theory emerged out of the view, according to which shareholders are the owners of the corporation and thus, they are empowered to control it, participate in definition of the primary strategy thereof and make the decision on expediency of implementation of the essential changes to policy and practice of the corporation.[61] Shareholders in the joint stock company have the largest instinct of ownership, it is characteristic for them basically, which makes them most interested in growth of profit and obtainment of high dividends. Any talks by business on the role of corporations on social responsibility in the society mislead us. As M. Friedman noted, "there is the only one business social responsibility in free society – to use own resources and conduct the activity, purposed for increase of profit under the conditions if it remains within the rules of the game, indicating to participation in open and free competition without lie and fraud.[62]

The basis of the shareholder primacy theory is shareholder value which, in itself is manifested in demand to increase the shareholder property at maximal extent. The idea of shareholder primacy is based on recognition of superiority of shareholders, priority protection of their interests versus the interests of

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"Del. J. Corp. L.", Vol. 16, Iss. 1, 1991, 33-56. One of the results of the debates for academic circle was emergence of "Berle and Means" modern corporation. See *Berle A., Means G.,* The Modern Corporation and Private Property, N.Y., 1932. The modern world does not solve evaluation of modern corporation with different angle. See *Bratton W.W., Wachter M. L.*, Shareholder Primacy's Corporatist Origins: *Adolf Berleand* „The Modern Corporation", J. Corp. L., Vol. 34, Iss. 1, 2008, 99-152; *Alces K.,* Revisiting Berle and Rethinking the Corporate Structure, Seattle U. L. Rev., Vol. 33, Iss. 4, 2010, 787-808. *Mizruchi M. S., Hirschman D.,* The Modern Corporation as Social Construction, Seattle U. L. Rev., Vol. 33, Iss. 4, 2010, 1065-1108. *Gelter M.,* Taming or Protecting the Modern Corporation - Shareholder-Stakeholder Debates in a Comparative Light, N.Y.U. J. L. &Bus., Vol. 7, Iss. 2, 2011, 641-730.

[58] Interests of the society with wider meaning, as of one whole unit. One of the topics of Berle-Dodd debates was duties of the leadership corporation to the society as one whole unit.

[59] See *Dodge v. Ford Motor Co.* 170 N.W. 668, (Mich. 1919).

[60] Ibid, 684.

[61] *Matheson J. H., Olson B. A.,* Corporate Law and the Long term Shareholder Model of Corporate Governance, Minnesota L. Rev., Vol. 76, 1992, 1327.

[62] See reference 4.

all other stakeholders. The only aim of the leadership shall be increase of profit which means increase of prices of own shares for shareholders. The basic disadvantage of the shareholder primacy norm is limited usage towards the decisions made within the ordinary entrepreneurial activity.[63]

5.1.2. Stakeholder Theory

Positioning of stakeholder theory in the debates regarding corporate social responsibility can be restrictedly granted with the second place. It is the theory of organizational management aiming at evaluation of the corporate goal and the role from the stakeholder perspective. Initially, it has been developed as the model of strategic management[64] which brought more dynamics to corporate social responsibility movement.

On the basis of review of normative, descriptive and instrumental aspects of stakeholder theory we can make a conclusion that stakeholders form the group valuable for the corporation attitude towards which shall not be based on the approach according to which they, as one large group, are the mere mean to achieve the goal.[65] The main disadvantage of the stakeholder theory is considered to be absence of solid normative basis and clarity. Upon the problems related to identification of the separate groups of stakeholders, the main disadvantage of the theory lies in balance of various relations and different aims or interests. Stakeholder approach of corporate governance is not easy to put in practice which is entailed with uncertainties of the leverage providing due response in case of violation of their rights, which derives from the wrong view of accountability and which in itself is based on the assumption that available agreements and regulatory mechanisms are enough for protection of the rights and interests of stakeholders. Despite of this fact it is supposed that increase of shareholder value at maximal extent in long-term perspective is possible in the event solely if leadership in the process of governance and administration of the corporation and in the decision-making process acts in line with the best interests of all the stakeholder groups which have contributed their mites in success of the corporation.[66]

Maximal multiplication of the property of the shareholders was the manual normative principle[67] of the corporate decision-making process in USA during the decades, unlike the continental Europe where protection of Stakeholders' rights and respect to their interests always was in particular spotlight. In this regards, the institute of consideration of the representatives protecting the interests of the employees in the composition of the Supervisory Board is noteworthy, which underlines self-sufficiency and singularity of German equity law.

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[63] *Keay A.,* Shareholder Primacy in Corporate Law: Can it Survive? Should it Survive?, "European Company and Financial L. Rev.", Vol. 7, Iss. 3, 2010, 379.

[64] *Freeman E.,* Strategic Management: A Stakeholder Approach, Cambridge UP, 2010, 44.

[65] *Keay A.*, Stakeholder Theory in Corporate Law: Has It Got What It Takes?, "Rich. J. Global L. & Bus.", Vol. 9, Iss. 3, 2010, 254.

[66] *Sprague R.,* Beyond Shareholder Value: Normative Standards for Sustainable Corporate Governance, "Wm. & Mary Bus. L. Rev., Vol. 1, Iss. 1, 2010, 80-81.

[67] Shareholder primacy norm in historical angle. See *Smith D. G.,* The Shareholder Primacy Norm, J. Corp. L., Vol. 23, Iss. 2, 1998, 277-323.

The substantive difference between primacy of shareholders and stakeholder theory is that the first admits that the leadership of the corporation is tend to abuse own position and use the entrusted property irrelevantly to the interests of the corporation and the shareholders, when the latter is based on professionalism of the leadership and the trust thereto. Contrast of the interests of shareholders and stakeholders is basically the dichotomy included in the micro-dichotomy group which is solely expressed in the corporate legal relations.[68] The process of approximation of theories may only be based on the assumption that confrontation of the interest to increase the shareholder value at maximal extent and the stakeholder interests may not occur at all[69] and we in fact deal with false antagonism beyond which shareholders are considered as one of the groups of stakeholders.

5.2. Possible Resolution of the Endless Debates: Enlightened Shareholder Value

In 2006, the corporate[70] law reform has been implemented in the United Kingdom of the Great Britain.[71] One of the achievements of the reform was enlightened shareholder value[72], which has been incorporated in the chapter of the general duties of the directors of the Act of the Company of 2006 with the significant title – duty to promote the success of the company.[73] Enlightened shareholder value is the better alternative to the traditional shareholder value. The reform implemented in the

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[68] Corporate legal relations in this case are used in narrow angle taking the corporate governance context into account. In case of wide explanation, we may deal with non-basic and wide dichotomy as the partial characteristic of corporate law which is expressed in demarcation of shareholder property and stakeholder contractual rights. If shareholder-market value is separated in the micro-dichotomy group besides maximal increase of social value, one more dichotomy related to distribution of governance rights and separation of shareholder regulatory-property and stakeholder regulatory-contractual rights. Unlike micro-dichotomy, macro-dichotomies are put in wider scopes. They include: market or hierarchy structure of the company; equalizing justice or distributor justice; liberalism or utilitarianism; market or state. The model of absolute primacy of the director has been developed based on these dichotomies. The author remarks that "first two dichotomies may be called "micro-dichotomies" as they are attributed to the corporate law solely. In comparison with them, the rest four of them may be characterized as "macro-dichotomies". They are introduced in all the spheres of private law, including the corporate law. See *Reich-Graefe R.,* Deconstructing Corporate Governance: Absolute Director Primacy, "Brook. J. Corp. Fin. & Com. L.", Vol. 5, Iss 2, 2011, 350-352.

[69] *K. Hopt,* Corporate Governance in Europe: New Model of Regulation and "soft law", translated by *I. Burduli*, "Law Journal", №1, 2009, 230 (In Georgian).

[70] So-called "of company".

[71] General information about the reform: *Tomasic R.,* Company Law Modernization and Corporate Governance in the UK - Some Recent Issues and Debates, "DICTUM - Victoria Law School Journal", Vol. 1, 2011, 43-60; criticism about the reform: *Reisberg A.,* Corporate Law in the UK after Recent Reforms: The Good, the Bad and the Ugly, "Current Legal Problems", Vol. 63, Iss. 1, 2010, 315-374;

[72] Enlightened shareholder value*: Williams R.,* Enlightened Shareholder Value in UK Company Law, "U. New South Wales L. J.", Vol. 35, Iss. 1, 2012, 360-377; *Keay A., Zhang H.,* An Analysis of Enlightened Shareholder Value in Light of Ex Post Opportunism and Incomplete Law, "European Company and Financial L. Rev.", Vol. 8, Iss. 4, 2011, 445-475.

[73] Duty to Promote the Success of the Company. ix.: Companies Act 2006 c. 46, Part 10, Chapter 2, Section 172,<http://www.legislation.gov.uk/ukpga/2006/46/section/172>, [15.03.2014].

company law has modified the shareholder value on the basis of the multifaceted approach in favor of stakeholders.[74]

Enlightened shareholder value is an alternative view of the corporation, the role thereof in the society and the objective and the purpose thereof deriving from this role which in the context of the corporate governance goes far beyond the scopes of traditional shareholder-stakeholder dichotomy by means of the fresh realization of the corporate function and the objective[75] and strives to unify the elements characterized for both theories in itself.

Enlightened shareholder value is the new basis for the effective corporate governance system which facilitates to approximation of corporate governance and corporate social responsibility. The advantage of the new approach to the corporate governance, particularly in regards with stakeholder theory, is revealed in existence of intact normative basis.

5.3. Sustainable Company

Sustainable company is the new approach developed in regards with the corporate governance in Europe offering wider view on the company and the objectives thereof.[76] The main objective of the Company in long-term perspective has generated the sustainable shareholder value. Activity of the sustainable company is based on the multi-dimensional concept of sustainability. Sustainability for the actors on the global theatre within the effective system of corporate governance is manifested in necessity to consider aggregation of social, environmental and financial aspects of own activity.[77]

Sustainable company is the outcome of synthesis of good corporate governance and sustainable development, more precisely – integration of sustainable development principles in the corporate governance system. Stakeholders, especially employees, by means of various mechanisms, participate in decision-making process in sustainable company which facilitates to creation of stakeholder value and is one of the important components of sustainable company. Engagement of stakeholders is the necessary pre-condition for creation of the sustainable model of corporate governance.

Corporation, facilitating to development and engagement of society with own activity, on the basis of the substitution principle, obtains in turn the conditions which promote existence thereof and successful and profitable activity in long-term perspective. The company, taking the environmental and social expectations of the society into account, enjoys benevolence by the society and makes important steps on the path to long-term sustainability.

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[74] See the shareholder value modification: *Keay A.,* Moving Towards Stakeholderism? Constituency Statutes, Enlightened Shareholder Value and All That: Much Ado about Little? "European Business L. Rev.", Vol. 22, Iss. 1, 2011, 1-49.

[75] *Ho V. H,* "Enlightened Shareholder Value": Corporate Governance Beyond the Shareholder-Stakeholder Divide, "The Journal of Corporation Law", Vol. 36, Iss. 1, 2010, 61;

[76] See Action Plan: European Company Law and Corporate Governance - a Modern Legal Framework for More Engaged Shareholders and Sustainable Companies, European Commission Communication, Strasbourg, 12.12.2012, COM(2012) 740 final.

[77] See ICGN Global Corporate Governance Principles: Revised 2009, 1.1., 9.

6. Path to Corporate Accountability

6.1. General Trend

Corporate accountability is the global approach to the corporate governance. Establishment of multinational corporations, activity of which goes far beyond national scopes and mostly applies to the territories of two and more states, complicated provision of their accountability on international theatre.

The state is no longer capable to implement full-scale regulation of their activity. The aim of corporate behavior is to overcome this asymmetry, inculcated between the expectations of the society to the corporations and their actions.[78] The state is able to create the legislative base only within own territory for further development of socially responsible corporate behavior.

6.2. National Legislation

6.2.1. Interrelation "Formula"

The national legislative frameworks, in the context of multi-aspect corporate accountability, facilitating to inculcation of corporate social responsibility practice, are of utmost importance and are the elements placed on the first stages of hierarchy. The European frameworks, promoting corporate social responsibility concerning creation of relevant legal environ for socially responsible behavior, have developed the discussions as follows: "despite of all this, it is preferable not to consider corporate social responsibility as the substitution of the regulation or legislation concerning the social rights and environmental standards including development of new relevant legislation. In the countries with such regulations, it is preferable to focus attempts on determination of relevant regulatory or legislative frameworks in order to define unified playing field, on the basis of which socially responsible practice may be developed".[79]

Interrelation between corporate social responsibility and the law is expressed in the "formula", which is characterized in three main directions. Corporate social responsibility beyond law, through law or for law[80] – are the three forms of interrelation best revealing the potential role of the law in terms of inculcation of socially responsible practice. The final destination of the formula of such type is definition of the nature of interrelation and the scopes thereof, namely, what role can be played by the law in promoting corporate social responsibility and vice versa, what role is played by the concept of corporate social responsibility in implementation of the minimal requirements under the law.

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[78] See *Deva S.,* Sustainable Good Governance and Corporations: An Analysis of Asymmetries, "Georgetown Int'L Envtl. L. Rev.", Vol. 18, Iss. 4, 2006, 707-750.

[79] Promoting a European framework for Corporate Social Responsibility, Green Paper, Brussels, 18.7.2001, COM(2001) 366 final, 2.22., 7.

[80] See *McBarnet D.,* Corporate Social Responsibility Beyond Law, through law, for law in the book: The New Corporate Accountability: Corporate Social Responsibility and the Law, Eds. by *McBarnet D., Voiculescu A., Campbell T.,* Cambridge University Press, 2009, 9-59.

The part of the "formula" is to subject to particular consideration for definition of interrelation, which concerns the role of the law in development of corporate social responsibility practice. The professor G. Teubner, upon consideration of the role of law, attaches his attention to three possible functions which it can fulfill in the process of institutionalization of corporate social responsibility. On the basis of opposition of the moral and law, the professor outlines the facilitating, regulatory and stimulating functions of the law.[81]

6.2.2. Attitude to the Separate Fields of Law

Determination of interrelation between the corporate social responsibility and the law is followed by definition of the role of the concept itself in regards with various dimensions of the law, which is expressed in modification of the balance between them, emerged in case of labor and consumer law, which basically is explained with interests of employees (internal factor) and the consumers (external factor) in development of best practice of corporate social responsibility.[82]

The role of the corporate law in promoting the corporate social responsibility lies in equipment of the leadership of the corporation with the catalogue of authorities, which will be the best trigger for inculcation of socially responsible practice in the corporation. The evident example of the given approach, as noted upon consideration of the enlightened shareholder value, is the duty to promote success of the company, prescribed under the *Act of the Companies.* Actions in this direction will be as well hailed in Georgian legislation. General reference in the Georgian Law on Entrepreneurs that the actions by the persons with authority of the leadership shall be most favorable for society[83], are not characterized with the level of specification which is appurtenant to the duty to promote success.

In terms of establishment of sustainable development principles in the corporate life, importance of corporate social responsibility increases in direction of environmental law as well. In the context of enhancement of social dimension of international investment agreements, international corporate social responsibility serves for balance between protection of the rights and the interest of the investors and all the parties, which are affected by the direct international investments.

6.3. International Standards and Transnational Regulations

Regulation of activities of the multinational or transnational corporations in terms of corporate social responsibility, which is expressed in the form of standards and guidelines on international level[84], aims at achievement of balance on issues concerning the international investments.

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[81] See *Teubner G.,* Corporate Fiduciary Duties and Their Beneficiaries: A Functional Approach to the Legal Institutionalization of Corporate Responsibility, in the book: Corporate Governance and Directors' Liabilities: Legal, Economic, and Sociological Analyses on Corporate Social Responsibility, eds.: *Hopt K. J., Teubner G.,* 1985, 159-164.

[82] See *Sobczak A.,* Corporate Social Responsibility: From Labor Law to Consumer Law, "Transfer: European Review of Labor and Research", Vol. 10, Iss. 3, 2010, 401-415.

[83] See the part two of the sentence two of the paragraph six of the article 9 of the Law of Georgia on Entrepreneurs.

[84] The following are included in the Corporate Social Responsibility internationally recognized principles and guidelines: OECD Guidelines for multinational enterprises; UN global compact 10 principles; ISO

Amongst the internationally recognized norms on corporate social responsibility, UN norms are particularly noteworthy on responsibilities of transnational corporations and other business enterprises in the human rights protection sphere, which served as the foundation to discussion of the regulatory norms on activity of transnational corporations as one of the transnational law[85] manifestations[86], as "global law without the state"[87] in the modern era or "new Lex Mercatoria"[88], which in its turn, is one of the manifestations[89] of legal pluralism.[90] The given approach has been facilitated by consideration of the law concept from transnational perspective in law philosophy.[91] Despite of this, UN norms failed to meet the expectations.[92] On June 16, 2011 UN, within Protect, Respect, Remedy project[93] developed the new document – Guiding Principles on Business and Human Rights to enhance the principle of respect of human rights in the course of activity of the corporations.[94]

26000:2010 Guidance on Social Responsibility; ILO multinational enterprises and social policy principles, tripartite declaration; UN norms on transnational corporations and other business enterprises responsibility in human rights sphere. See A renewed EU strategy 2011-14 for Corporate Social Responsibility, European Commission Communication, Brussels, 25.10.2011 COM (2011) 681 final, 3.21., 6. Besides general regulatory standards, various sphere international instruments are being developed: standards on human rights, labor rights, environmental and consumer interests and production responsibility spheres. Standards in combat against corruption and international standards on sustainable development accountability are noteworthy. See OECD Guidelines for Multinational Enterprises, OECD, 2011, 15.

[85] Briefly on transnational regulations See *Cotterrell R.,* What Is Transnational Law? Law & Social Inquiry, Vol. 37, Iss. 2, 2012, 500-524. Also See *Berman P. S.,* From International Law to Law and Globalization, Columbia Journal of Transnational Law, Vol. 43, Iss. 2, 2005, 485-556.

[86] For example See *Backer L. C.,* Multinational Corporations, Transnational Law: The United Nation's Norms on the Responsibilities of Transnational Corporations as Harbinger of Corporate Social Responsibility in International Law, Colum. Hum. Rts. L. Rev., Vol. 37, Iss. 1, 2005, 162.

[87] See *Michaels R.,* The True LexMercatoria: Law Beyond the State, *Indiana J.,* Global Legal Staties, Vol. 14, Iss. 2, 2008, 447-468.

[88] New Lex Mercatoria (New Lex Mercatoria) is the modern and transnational expression of ordinary law for regulation of trade relations. See *Gimenez-Corte C.,* Lex Mercatoria, International Arbitration and Independent Guarantees: Transnational Law and How Nation States Lost the Monopoly of Legitimate Enforcement, Transnational Legal Theory, Vol. 3, Iss. 4, 2012, 348; also See *Cuniberti G.,* Three Theories of Lex Mercatoria, Columbia Journal of Transnational Law, Vol. 52, Iss. 1, 2013, 101-166, <http://papers. ssrn.com/ sol3/papers.cfm?abstract_id=2244349> [15.04.2014].

[89] On legal pluralism See *TamanahaB.Z.,* Understanding Legal Pluralism: Past to Present, Local to Global, Sydney Law Review, Vol. 30, Iss. 3, 2008, 375-411;

[90] See *Zumbansen P.,* Transnational Legal Pluralism, Transnational Legal Theory, Vol. 10, Iss. 2, 2010, 141-189,

[91] See *Daniels D.,*The Concept of Law from a Transnational Perspective, Ashgate Publishing, Burlington, 2010.

[92] On possible reasons See *Bachmann S., Miretski P.,* Global Business and Human Rights - The UN 'Norms on the Responsibility of Transnational Corporations and Other Business Enterprises with Regard to Human Rights' - A Requiem, *Deakin L.*, Rev., Vol. 17, Iss 1, 2012, 5-41.

[93] On Protect, Respect and Remedy project See *Backer L.,* On the Evolution of the United Nations' 'Protect-Respect-Remedy' Project: The State, the Corporation and Human Rights in a Global Governance Context, Santa *Clara J.,* Int'l L., Vol. 9, No. 1, 2010, 101-156.

[94] *Deva S.,* Guiding Principles on Business and Human Rights: Implications for Companies, "European Company Law", Vol. 9, Iss. 2, 2012, 102.

6.4. Self-regulation of Corporate Conduct

In order to further establish the corporate social responsibility practice, self-regulation occupies the third place in terms of acceptability by the multinational corporations. Existence of the corporate code and corporate ethics in the multinational corporations is the accepted practice. Absolute majority of multinational corporations, as a rule, observe one of them at least, though corporate behavior codes, deriving from the comprehension thereof, play greater role in regulation of corporate behavior than corporate ethics codes, which apply to narrower sphere relations. OECD guidelines for multinational enterprises are considered as one of the best models of responsible business behavior on the global level. These guidelines are the integral part of the declaration adopted by OECD on international investments and multinational enterprises.

In the context of corporate social responsibility the issue is frequently raised that regulation of corporate behavior shall be implemented voluntarily by means of corporate codes of conduct for instance, towards which the question arises about moral or legal obligation[95], if deriving from the nature of multinational corporations, application of mandatory regulations is expedient which is expressed in subordination to the instruments, developed in line with various spheres on the international level, the aim of which as noted, is creation of relevant environ for promotion of socially responsible behavior on the global level and balance of the interests. Over time, the instruments developed on the international level for corporate social responsibility issues, weighed the scale to the other side and somehow ended the ongoing discussion concerning the said issue.

6.5. Meta-Regulation

Legal accountability for corporate social responsibility can be achieved through meta-regulation, which is actively applied for evaluation of the initiatives under the aegis of corporate social responsibility.[96] Meta-regulation is frequently mentioned as “internal self-regulation” or “self-regulation under the shadow of the law”. Meta-regulation implies subordination of corporate conscience to legal regulation. Corporate conscience is the compendium of the values, which goes beyond the narrow economic interests of the corporation. Establishment and real implementation of corporate social responsibility without legal accountability is impossible. Only in case of attempt by the civil society, corporate accountability to the society can be provided.

The role of meta-regulation in effective self-regulation is evidently revealed by the activities following the *Kasky v. Nike case*.[97]This case was connected with the doctrine of commercial expression and the related issues. The brief fable of the case is as follows: in 1990, Nike Incorporation

[95] See *Glinski C.,* Corporate Codes of Conduct: Moral or Legal Obligation?. In the book: The New Corporate Accountability: Corporate Social Responsibility and the Law, Eds. by *McBarnet D., Voiculescu A., Campbell T.,* Cambridge University Press, 2009, 119-147.

[96] See *Parker C.,* Meta-Regulation: Legal Accountability for Corporate Social Responsibility? In the book: The New Corporate Accountability: Corporate Social Responsibility and the Law, Eds. By *McBarnet D., Voiculescu A., Campbell T.,* Cambridge University Press, 2009, 201-240.

[97] *Nike, Inc. v. Kasky* 539 U.S. 654 (2003).

in order to attract consumers and in response to the criticism, held the advertising campaign in various press media and in the report on corporate social responsibility. It indicated that the employees in their factories enjoyed the relevant labor conditions. *Mark Kasky* was the civil activist in labor and environmental rights protection direction. He appealed to the court with the suit that all statements by Nike were wrong and lie. The employees of Nike factories received low salaries and in some events, labor of minors was used. The Court discussed the unfair competition and misleading (wrong) advertisement, separated commercial and non-commercial speeches. One of the conclusions by the Court provided that "when a corporation, to maintain and increase its sales and profits, makes public statements concerning labor practices and working conditions at factories where its products are made, those public statements are commercial speech that may be regulated to prevent consumer deception".[98] The different opinion indicated that Nike case failed to fit in traditional doctrine of commercial speech. Nike case is a good example of the results of usage of corporate social responsibility for PR solely without implementation of real programs and social initiatives. Nike is an international brand, in case of undue behavior of which, it can be easily undergo the public criticism. This case revealed the potential of civil society in establishment of socially responsible practice by legal means of protection of rights under the background of social protest.

7. The Role of Codes of Corporate Governance

7.1. Establishment of Socially Responsible Practice

The codes of corporate governance play an important role in promotion of corporate social responsibility. Corporate social responsibilities and corporate governance are annually merged in the code of corporate governance up to specific scopes naturally, which create intact foundation for good corporate governance.

Involvement of corporate social responsibility issues in codes of corporate governance even on the level of values create better environ for development of corporate social responsibility practice, which in itself is the pre-condition for inculcation of the best practice of corporate governance. Inculcation of the practice of usage of the best rules of corporate governance is the defining element for establishment of corporate culture in multinational enterprises and stimulation of business-ethic norm observance.[99] For the purpose of creation of transparent environ in the multinational corporations, the main requirement within the availability of information requirement, lies in availability of the information on the implementation process of the principles prescribed under the corporate governance codes.[100]

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98 When a corporation, to maintain and increase its sales and profits, makes public statements defending labor practices and working conditions at factories where its products are made, those public statements are commercial speech that may be regulated to prevent consumer deception.See *Kasky v. Nike, Inc.* (2002) 27 Cal. 4th 969 [119 Cal. Rptr. 2d 296, 45 P.3 d 243].

99 OECD Guidelines for Multinational Enterprises, OECD, 2011, Commentary on Combating Bribery, Bribe Solicitation and Extortion, 75, 49.

100 OECD Guidelines for Multinational Enterprises, OECD, 2011, part III, 2, h.

7.2. Georgian Code of Corporate Governance

Corporate governance code is the crucial instrument based on self-regulation principles which serves for inculcation of good corporate governance principles. Coordinated conduct of corporate social responsibility and corporate governance in the context of multi-aspect corporate accountability, can be explained with existence of soft law.

Since 2009 we have the Code of Corporate Governance in Georgia developed for commercial banks solely, the main objective of which among others, was set-up of higher standards of corporate governance;[101] and adoption of which can be explained with the current level of development of this sector for one specific sector in business. Since 2009 up-today none of the changes have been adopted to the Code when intermittent changes to the corporate governance codes or adoption of a brand new code is a recognized practice.

The principle of compliance of the national legislation and the regulations has been reflected in the corporate governance code for commercial banks,[102] which is the essential component of good corporate governance. The requirement of higher standards of corporate governance in regards with the parties concerned shall be decreased to the maximally achievable level of informational provision for effective relations therewith. The essence of effective relations is revealed in compliance of transparency, accountability and business ethics principles which is attributed to the prerogative of the governing bodies.

7.3. Integration Ways

There are various approaches to consider the corporate social responsibility and relevant issues in the corporate governance codes, efficiency of which is mostly expressed in the junction of the objectives of corporate social responsibility and corporate governance in regards with the aims to be achieved by the corporations in the long-term perspective.

Existence of the direct reference to the corporate social responsibility is characteristic for the separate codes of corporate governance and identification of all stakeholder groups when different approach considers the main issues of social responsibility in the codes solely on the level of recognition of values and principles. For instance, the Norwegian Code of Practice for Corporate Governance directly provides general definition of corporate social responsibility, according to which the essence of the concept lies in responsibility of the company for activity with which it has impact on people, society and environ and ordinarily concerns the human rights, prevention of corruption, rights of employees, health, security and labor conditions free from discrimination, as well as environmental protection issues.[103]In some cases, instead of definition of the essence of the corporate social responsibility, we find indications to the environmental and social issues.[104]Romanian corporate governance code is also

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[101] Corporate governance code for commercial banks, 2009, 2.

[102] See Corporate Governance Code for Commercial Banks, chapter 2, paragraph "b", sentence 5.

[103] The Norwegian Code of Practice for Corporate Governance, 7th ed., sec. 1, 2012, 13 (23 Oct. 2012).

[104] See The Bucharest Stock Exchange Corporate Governance Code (Romania), 14 (22 Jan. 2009), Art. 7, rec. 25.

interesting in the term that it precisely identifies the stakeholder groups and offers classification thereof as internal and external stakeholders. Namely, the internal stakeholders include employees, the representatives thereof and partially Trade Unions; and the external stakeholders include creditors, users and investors.[105]

Unlike Norwegian and Romanian codes, the UK Corporate Governance Code does not include the peculiar reference to the corporate social responsibility and the level of values, it solely underlines importance of the concept for success in the long-term perspective.[106]

Hence, the corporate governance codes can evidently exercise important functions for facilitation to corporate social responsibility. Briefly, in the context of corporate social responsibility, the main target for corporate governance recommendations is stakeholders, who carry the burden to activate the environmental and social issues.

8. Fiduciary Duties: Duet or Triad

8.1. General View

Corporate governance bodies play the leading role in the course of corporate governance and activity in terms of establishment of socially responsible practice. The authority of the leadership includes implementation of the decisions upon adoption of which consideration of environmental protection and social issues makes the leadership and the corporation the responsible member of society.

Adoption of the policy on corporate social responsibility and undertaking the relevant measures consequently with the active development of corporate social responsibility movement gradually passed beyond the scopes of discretion of the high officials of the corporation and were put in the group of necessary initiatives conditioned with "pressure" by the society.[107] Adoption of the policy on social responsibility is basically expressed in commitment of the leadership of the corporation to share the voluntary initiatives universally recognized on the international or national level.[108] Activity of the directors in the direction of establishment of corporate social responsibility practice is justified with profitability of the measures undertaken within social responsibility in long-term perspective.

The only duty of the leadership of the corporation is to protect interests of the corporation. The interests of the corporation derive from the objective thereof, which in long-term perspective is manifested in successful operation and expressed in gaining profit and provision of society with goods

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105 See The Bucharest Stock Exchange Corporate Governance Code (Romania), 14 (22 Jan. 2009), Art. 10, rec. 38.

106 See The UK Corporate Governance Code, Financial Reporting Council (28 September, 2012), C.1.2.

107 On the intermediate stage of development of corporate social responsibility movement, implementation of the initiatives under the aegis of corporate social responsibility was included in the discretion of the Board of Directors. *Posner R.A.,* Economic Analysis of Law, 8th ed., NY, 2011, §14.14.

108 In lie with the recommendations on corporate governance for the companies in Denmark, adoption of the policy on corporate social responsibility implies the following. See Recommendations on Corporate Governance (Denmark), (6 May 2013), 2.2.1., 13.

and service despite of the functions imposed on business deriving from the necessity to consider wider interests of the society.

All other duties which in line with the legal system, can be found in various forms, context or title, derive from this supreme duty and facilitates to implementation thereof. Division of so-called fiduciary duties of the leadership (Board of Directors) into two large groups is characteristic for American corporate law when English company law, despite of attribution thereof to common law, does not share such division and offers wider range of duties. It's easier when we deal with the British company law in terms of legal environ promoting development of corporate social responsibility practice. Upon considering the British approach to the corporate governance, we mentioned that the reform in 2006 took the duty to promote success of the company into account, which creates solid normative basis for Directors to conduct development of socially responsible practice. American approach offers different solution, which is based on traditional fiduciary duties.[109]

8.2. Duty of Good Faith – Independent Fiduciary Duty?!

We can briefly express the essence of fiduciary duties as follows – to be devoted and serve in good faith for the best interests of the corporation. Consideration of corporate social responsibility in terms of fiduciary duties entailed usage of the good faith principles in new manner in American case law, which facilitated to creation of good faith, as different approach to independent fiduciary duties.[110]

The good faith principle obtained the particular importance in 1986 when in response to one of the most famous decisions[111] of the Supreme Court of Delaware the change has been adopted to the General Corporation law of Delaware, envisaging addition of the section 102(b)(7)[112]. The change envisaged inclusion of the provision in the constituent documents (certificates of Incorporations) of registered corporations in Delaware with which the personal responsibility of the leadership

[109] Legal Analysis of Corporate Social Responsibility on the Basis of Fiduciary Duties Approach. See *Teubner G.,* Corporate Fiduciary Duties and Their Beneficiaries: A Functional Approach to the Legal Institutionalization of Corporate Responsibility, in the book: Corporate Governance and Directors' Liabilities: Legal, Economic, and Sociological Analyses on Corporate Social Responsibility, eds.: *Hopt K. J., Teubner G.,* 1985, 149-177. This approach is acceptable solely in good corporate governance context. See *Veasey E.N.,* Should Corporation Law Inform Aspirations for Good Corporate Governance Practices - or vice Versa?, "U. Penn. L. Rev.", Vol. 149, Iss. 1, 2001, 2179-2191. As to fiduciary duties, the matter is how much is for aspiration to ideals in the action area of fiduciary duties. See *Velasco J.,* The Role of Aspiration in Corporate Fiduciary Duties, "Wm. & Mary L. Rev.", Vol. 54, Iss. 2, 2012, 519-586.

[110] See On good faith independent duties: *Eisenberg M. A.,* The Duty of Good Faith in Corporate Law, "Del. J. Corp. L.", Vol. 31, Iss. 1, 2005, 1-75; *Kerr J.,* Developments in Corporate Governance: The Duty of Good Faith and its Impact on Director Conduct, "George Mason L. Rev.", Vol. 13, Iss. 5, 2006, 1037-1082; *Velasco J.,* How Many Fiduciary Duties Are There in Corporate Law?, "Southern California L. Rev.", Vol. 83, Iss. 6, 2010, 1213-1318; on criticism See *Furlow C. W.,* Good Faith, Fiduciary Duties, and the Business Judgment Rule in Delaware, "Utah L. Rev.", Vol. 2009, Iss. 3, 2009, 1061-1095.

[111] Implies the decision on *Smith v. Van Gorkom* case 488 A.2d 858, 872 (Del. 1985).

[112] See DEL. CODE ANN. tit.8, § 102(b) (7) (2001). For details: *HowickiE.A.,* Director Inattention and Director Protection under Delaware General Corporation Law Section 102(B)(7): A Proposal for Legislative Reform, "Del. J. Corp. L.", Vol. 33, Iss. 3, 2008, 695-718.

(Directors) of the corporation for the explicit costs emerged due to violation of duty to care, has been restricted.

The good faith principle is the significant element of the duty as of care so of loyalty. It is the basic coefficient of both fiduciary duties. Entailment of the different opinion on the good faith duty, as a separate duty, has been conditioned with sundry decisions. One of the first decisions, unambiguously indicating to existence of triad, was the decision of 1993 made on Cede and Co. v Technicolor case in which the Delaware Supreme Court noted that the plaintiff shareholder should prove the fact of violation of one of the duties out of the triad of fiduciary duties by the directors.[113] Though we shall underline the circumstances that State of Delaware is dignified with rich judiciary practice, focused on good faith principle, more precisely on necessity of good faith conduct when dealing with the issue of responsibility of the directors.[114]

Good faith duty is the liability, "forcing" the directors in globalization era, to take the possibility into account of impact of the decisions made on the whole society.[115] In case of introduction thereof in capacity of the independent duty, the duty of care undergoes the risk to lose the form and the duty of loyalty undergoes the risk to lose context. The main argument, certifying separate existence of good faith duty, lies in the fact that separate cases shall not be included in the duties of care and loyalty, instead it can easily be put in the sphere of good faith duty application. The range of the court decisions[116] have been adopted in Delaware, striving to put the new light to the role of good faith principle, considering it as independent, separate fiduciary duty. Introduction of good faith as the independent duty creates the relevant basis for adoption of the decision, only characteristic for good corporate governance.[117]

The recent practice of Supreme Court of Delaware got resumed to traditional division of fiduciary duties. The Supreme Court of Delaware in re decision on the Stone v. Ritter case noted that "duty to act in good faith does not establish independent fiduciary duty based on the same basis as the duties of care and loyalty".[118]

Consideration of the duty of good faith in capacity of independent duty entailed re-realization of the issues related to responsibility of the directors and creation of the new questions.[119]

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[113] See *Cede & Co. v. Technicolor, Inc.* 634 A.2d 345, 361 (Del. 1993).

[114] For example See *Graham v. Allis Chalmers Manufacturing Company*, 188 A.2d 125 (Del. 1963); *Warshaw v. Calhoun*, 221 A.2d 487, 493 (Del. 1966); Caremark Int'l Inc. Deriv. Litig., 698 A.2d 959, 959 (Del.Ch. 1996). *Malone v. Brincat,* 722 A.2d 5, 10 (Del. 1998).

[115] *Kerr J. E.,* The Creative Capitalism Spectrum: Evaluating Corporate Social Responsibility Through a Legal Lens, "Temple L. Rev.", Vol. 81, Iss. 3, 2008, 835.

[116] The following decisions have been made in re Disney case: In re Walt Disney Co. Derivative Litig. 731 A.2d 342, 380 (Del. Ch. 1998) (Disney I); *Brehm v. Eisner* 746 A.2d 244, 267 (Del. 2000) (Disney II); In re Walt Disney Co. Derivative Litig. 825 A. 2 d 275, 291 (Del. Ch. 2003) (Disney III); In re Walt Disney Co. Derivative Litig. 907 A.2d 693, 778–79 (Del. Ch. 2005) (Disney IV); In re Walt Disney Co. Derivative Litig. 906 A. 2d 27, 75 (Del. 2006) (Disney V).

[117] See *Sneirson Judd F.,* Green Is Good: Sustainability, Profitability, and a New Paradigm for Corporate Governance, Iowa L. Rev., Vol. 94, Iss. 1, 2009, 987-1022.

[118] See *Stone v. Ritter*, 911 A. 2d 362, 370 (Del. 2006).

[119] See *Lund A.,* Opting Out of Good Faith, Florida U. L. Rev., Vol. 37, Iss. 2, 2010, 393-450; *Jones R. M.,* The Role of Good Faith in Delaware: How Open-Ended Standards Help Delaware Preserve Its Edge, "New York

8.2.1. The Walt Disney Co. Derivative Litigation

In August, 1995 Walt Disney Co. signed the labor contract with Michael Ovitz appointing M. Ovitz as the President of Disney Co. for the term of 5 years. In December, 1996 M. Ovitz was dismissed without indication to the ground. The remuneration paid in total constituted 13 million USD. In January, 1997 shareholders filed the derivative suit against M. Ovitz and the Directors of Disney. The plaintiffs stated that payment of remuneration in the amount of 13 million USD was violation of fiduciary and contractual duties of M. Ovitz as well as of fiduciary duties of the directors.[120]

The Supreme Court of Delaware in re Walt Disney Co. derivative litigation separated the duties of care and good faith and outlined three categories of bad faith behavior: subjective bad faith, gross negligence and deliberate non-fulfillment of the duties/conscious neglect of duties.[121] The core formulation in re decision on Disney case is the description indicating to the fact that deliberate non-fulfillment of the duty, conscious neglect of the duties is not due (though not the only one) standard to define whether the trustees act in good faith.[122] Derivative litigation of Disney is the classic example of duty of care as it peculiarly concerns the decision-making process. It was connected with the duty of good faith due to the fact that Disney incorporation certificate provided the restriction in the section 102(b)(7) of the general corporate law.

The Counselor Court of Delaware did not share the affirmation on violation of the duty of care and good faith behavior. The plaintiffs in the Superior Court claimed that description of bad faith as deliberate non-fulfillment of duty/conscious neglect of duty is not essentially right. The main argument of the plaintiffs was that the directors breached the good faith duty when making decision without considering adequate information and all circumstances.[123] The Supreme Court of Delaware rejected their arguments stating that bad faith qualitatively differs and is to be more condemned from the behavior which serves as the basis for violation of duty of care.[124]

8.2.2. *Stone v. Ritter*

The actual composition of the case Stone v. Ritter briefly lies as follows: William and Sandra Stones, being the shareholders of AmSouth Inc. filed the derivative suit against the directors on behalf of the corporation, claiming that members of the Board of Directors have breached own fiduciary duties failing to provide the adequate internal control for lawful compliance.[125]AmSouth Inc. is the corporation of Delaware, the subsidiary AmSouth Bank of which failed to satisfy the requirement by

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L. Rev.", Vol. 55, Iss. 2, 2011, 499-524; *Thompson R. B.,* The Short, But Interesting Life of Good Faith as an Independent Liability Rule, "New York L. Rev.", Vol. 55, Iss. 2, 2011, 543-561.

[120] In re Walt Disney Co. Derivative Litig. 906 A.2d 27, 35 (Del. 2006).

[121] Ibid, 66.

[122] Ibid, 62.

[123] Ibid.

[124] *Holland R.J.*, Delaware Directors' Fiduciary Duties: The Focus on Loyalty, U. PA. J. BUS. L., Vol. 11, Iss. 3, 2009, 695.

[125] *Stone v. Ritter*, 911 A. 2d 362, 365 (Del. 2006).

Bank Secrecy Act not submitting the so-called suspicious activity report, which entailed imposition of the penalty to the bank. The Counselor Court characterized the demand by the plaintiff as the "classic Caremark demand".[126] In case of Caremark, the Counselor Court noted that solely failure to conduct monitoring for long-term and on systematic base indicates to absence of good faith, which is the necessary pre-condition for imposition of responsibility.[127]

In re Stone v. Ritter decision, the Supreme Court of Delaware emphasized two issues. First of all, the Court noted that conduct of activity of the corporation in bad faith is not the behavior entailing ipso facto imposition of responsibility[128] and elucidated that solely breach of duties of care and loyalty entails direct and indirect responsibility when conduct of activity in bad faith, in other words, breach of duty to act in good faith, may serve as the basis for imposition of responsibility though indirectly[129] as it is the integral element of duty of loyalty.[130] The second issue concerned the duty of loyalty itself, more precisely enlargement of the scope of application thereof. The Court noted that the duty of loyalty is not limited with the activities dealing with financial or other conflict of interests, subject to proceedings. It as well includes the activities dealing with the facts of bad faith.[131] The Court, in order to enhance own position, cited the section of the decision in re *Guttmann v. Huang* which concerns the fact that a director cannot be loyal to the corporation in own actions if he/she does not in good faith believe that his/her actions are of the best interests of the corporation.[132]

In re Stone v. Ritter decision, the Court strived to define the role of the principles of good faith in the context of fiduciary duties. Increase of importance of good faith principle entailed expanding of the duty of loyalty.[133] Good faith has been seen in the role of central requirement of duty of loyalty[134] which facilitated to development of the duty of loyalty and evaluation thereof in the new light.[135]Expanding the duty of loyalty allowed the leadership of corporation, within the corporate social responsibility, to implement some activities.[136] Despite of this fact, some authors consider that inclusion of the principle of good faith in the scopes of the duty of loyalty is a wrong approach as good faith is the ultimate goal, due to which it is the necessary element as of duty of loyalty so of duty of care.[137]

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[126] Ibid, 364.

[127] See In re Caremark Int'l Inc. Deriv. Litig., 698 A.2d 971 (Del.Ch. 1996).

[128] *Stone v. Ritter,* 911 A.2d 362, 369 (Del. 2006).

[129] Ibid, 370.

[130] Ibid.

[131] Ibid.

[132] *Guttman v. Huang,* 823 A.2d 492, 506 n. 34 (Del.Ch. 2003).

[133] *Hill C. A., McDonnell B. H., Stone v. Ritter* and the Expanding Duty of Loyalty, Fordham L. Rev., Vol. 76, Iss. 3, 2007, 1769-1796.

[134] See *Strine L.E., Hamermesh L.A., Balotti R.F.*, Loyalty's Core Demand: The Defining Role of Good Faith in Corporation Law, Georgetown L. J., Vol. 93, Iss. 1, 2010, 629-696.

[135] *Gold A.S.,* The New Concept of Loyalty in Corporate Law, UC Davis L. Rev., Vol. 43, Iss. 2, 2009, 464.

[136] See *Rosenberg D.,* Delaware's Expanding Duty of Loyalty and Illegal Conduct: A Step Towards Corporate Social Responsibility, Santa Clara L. Rev., Vol. 52, Iss. 2, 2012, 81-103.

[137] *Appleby A. D., Montaigne M. D.,* Three's Company: *Stone v. Ritter* and the Improper Characterization of Good Faith in the Fiduciary Duty "Triad", "Arkansas L. Rev.", Vol. 62, Iss. 1, 2009, 474.

9. Importance of Shareholder Activism in Promotion of Socially Responsible Investments

9.1. Socially Responsible Investment

The role and importance of socially responsible investment increased following to development of corporate social responsibility movement. We can unequivocally name the socially responsible investment as the trend developed in the bosom of corporate social responsibility movement which deriving from the causal importance thereof, obtained the signs characteristic for global phenomenon.

Socially responsible investment is the investment strategy first of all with integrated essential elements of corporate social responsibility. Namely, the socially responsible investment implies necessity to consider environmental, social and corporate governance issues in the course of investment project analysis and investment decision-making. Increased interest to socially responsible investment entailed elaboration of the principles, necessary for promotion of socially responsible investment, on the basis of which institutional investors assume responsibility to be active, in own investment strategies and practice, taking the above-mentioned issues into account and in their term, facilitate assurance of open and transparent environ on environmental, social and corporate governance issues in the enterprises invested thereby.[138]

9.2. Role of Shareholder Activism

Emphasizing interrelation between shareholder activism and corporate social responsibility is being held in the discourse of corporate social responsibility. Institutional investors play an important role in promotion of good corporate governance and inculcation of responsible business practice. The optimal role of shareholders and positive and negative aspects of shareholder democracy[139] are best outlined in diversity of activities implemented within the scope of shareholder activism. The crucial role in inculcation of best practice of corporate governance is imposed on activities by the shareholders dictated with necessity to consider own and society's interests.

Shareholder activism aims at positive impact on the leadership and activity of the corporation, more precisely, on improvement of corporate governance by means of effective usage of suffrage.[140] Popularity of socially responsible investment can be explained with the reactive nature of institutional investors, which with investments in sustainable companies, underline their attitude to non-sustainable companies and thus, "punishing" them.

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[138] See Principles for Responsible Investment, Principle 2-6. See the full text of principles <http://www.unpri.org/about-pri/the-six-principles/> [28.03.2014].

[139] *Ho V. H,* "Enlightened Shareholder Value": Corporate Governance Beyond the Shareholder-Stakeholder Divide, "J. Corp. L.", Vol. 36 Iss. 1, 2010, 61.

[140] *Gillan S. L., Starks L. T.,* The Evolution of Shareholder Activism in the United States, "Journal of Applied Corporate Finance", Vol. 19, Iss. 1, 2007, 58.

10. Reputation and Risk Management

10.1. Committee on Corporate Reputation

Increase, development and establishment of entrepreneurial endeavors are a long-term and time-consuming process, maintenance of growing and positive dynamics of which requires high efforts. Simultaneously with growth of volume and scopes of entrepreneurial activity, the geographic application area thereof and assortment of offered goods are being extended. Design is being improved, quality is being enhanced and public awareness is being increased following to these events. And thus, the brand is being formed. The brand is particularly important in multi-competitive environ. The reputation obtains importance for the brand, which deriving of this importance, can be seen as of particular form of the asset.

Branding shall be integral part of marketing and managerial strategy if the corporation aims at creation and maintenance of good reputation in long-term perspective. Today, the most of the multinational corporations acting on international theatre, are the global brands, for which good reputation is one of the defining factor to attract consumers, qualified personnel and investors. The globalization processes in the world increased the scopes of accountability related to reputation and outlined the role of reputational capital.[141]

Entrepreneurial activity is risk-related. Risk is an event accompanying the business. It may be found in many forms, which as a rule, can be classified in two large groups – financial and non-financial risks, both of which ultimately, affect the financial condition of the corporation. Impact, evaluation and management of risk are the integral parts of the routine activity, which can be implemented by means of risk management system.

Risk management is an element necessary for good corporate governance. Risk management system can be found in the form of sub-system of corporate governance and can be considered in the structural organizations as the Committee. The gradual approximation process of corporate governance and corporate social responsibility, expressed in good corporate governance, is manifested on the core value level. Separate changes can as well be detected on risk management level. Convergence, being implemented on the level of values, implies wide explanation of corporate governance on the basis of ethic assumptions. In case of convergence on risk management level, the main task is to determine the type of risk we encounter. The most active supporters of convergence on the value level are the stakeholders. The employees of the corporation are particularly noteworthy, as the group of stakeholders, most interested in convergence on the value level.

10.2. Reputational Risk

Absence of socially responsible practice or improper inculcation thereof threats to abuse of reputation of the corporation. Reputational risk is the risk entailed with negative public statements or

[141] *Jackson K.,* Global Corporate Governance: Soft Law and Reputational Accountability, Brook J. Int. L., Vol. 35, Iss. 1, 2010, 88.

negative representation of the corporation in aggregation with other factors related to activity of the corporation.[142]Development of policy on corporate social responsibility and implementation of various programs within is one of the best means of corporate risk management. Risk management related to environmental, social and corporate governance issues is an expression of approach of enlightened shareholder value, which on the basis of implementation of the principles, developed for responsible investments, aims at improvement of financial implementation of risks at the account of reduction or full neutralization of the risks on the level of the company or the investment portfolio of the risks.[143]

Reputational risk is the risk included in the group of non-financial risks, though deriving from importance thereof, it can easily cause some fluctuations in financial terms in the financial condition of the corporation. Thus, it is expedient the risk evaluation to cover not the narrow financial but also environmental and social issues as well. The kickback on abuse of reputation in the context of corporate social responsibility are of consumers, the mood and attitudes of which have the greatest impact on the volume of sales of consumer goods. The absolute majority of the consumers associate corporate social responsibility with good corporate governance.

11. Conclusion

Corporate social responsibility is the effective means to apply the principles of sustainable development to reality. It can be used for contribution of significant mite in environmental protection, social justice and economic growth.

Corporate social responsibility is a manifestation of the specific role of business in society. The large and multinational enterprises can, by means of inculcation and development of corporate social responsibility practice, elaboration of special programs and undertaking the relevant measures, contribute positive mite in economic, social and ecologic development of humankind. Corporate social responsibility is one of the facilitator factors of increase of level of life for population and economic development of the country.

Corporate social responsibility is the concept comprising numerous issues. The rout from social initiatives implemented for creation of elementary conditions of labor and life for employees to achievement of sustainable development goals of humankind is passed by the corporate social responsibility concept on own evolution path.

Conversations of positive mite contributed by the large and multinational enterprises are not only inexpedient but impossible as well without mentioning the issue implying determination of interrelationship between corporate social responsibility and corporate governance. Convergence thereof based on disclosure, transparency and accountability, is favorable for both and ultimately for everyone. Under this circumstance, socially responsible conduct of business achieved by setting the

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[142] See elucidation of reputational risk related to the bank activity: Article 36 of the Ordinance N 71 of the President of the National Bank of Georgia of March 17, 2008 on Endorsement of the Articles of the Risk Management in the Commercial Banks.

[143] *Ho V. H,* "Enlightened Shareholder Value": Corporate Governance Beyond the Shareholder-Stakeholder Divide, J. Corp. L., Vol. 36, Iss. 1, 2010, 81.

higher standards over legislation, becomes even more desired and acceptable. Corporate social responsibility does not play the role of mere addition or accessory, it is the integral part of good corporate governance. Consideration of corporate social responsibility issues on all the stages of inculcation of applied practice of the best rules of corporate governance is pre-condition for creation of sustainable model of good corporate governance. The essential elements of frameworks regulating corporate conduct and combination of these elements, characterized with high index of flexibility, create real guarantees for creation of such model.

Natia Chitashvili*

Analysis of the Grounds Excluding Contractual Liability and their Attendant Legal Consequences in Changed Circumstances

(In the Angle of Georgian and Anglo-American Law)

I. Introduction

Unlimited application of the principle of supremacy of contract as the underlying imperative of law and order may entail encroachment [1] of principles of contractual justice, reasonability and good faith upon emergence of changes in circumstances under the hardship of civil turnover and may cause the consequences contrary to the objective of these principles.[2] Correspondingly, any legal system recognizes importance of changed circumstances in terms of the contractual binding force and impact on the contract's legal fate.

Emergence of changed circumstances in contractual relations entails two underlying basic concepts[3] of salient force majeure *(vis major – in Roman Law)* and hardship of implementation with attendant legal consequences.

Force majeure and hardship, as unified and general legal constructions, have been established as general contractual principles in transnational legal space and are applied in capacity of universally and internationally recognized provisions for the international commercial contracts.

Force majeure and hardship, as the grounds of exemption from liability to implement and adaptation of contract, are recognized in the international commercial and trade law as the general principles of contract law. The mentioned concepts unify the striking but generalized and neutral legal

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* Doctor of Law, Assistant Professor at TSU Faculty of Law.

1 *Baranauskas E., Zapolskis P.,* The Effect of Change in Circumstances on the Performance of Contract, Mykolas Romeris University, 4 (118), 2009, 198, <http://www.mruni.eu/lt/mokslo_darbai/jurisprudencija/archyvas/dwn.php?id=226657>, [23.07.2014].

2 *Maskow D.,* Hardship and Force Majeure, Am. J. Comp. L., Vol. 40, 1992, 658, <http://www.trans-lex.org/126400>, [23.07.2014]; *Ciematniece I.,* Contract Renegotiation and Adaptation, Concept of Contract Renegotiation and Adaptation in International Commercial Law Contracts, Lambert Academic Publishing, Saarbrücken, 2010, 9.

3 *Lando O.,* Salient Features of the Principles of European Contract Law: A Comparison with the UCC, Pace Int'l L. Rev., Vol. 13, Iss. 2, 2001, 27, <http://digitalcommons.pace.edu/pilr/vol13/iss2/4/>, [24.06.2014]; *Horn N.,* Changes in Circumstances and the Revision of Contracts in some European Laws and International Law in: *Horn N.* (ed.), Adaptation and Renegotiation of Contracts in International Trade and Finance, Antwerp, Boston, London, Frankfurt a.M., 1985, 16, <http://translex.uni-koeln.de/113700/highlight_horn_changes_circumstances_and_the_revision_contracts_some_european_laws_and_international_law_horn_adaptation_and_renegotiation_contracts_inter_not_national_trade_and_finance>, [24.06.2014]; *Ciematniece I.,* Contract Renegotiation and Adaptation, Concept of Contract Renegotiation and Adaptation in International Commercial Law Contracts, Lambert Academic Publishing, Saarbrücken, 2010, 9, 13.

characteristics for various legal systems and imply system of necessary primary pre-conditions in own concept.

The above-mentioned generalized concepts are reflected in different terms in separate legal systems. For instance, in capacity of various categories of the doctrine of *"interference with the basis of the transaction" (Störung der Geschäftsgrundlage)* and *hardship* in German Law; in capacity of doctrine of *"imprevision"* in French Law,[4] in capacity of doctrines of *"commercial impracticability"* and of *"frustration of contractual purpose"* in Anglo-American Law, etc.

Any legal order forms the exclusive basis system of debtor responsibility.[5] Despite of the fact each legal space frequently reveals the conceptually different approach upon regulation[6] of the issue with some or another modifications, as Continental so Anglo-American Law aspire to unify the concept of hardship of the performance.[7] Taking above-mentioned into account, refinement of the National Law, as the integral part of the unification process can be achieved solely by scrutinizing the interrelation of the institutions and concepts similar to the law established in various legal systems.[8]

Upon changes in contractual circumstances, Georgian legislation determines the legal pre-conditions for modification of contractual responsibility or exemption therefrom. Legal analysis and elucidations of legal nature of the excluding pre-conditions of responsibility within the mentioned survey shall be scrutinized in relations with the excluding basis of responsibility incumbent in Anglo-American law. In this term, Anglo-American law is dignified with evidently interesting order.

II. From Absolute Responsibility to Recognition of Excluding Circumstances thereof

Necessity to conduct survey on Anglo-American law has been conditioned with conceptually different approach of the mentioned system to the issue of contractual responsibility. The concept of contract itself significantly differs in common law from legal systems of Germany and France.[9]

System of Continental law is the follower of the principles of culpable responsibility,[10] and Anglo-American law has been based on principles of strict responsibility[11] on the basis of which all contractual conditions shall be granted with the power of guarantee.

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4 *Horn N.,* Changes in Cirsumstances and the Revision of Contracts in some European Laws and in International Law, 1985, 18, in the book*: Horn N.* (ed.), Adaptation and Renegotiation of Contracts in Inter-National Trade and Finance, Deventer/The Netherlands, Kluwer Law and Taxation Publishers, 1985.

5 *Schwenzer I.,* Force Majeure and Hardship in International Sales Contracts, VUWLR, Vol. 39, 2008, 710, <www.austlii.edu.au/nz/journals/VUWLawRw/2008/39.pdf>, [24.06.2014].

6 *Ciematniece I.,* Contract Renegotiation and Adaptation, Concept of Contract Renegotiation and Adaptation in International Commercial Law Contracts, Lambert Academic Publishing, Saarbrücken, 2010, 14.

7 *Shakiashvili B.*, Hardship of Implementation of Contractual Liabilities, Thesis for Dissertation for Scientific Degree of Legal Sciences, Tb., 1997, 6.

8 *Chitashvili N.,* Importance of Guilt for Definition of Contractual Responsibility, TSU Law Faculty "Law Journal", # 1, 2009, 145.

9 *Beale H., Hartkamp A.* (eds.), Cases, Materials and Text on Contract Law, Oregon, Hart Publishing Oxford and Portland, 2002, 1.

10 *Schwenzer I., Hachem P., Kee Ch.,* Global Sales and Contract Law, Oxford University Press, New York, 2012, 650.

The contract stipulating strict responsibility shall be considered as the guarantee and an effective legal mechanism for unconditional implementation of the certain legal consequences. It implies fulfillment of the liability with strict accuracy due to the contract. Failure to achieve the outcome under the contract sets breach of liabilities with due responsibility.[12] Full observance of all salient terms of the contract is the obligation assumed by the parties, breach of which shall entail civil and legal responsibilities.[13]

Despite of above-mentioned, the responsibility of the debtor is not absolute and may be limited with the force majeure clauses stipulated by the parties,[14] which are characteristic almost for all legal systems.[15] In this event, counteragents, in the contract, refer to the circumstances existence of which entails exemption thereof from responsibility.[16] In this term, it's important for the parties to define the legal consequences of force majeure in details under the contract.[17]

Strict liability in Anglo-American law has later been limited with the principle of culpable responsibility characteristic for Continental System.

Similar to Continental Law, by virtue of Anglo-American law, the party may be exempted from liability if he/she proves that under the emerged circumstances he/she, in view to prevent breach of obligation, has been undertaken all necessary, reasonable and legal measures.[18]

Hence, the strict liability has been gradually combined with the principle of culpable responsibility and thus, Anglo-American law has been approximated to the system of legal thinking of Continental law. Nowadays, Anglo-American law, similar to Continental law, maintains the rule of strict liability towards the certain violations. For instance, similar to Continental law, liability is even stricter in case of breach of monetary obligation, also obligation to supply generic goods and goods without defect.[19]

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[11] *Scott R. E.,* In (Partial) Defense of Strict Liability in Contract, Columbia Law and Economics Working Paper No. 341, Mich. L. Rev., Vol. 107, 2009, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1304239>, [23.04.2014].

[12] *Zweigert K., Kötz H*., Introduction to Comparative Law, Vol. 2, The Institutions of Private Law, 2nd Revised ed., Translated from German by *Weir T.,* Oxford, Clarendon Press, 1987, 187.

[13] *Reimann M., Zimmermann R.* (eds.), The Oxford Handbook of Comparative Law, *Farnsworth A.,* Comparative Contract Law, Part III, United States by Oxford University Press Inc., New York, 2006, 922.

[14] Judgment by the Chamber of Civil Cases of the Supreme Court of Georgia of July 6, 2010 in re: Nas-7-6-2010. The parties of the case, under the contractual agreement, defined that they are to be temporarily exempted from liability upon failure to implement obligations under the contract during force majeure if entailed with insurmountable force.

[15] *DiMatteo L.A.,* The Law of International Contracting, Kluwer Law International, The Hague, London, Boston, 2000, 54.

[16] *Chanturia L., Zoidze B., Ninidze T., Shengelia R., Khetsuriani J.*, Comment to the Civil Code of Georgia, Book III, Law of Obligation, General Part, Tb., 2001, 374 (In Georgian).

[17] *DiMatteo L.A.,* The Law of International Contracting, Kluwer Law International, The Hague, London, Boston, 2000, 54.

[18] *Reimann M.*, *Zimmermann R.* (eds.), The Oxford Handbook of Comparative Law, Farnsworth A., Comparative Contract Law, Part III, Published in the United States by Oxford University Press Inc., New York, 2006, 922.

[19] *Chitashvili N.,* Meaning of Guilt for Definition of Contractual Liability, TSU Law Faculty Journal "Law Journal" , # 1, 2009, 159 (In Georgian).

Taking all above-mentioned into account, research of excluding basis of responsibility in Anglo-American law is of particular interest.

III. Legal Regulation of Changes in Circumstances in Anglo-American Law and Parallels to the Continental Legal Doctrine of Georgian Legislation

Anglo-American law does not recognize the terms "force majeure" and "hardship".[20] The doctrines of "frustration of purpose"[21] and "commercial impracticability"[22] apply in terms of problems of changes in circumstances, scrutinizing of which in regards with interrelation of Georgian law with similar concepts in terms of conceptual similarity and difference between the legal systems, is of utmost importance. Also, the Civil Code of Georgia[23] (hereinafter referred to as – CCG) upon impediment for contract performance, does not provide the detailed legal regulation of basics for exemption from liability. Correspondingly, the hereby research aims at study of legal pre-conditions and legal consequences of the mentioned grounds of liability exclusion in interrelation with Anglo-American legal institutions.

1. English Doctrine of Frustration of Contract

1.1. Emergence of Doctrine of Frustration of Contract

The strict liability in Anglo-American law, except the excluding circumstances of liability stipulated with the contractual agreement, is also limited with the doctrine of frustration of contract, development of which originates from the case[24] *Taylor v. Caldwell*.[25]

With the decision on the case, the Court for the first time, admitted impossibility of performance as the basis for exemption from liability,[26] with which significantly changed approach of English law

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[20] *Perillo J.,* Hardship and Its Impact on Contractual Obligations: A Comparative Analysis, Roma, 1996, 1, <http://www.cisg.law.pace.edu/cisg/biblio/perillo4.html>, [10.02.2014].

[21] *Frustration of Purpose.*

[22] *Commercial Impracticability.*

[23] Civil Code of Georgia, Official Publication of the Parliament "Herald", Legislative Addition, # 31, 1997 (In Georgian).

[24] *Ciematniece I.*, Contract Renegotiation and Adaptation, Concept of Contract Renegotiation and Adaptation in International Commercial Law Contracts, Lambert Academic Publishing, Saarbrücken, 2010, 23.

[25] *(1863)b & S826, 122 ER 309 (QB).* In regardless of guilt of the parties, the music hall has been burnt down, which was purposed for the concert. The Court annulled validity of the contract and exempted both counteragents from contractual liabilities. See*: Poole J.,* Casebook on Contract Law, 9th ed., Online Resource Centre, Oxford University Press, Oxford, 2008, 565; *Farnsworth E.A.,* Farnsworth on Contracts, 3rd ed., Vol. 2, Aspen Publishers, 2004, 627-632; *Perillo J.,* Hardship and Its Impact on Contractual Obligations: A Comparative Analysis, Roma, 1996, 4, <http://www.cisg.law.pace.edu/cisg/biblio/perillo4.html>; *Southerington T.*, Impossibility of Performance and Other Excuses in International Trade, 2001, <http://www.cisg.law.pace.edu/cisg/biblio/southerington.html>; *Bridgeman C.,* Reconciling Strict Liability with Corrective Justice in Contract Law, Fordham L. Rev., Vol. 75, 2007, 3035, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=669504>, [10.02.2014].

to strict performance of obligations under the changed circumstances.[27] The Court considered exemption of the parties from liability as admissible and the implied terms of the contract[28], if prior to breach of the contract, fulfillment of obligations appeared impossible independently from the fault of the debtor for instance prior to destruction of the individual subject.[29]

The initial doctrine has been described in narrow angle and has been applied under the conditions of objective hardship solely as the basis for exemption from liabilities.[30] Though, case *Taylor v. Caldwell* was not a model of absolute physical impossibility, inasmuch as fulfillment of an obligation was in fact impracticable in case of vast amount of expenses.[31] Hence, hardship and impossibility have been recognized as exception from the absolute responsibility principle.[32]

Recalling all above-mentioned, validity and the scope of doctrine application has been expanded over time.[33] The Courts have been applying it not only in the event when fulfillment of obligation was impossible due to destruction of the subject of the contract, but when in case of nullification of the expected contractual interest of the parties and the objective of the contract appeared to be vain. Despite of this fact, fulfillment of obligation has been still feasible,[34] execution of justice required exemption of the party from obligation of performance.[35]

In Georgian legislation, upon impossibility of performance, the basis for exemption from liability is regulated in a separate article[36] and does not coincide with the legal basis for modification

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[26] *Goldberg V.P.,* Excuse Doctrine: The Eisenberg Uncertainty Principle, J. Legal Analysis, Vol. 2, No. 1, 2010, 366, <http://jla.oxfordjournals.org/content/2/1/359.full.pdf+html>, [10.02.2014]; *Smythe D.J.,* Bounded Rationality, the Doctrine of Impracticability, and the Governance of Relational Contracts, S. Cal. Interdisc. L.J., Vol. 13, No. 2, 2003-2004, 228, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=799328>, [10.02.2014].

[27] The case *Paradine v. Jane* was the model example for absolute contractual obligation, *English Rep. 897 [K.B. 1647],* which fortified the obligations despite of changes in circumstances in terms of strict observance principle. See: *Chen-Wishart M.*, Contract Law, 2nd ed., Oxford University Press, 2008, 386.

[28] *Implied terms.*

[29] *Treitel G.H.,* The Law of Contract, 9th ed., Sweet and Maxwell, London, 1995, 779; *Brunner Ch.,* Force Majeure and Hardship under General Contract Principles, Exemption for Non-performance in International Arbitration, Kluwer Law International BV, The Netherlands, 2009, 89.

[30] *Blum B.A., Chemerinsky E., Epstein R., Gilson R. F., Krier J.E., Neumann R.K., Syverud K.D., Warren E., Farndsworth E.A., Hazard GS., Wolfman B.* (eds.), Contracts, Examples and Explanations, 3rd ed., Aspen Publishers, New York, 2004, 455.

[31] Due to mentioned, USA substituted the term “Hardship” with “Impracticability”. See: *Treitel G.H.,* The Law of Contract, 9th ed., Sweet and Maxwell, London, 1995, 793.

[32] *Jacobs D.L.,* Legal Realism or Legal Fiction? Impracticability Under the Restatement (Second) of Contracts, New York, Com. L.J., Vol. 87, June/July, 1982, 289, <http://heinonline.org/HOL/LandingPage?collection=journals&handle=hein.journals/clla87&div=70&id=&page=>, [24.06.2014].

[33] *Blum B.A., Chemerinsky E., Epstein R., Gilson R. F., Krier J.E., Neumann R.K., Syverud K.D., Warren E., Farndsworth E.A., Hazard GS., Wolfman B.* (eds.), Contracts, Examples and Explanations, 3rd ed., Aspen Publishers, New York, 2004, 456.

[34] *Treitel G.H.,* The Law of Contract, 9th ed., Sweet and Maxwell, London, 1995, 779.

[35] *Blum B.A., Chemerinsky E., Epstein R., Gilson R. F., Krier J.E., Neumann R.K., Syverud K.D., Warren E., Farndsworth E.A., Hazard GS., Wolfman B.* (eds.), Contracts, Examples and Explanations, 3rd ed., Aspen Publishers, New York, 2004, 456.

[36] CCG, Article 401.

of contractual obligations and exemption from liability upon hardship.[37] The doctrine of frustration of contract unifies the events of absolute impossibility and extreme gravity thereof and may be applied as the mechanism of exemption from liability on the basis of evaluation of gravity degree and scales of enacted implementation.

1.2. Legal Characteristics of Frustration of Contract and Application Thereof to the Pre-conditions, Prescribed under the Article 398 of the CCG

a) Salient Change in Circumstances

The contract may be discharged[38] on the basis of frustration of the contract if the external event, emerged after signing the contract independently from the party[39] makes fulfillment of an obligation impossible as in physical so in economic terms or entails obligation of absolutely different context and legal nature,[40] than it was communicated by the parties upon concluding the contract.[41]

Likewise, the Article 398 I of the CCG, prescribes the salient change in circumstances considered as the basis of the contract in capacity of pre-condition for adaptation of contractual obligation.

In view of analysis of the above-mentioned pre-condition, the fact shall be evaluated whether the essence of contractual obligation was significantly altered as the changes in circumstances or unnatural act[42] has been emerged.[43] It requires definition of the legal nature of the initial contract and the circumstances at the stage of conclusion of the contract, considered as the "basis for bargain", determination of the context of the obligations prior and post unforeseen events and evaluation of

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[37] CCG, Article 398.

[38] *Frustration of a Contract.*

[39] *Blum B.A., Chemerinsky E., Epstein R., Gilson R. F., Krier J.E., Neumann R.K., Syverud K.D., Warren E., Farndsworth E.A., Hazard GS., Wolfman B. (eds.),* Contracts, Examples and Explanations, 3rd ed., Aspen Publishers, New York, 2004, 442; *Nachatar J.S., Hussin A.A., Omran A.,* Frustration of Contract in the Malaysian Construction Contract management, IJE, Tome 9, fascicule 3, Hunedoara, Romania, 2011, 86, <http://web.ebscohost.com/ehost/pdfviewer/pdfviewer?sid=cbc3f99c-b258-4811-9ace-4a8f1729b548%40sessionmgr13&vid=2&hid=10>, [24.06.2014].

[40] See Decisions: *National Carriers Ltd. v. Panalpina (Northern) Ltd; Davis Contractors v Fareham UDC;* See as well, G*regorio M.,* Impossible Performance or Excused performance? Common Mistake and Frustration after Great Peace Shipping, KCLJ, Vol. 16, No. 1, 2005, 71.

[41] *Chen-Wishart M.,* Contract Law, 2nd ed., Oxford University Press, 2008, 283; *McKendrick E.,* Chitty on Contracts, The Law of Contracts, Vol. 1, General Principles, Chapter 24, Discharge by Frustration, London, 1999, 24-001.

[42] *Schwartz A.A.,* A "Standard Clause Analysis" of the Frustration Doctrine and the Material Adverse Change Clause, Rev., Vol. 57, 2009 - 2010, 22-23, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1466131>, [24.06.2014].

[43] See decision: *Davis Contractors LTD v Fareham Urban District Counsil*, [1956] AC 696 (HL).

existence of root conversion on the basis of interrelationship thereof in the context of initial obligation.[44]

Change of the performance method can appear important for modification of contractual liability if application of the specific method has been particularly communicated by the parties.[45]

b) Non-Culpability of the Parties Towards Emergence of Changed Circumstances

Frustration of the contract is entailed with newly emerged circumstance independently from the parties, which causes essential changes in the contractual circumstances and the content of the obligation, frustration[46] of the contract basis and at that is not the outcome of culpable action or inaction of the party,[47] requiring exemption from liability on the basis of contract frustration.[48]

Similar to this fact, the Article 398 I of the CCG as the basis of exemption from liability, prescribes the pre-condition for emergence of the events beyond the control sphere of the party, which implies the impossibility of impact of the counteragent on emergence of the events, elimination thereof or negative outcomes. It, from the very beginning, excludes responsibility of the debtor for events emerged and sets one more independent pre-condition of non-culpability of the party.

c) Frustration of the Purpose of the Contract

Frustration of the contract may be entailed with the events, which make fulfillment of obligation impossible or significantly complicate it. It is superior for it to entail loss of interest to performance of an obligation, to make the purpose of contract frustrated and commercially impracticable, which was the primary motivation for engagement in the legal contractual relations.[49]

The Article 398 I of the CCG envisages the similar pre-condition when prescribes emergence of unforeseen circumstances as the basis for exemption from liability, in awareness of which the parties

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44 *Brunner Ch.*, Force Majeure and Hardship under General Contract Principles, Exemption for Non-performance in International Arbitration, Kluwer Law International BV, The Netherlands, 2009, 90.

45 See decision: *Tsakiroglou & Co. LTD v. Noblee Thorl GmbH*, [1962] AC 93 (HL).

46 *Smith S.A.,* Contract Theory, McGill University, Oxford University Press, 2007, 372. See as well Decision Developing the Doctrine of Frustration of the Contract Basis in English Law: *F.A. Tamplin Steamship Co. v. Anglo-Mexican Petroleum Products Co.* [1916] 2 A.C. 397, Referred: *Rapsomanikas M.G.,* Frustration of Contract in International Trade Law and Comparative Law, Duq. Bus. L.J., Vol. 18, 1979-1980, 556, <http://www.cisg.law.pace.edu/cisg/biblio/rapsomanikas.html#39>, [20.05.2014].

47 See Decisions: *Lauritzen AS v Wijsmuller BV, The Super Servant Two, [1990] 1Lloyd's Rep 1 (CA);* See also, *Nachatar J.S., Hussin A.A., Omran A.,* Frustration of Contract in the Malaysian Construction Contract Management, IJE, Tome 9, fascicule 3, Hunedoara, Romania, 2011, 86, <http://web.ebscohost.com/ehost/pdfviewer/pdfviewer?sid=cbc3f99c-b258-4811-9ace-4a8f1729b548%40sessionmgr13&vid=2&hid=10> , [20.05.2014].

48 *McKendrick E.*, Chitty on Contracts, The Law of Contracts, Vol.1, General Principles, Chapter 24, Discharge by Frustration, London, 1999, 24-007.

49 *Weiskopf N.R.,* Frustration of Contractual Purpose - Doctrine or Myth? St. John's L. Rev., Iss. 2, Vol. 70, Number 2, Spring 1996, 240, <http://scholarship.law.stjohns.edu/cgi/viewcontent.cgi?article=1607&context=lawreview>, [20.05.2014].

would not conclude the contract. Thus, similar to Anglo-American doctrine, absence of contractual interest serves as the basis for modification of contractual obligation, which in the event of prior consideration thereof, would unequivocally exclude the possibility of the parties to achieve the agreement initially.

Frustration of the purpose of the contract is being emerged if the events, emerged subsequently to conclusion of the contract, reduced the value of items, service or service means to the extent that it is unreasonable to receive such burdensome performance on coverage of the agreed price on the consumer.[50] This is the case, when CCG unambiguously considers requirement of strict observance of the agreed terms by the party unreasonable.

Upon frustration of the purpose of contract, unlike hardship, performance of an obligation is still objectively possible,[51] though changes in circumstances nullify all the values of reception of the counter performance for the creditor[52] and thus, annul the primary contractual purpose thereof.[53] At that, it is of utmost importance for the both parties to acknowledge the main purpose of contractual relations, non-performance of which nullifies the value of performance of obligation for the parties.[54]

The personal motifs are not to be taken into account. The contractual purpose shall be crystal clear for the parties and shall be recognized as the common, shared basis of the contract.[55] Thus, the default view of the parties shall be necessarily mutually shared,[56] and annulment thereof shall serve as the basis for exemption from liability.

The main similarity between numerous common characteristics of Georgian doctrine of changed circumstances and frustration of contractual purpose is impossibility to implement the contractual

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50 *Brunner Ch.*, Force Majeure and Hardship under General Contract Principles, Exemption for Non-performance in International Arbitration, Kluwer Law International BV, The Netherlands, 2009, 91, with the following reference: *Treitel G.H.,* The Law of Contract, 10th ed., London, 1999, 824; *Treitel G.H.*, Frustration and Force Majeure, 2nd ed., London, 2004, Ch.7.

51 *Kim N.,* Mistakes, Changed Circumstances and Intent, U. Kan. L. Rev., Vol. 56, 2007-2008, 505, <http://www.law.ku.edu/sites/law.drupal.ku.edu/files/docs/law_review/v56/Kim_Final.pdf>, [20.05.2014].

52 *Rohwer C.D., Skrocki A.M.,* Contracts in a Nutshell, 7th ed., West Nutshel Series, 2010, 320; *Schwartz A.A.,* A "Standard Clause Analysis" of the Frustration Doctrine and the Material Adverse Change Clause, UCLA L. Rev., Vol. 57, 2009-2010, 20, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1466131>; *Kim N.,* Mistakes, Changed Circumstances and Intent, U. Kan. L. Rev., Vol. 56, 2007-2008, 505, <http://www.law.ku.edu/sites/law.drupal.ku.edu/files/docs/law_review/v56/Kim_Final.pdf>, [20.05.2014].

53 *Schwartz A.A.,* A „Standard Clause Analysis" of the Frustration Doctrine and the Material Adverse Change Clause, UCLA L. Rev., Vol. 57, 2009-2010, 49, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1466131>, [20.05.2014]; *Brunner Ch.*, Force Majeure and Hardship under General Contract Principles, Exemption for Non-performance in International Arbitration, Kluwer Law International BV, The Netherlands, 2009, 98; *Blum B.A., Chemerinsky E., Epstein R., Gilson R. F., Krier J.E., Neumann R.K., Syverud K.D., Warren E., Farndsworth E.A., Hazard GS., Wolfman B. (eds.),* Contracts, Examples and Explanations, 3rd ed., Aspen Publishers, New York, 2004, 463.

54 *Rohwer C.D., Skrocki A.M.,* Contracts in a Nutshell, 7th ed., West Nutshel Series, 2010, 321.

55 *Blum B.A., Chemerinsky E., Epstein R., Gilson R. F., Krier J.E., Neumann R.K., Syverud K.D., Warren E., Farndsworth E.A., Hazard GS., Wolfman B. (eds.),* Contracts, Examples and Explanations, 3rd ed., Aspen Publishers, New York, 2004, 463.

56 *Eisenberg M.A.,* Impossibility, Impracticability and Frustration, J., Legal Analysis, Vol. 1, No. 1, 2009, 221, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1349482>, [28.06.2014].

purpose in both events and the expected contractual interest of the parties cannot be realized under the conditions of changed circumstances.

1.3. Legal Consequences of Frustration of Contract

In 1943, the United Kingdom passed Law Reform (Frustrated Contracts) Act regulating the frustration of contract (hereinafter referred to as – Act), 57 aiming at adoption of changes and amendments to the regulatory norms of the mentioned issue.

Prior to adoption of the Act, frustration of contract entailed declaration of agreement between the parties as void from the moment of event emergence (ex nunc [58]) instead of origination of the obligation (ex tunc – ab *initio)*, on the basis of which the parties were to be exempted from further obligations but the rights obtained prior to emergence of changes in circumstances remained valid.[59] Although, in accordance with this rule, the parties were unable to receive performance carried out prior to emergence of changes in circumstances carried, which entailed unjust enrichment of the other party.[60]

In the event, if one of the parties of the contract, prior to change in the circumstance, performed the timely obligation, then after frustration of the contract, he/she would neither have the right to demand the return of performance from the counter party nor to perform counter obligation which became due solely after the change in circumstances.[61]

With the Court decision in re *Chandler v. Webster,*[62] demand on restitution did not apply to payment by the counter party performed prior to the event entailing contract frustration.[63] Despite of the profound criticism, the above-mentioned rule was effective during forty years until the Act of crucial importance was adopted, saliently altering the existing practice and approach to the issue.[64]

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[57] Law Reform (Frustrated Contracts) Act 1943, <http://opsi.gov.uk/RevisedStatutes/Acts/ukpga/1943/ cukpga_ 19430040_en_1>, [20.05.2014]. see as well, *Poole J.,* Casebook on Contract Law, 9th ed., Online Resource Centre, Oxford University Press, Oxford, 2008, 584.

[58] *Rapsomanikas M. G.,* Frustration of Contract in International Trade Law and Comparative Law, Duq. Bus. L.J., Vol. 18, 1979-1980, 557, <http://www.cisg.law.pace.edu/cisg/biblio/rapsomanikas.html#39>, [29.05.2014].

[59] *Brunner Ch.*, Force Majeure and Hardship under General Contract Principles, Exemption for Non-performance in International Arbitration, Kluwer Law International BV, The Netherlands, 2009, 90-91, with reference: *Treitel G.H.,* The Law of Contract, 10th ed., London, 1999, 847-849; *McKendrick E.*, Chitty on Contracts, The Law of Contracts, Vol. 1, General Principles, Chapter 24, Discharge by Frustration, London, 1999, 24-069/070/71.

[60] *Mckendrick E.,* The Consequences of Frustration: The Law Reform (Frustrated Contracts) Act 1943, Force Majeure and Frustration of Contracts , 1991, 55-57, cited in: *Mizrachi K.,* Force Majeure in Project Finance: A Comparative and Practical Analysis of Risk Allocation, J. Struct. Finan., Vol. 12, No. 2, 2006, 79.

[61] *Brunner Ch.*, Force Majeure and Hardship under General Contract Principles, Exemption for Non-performance in International Arbitration, Kluwer Law International BV, The Netherlands, 2009, 91.

[62] *Chandler v. Webster, [1904] 1 K.B. 493.*

[63] *Goldberg V.P.,* After Frustration: Three Cheers for *Chandler v. Webster*, Wash. & Lee L. Rev., Vol. 68, Iss. 3., 2011, 1134, <http://heinonline.org/HOL/LandingPage?collection=journals&handle=hein.journals/waslee 68&div=35&id=&page=>, [22.07.2014].

[64] *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour, Ltd, [1943] A.C. 32 at 49-50 (H.L. 1942), Goldberg V.P.,* After Frustration: Three Cheers for *Chandler v. Webster*, Wash. & Lee L. Rev., Vol. 68, Iss.

For solution the above-mentioned problems, the Act of 1943[65] has been adopted on the legislative level, the primary objective of which was prevention of unjust enrichment of one of the parties entailed due to frustration of the contract[66]. The Articles 1 (2) and 1 (3) of the Act provide the legal consequences of the frustration of contract:

According to the Article 1 (2), if prior to changed circumstances the liability of monetary payment existed between the parties, then the party, upon establishment of frustration of contract, shall be exempted from the above-mentioned liability,[67] and in the event of performance, the party shall be entitled to demand the paid sum back.[68] If the party, to which within the contractual obligation, the counter party should pay a certain amount of money, incurred certain expenses for performance, the Court is entitled after frustration of the contract taking justice into account, to empower the party to demand reception amount of money or not to give paid amount back in the amount of inflicted costs solely.[69]

According to the Article 1 (3), if the party, prior to changes in circumstances, gained significant benefit (non-monetary) out of the actions of the counter party carried out for performance of obligation, then the Court is entitled to impose obligation on the party to pay the amount of money back corresponding to the amount of benefit gained.[70] Here the following circumstances should be taken into account:

a) The amount of money conveyed to other party for the purpose of contract and expenses issued for performance of the obligation by the beneficiary party prior to change in circumstance;

b) Impact of changed circumstances entailing frustration of contract on the benefit obtained by the party.[71]

The legal consequence provided with the reform Act in Georgian legislation can be achieved with the right of avoidance of the contract by the participants of the contractual relations.[72] Though, under the changes in circumstances, enactment of the mechanism of contract avoidance shall be allowed as a legal tool of last resort and only when adaptation of the contract or performance thereof with unaltered conditions fails to provide fair realization of the best interests of the parties.

3, 2011, 1134, <http://heinonline.org/HOL/LandingPage?collection=journals&handle=hein.journals/waslee68&div=35&id=&page=>.

[65] *Goldberg V.P.,* After Frustration: Three Cheers for *Chandler v. Webster*, Wash. & Lee L. Rev., Vol. 68, Iss. 3, 2011, 1147, <http://heinonline.org/HOL/LandingPage?collection=journals&handle=hein.journals/waslee68&div=35&id=&page=>.

[66] *Mckendrick E.,* The Consequences of Frustration: The Law Reform (Frustrated Contracts) Act 1943, Force Majeure and Frustration of Contracts, 1991, 55-57, cited in: *Mizrachi K.,* Force Majeure in Project Finance: A Comparative and Practical Analysis of Risk Allocation, J. Struct. Finan., Vol.12, No.2, 2006, 79.

[67] See *Gamerco SA v I.C.M./Fair Warning (Agency) Ltd, [1995]1 WLR 1226.*

[68] See *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd, [1943] AC 32 (HL).*

[69] *Goldberg V.P.,* After Frustration: Three Cheers for *Chandler v. Webster*, Wash. & Lee L. Rev., Vol. 68, Iss. 3, 2011, 1147, <http://heinonline.org/HOL/LandingPage?collection=journals&handle=hein.journals/waslee68&div=35&id=&page=>.

[70] See *BP Exploration Co. (Libya) Ltd v Hunt (No.2), [1979] 1WLR 783.*

[71] See Law Reform (Frustrated Contracts) Act 1943, <http://www.legislation.gov.uk/ukpga/Geo6/6-7/40>.

[72] Article 398 III of the CCG.

1.4. Superiority of the Continental-Legal Grounds of Excluding the Contractual Liability in Terms of Impact on Legal Consequences

The problems of changes in circumstances in Georgian legislation are not regulated with the institutions of force majeure or hardship. However, the legislation provides regulation of saliently similar legal concepts named as superior force, inculpable impossibility and changed circumstances.

The above-mentioned concepts, endorsed with Georgian legislation, echo saliently the general legal categories of hardship and force majeure, thus the hereby research uses the mentioned terms.

The doctrine of frustration of contract in English law, in terms of legal consequences, significantly differs from the current force majeure legal concept in Continental and Unified law.[73] Namely, frustration of contract automatically entails termination of the contract in total[74] and the parties are exempted from responsibility to remunerate the damage inflicted with breach of obligation.[75] The mentioned basis for exemption from responsibility shall be restrictedly used and shall not be widely interpreted.[76]

Termination of the contract on the basis of force majeure depends on exercise of the right of the creditor – to demand avoidance of the contract for fundamental breach of obligation.[77] Also exemption of the party from responsibility on the basis of force majeure can be partial,[78] inasmuch as force majeure may impact on a certain part of the contract and with the relevant proportion solely may entail exemption of the party from responsibility.[79]

The changed circumstance may as well be of a temporary nature. Thus, exemption from responsibility on the basis of force majeure may solely be implemented with the term of hindering

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73 *Brunner Ch.*, Force Majeure and Hardship under General Contract Principles, Exemption for Non-performance in International Arbitration, Kluwer Law International BV, The Netherlands, 2009, 94.

74 *Treitel G. H.,* Frustration and Force Majeure, London: Sweet and Maxwell, 1994, 52, cited in: *Osadare B.,* Force Majeure and the Performance Excuse: A Review of the English Doctrine of Frustration and Article 2-615 of the Uniform Commercial Code., 2010, 10; *Anson W.,* Anson's Law of Contract, 27th ed., Oxford: Oxford University Press, 1998, 526, cited in: *Firoozmand M.R.,* Changed Circumstances and Immutability of Contract: a Comparative Analysis of Force Majeure and Related Doctrines, Bus. L. Int'l, Vol. 8, No.2, 2007, 177, <http://heinonline.org/HOL/Welcome?message=Please%20log%20in&url =%2FHOL%2FPrint%3Fhandle%3Dhein. journals%2Fblawintnl2007%26div%3D17%26collection%3Djournals%26set_as_cursor%3D1% 26men_tab%3Dsrchresults>, [22.07.2014].

75 *Chen-Wishart M.,* Contract Law, 2nd ed., Oxford University Press, 2008, 318; *Southerington T.*, Impossibility of Performance and Other Excuses in International Trade, 2001, <http://www.cisg.law.pace.edu/cisg/biblio/southerington.html>, [22.07.2014].

76 *Nachatar J.S., Hussin A.A., Omran A.,* Frustration of Contract in the Malaysian Construction Contract management, IJE, Tome 9, fascicule 3, Hunedoara, Romania, 2011, 85-86, <http://web.ebscohost.com/ehost/pdfviewer/pdfviewer?sid=cbc3f99c-b258-4811-9ace-4a8f1729b548%40s---essionmgr13&vid=2&hid=10>, [22.07.2014].

77 *Brunner Ch.*, Force Majeure and Hardship under General Contract Principles, Exemption for Non-performance in International Arbitration, Kluwer Law International BV, The Netherlands, 2009, 94.

78 *Chechelashvili Z.,* Introduction to the Georgian Business Law, Textbook, GIZ, Tb., 2013, 133 (In Georgian).

79 *Ciematniece I.,* Contract Renegotiation and Adaptation, Concept of Contract Renegotiation and Adaptation in International Commercial Law Contracts, Lambert Academic Publishing, Saarbrücken, 2010, 63.

circumstances and negative impacts thereof. Deriving from above-mentioned, the objective of the doctrine of frustration of contract is to annul the contract and ultimate exemption of the parties from reciprocal obligations.

German judicial practice, unlike Anglo-American system court, in terms of automatic termination of the contract, lodges preference to adaptation thereof with the changed circumstances, which is the most important characteristic of the Continental law system.[80]

The degree of interference of the legal systems in contractual freedom by means of contract adaptation mechanisms is drastically different.[81] Anglo-American and Continental law systems on application of the contract to the changed circumstance,[82] reveal the conceptually different approach: the legal consequence of non-performance of contract and the doctrine of frustration of contract in common law are termination of the contract. Unlike German law, the doctrine of frustration of the contractual purpose in English law does not provide possibility of adaption of the contract by the Court.[83] Distribution of the damages and negative consequences, inflicted with interference of the Court on the parties is considered as revision of the contract, and similar legal reality in Continental law is equal to typical case of termination of contract with imposition of obligation to the party for reimbursement of damage.

The strict liability principle is valid in the common law, in view of prevention of strict, accurate observance of application thereof and extremely complicated obligation, the preliminary termination of contractual relations is considered as modification of contract in the mentioned system by the Court.[84]

Hence, interference of the Court post emergence of frustration or impracticability of the contract, aims at termination of contract solely instead of provision of further performance thereof.

Revision of the contract in Continental legal system without transformation of the relationship in the regime of the secondary rights implies performance of the initial contractual obligations with changed terms.

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80 *Vagts D.F.,* Rebus Revisited: Changed Circumstances in Treaty Law, Colum. J. Transnat'l L., Vol. 43, 2004-2005, 464, <http://heinonline.org/HOL/Page?handle=hein.journals/cjtl43&collection=journals&page=459>, [22.07.2014].

81 *Ciematniece I.,* Contract Renegotiation and Adaptation, Concept of Contract Renegotiation and Adaptation in International Commercial Law Contracts, Lambert Academic Publishing, Saarbrücken, 2010, 74.

82 Numerous terms are used in commercial contractual relations with the meaning of adaptation of the contract to the changed circumstances: “adaptation”, “reconciliation”, “renegotiation”, “alteration”, “modification”, etc. See: *Ciematniece I.,* Contract Renegotiation and Adaptation, Concept of Contract Renegotiation and Adaptation in International Commercial Law Contracts, Lambert Academic Publishing, Saarbrücken, 2010, 17.

83 *Beale H., Hartkamp A.* (eds.), Cases, Materials and Text on Contract Law, Oregon, Hart Publishing Oxford and Portland, 2002, 607.

84 *Collins H.,* The Law of Contract, LexisNexis Butterworth’s: London, 2003, 294, cited in: *Uribe M.,* The Effect of a Change of Circumstances on the Binding Force of the Contracts, Comparative Perspectives, Intersentia, 2011, 236.

2. American Doctrines of Commercial Impracticability and Frustration of Purpose

2.1. Scopes of Application of American Doctrines of Commercial Impracticability and Frustration of Purpose

American law provides the doctrine of commercial Impracticability,[85] which is the basis for exemption from obligation not only in case of objective physical impossibility but in case of extreme hardship of performance as well.[86] In this term, the scope of application of the doctrine of commercial impracticability is much wider than the rule effective prior to the legal regulation thereof, which determined the absolute disability as the pre-condition for exclusion of responsibility. Correspondingly, American law substituted the term "hardship" with the term "Impracticability",[87] inasmuch as the latter is a wider concept and comprises not only absolute impossibility but aggravation of obligation fulfillment as well.[88]

Paragraph 265 of the Restatement (Second) of Contracts as well enhances the doctrine of frustration of purpose: if the primary contractual purpose of the party,[89] regardless the fault thereof, is being essentially frustrated by virtue of the circumstances, absence of which served as the main motivation for conclusion of the contract by the parties, then the debtor shall be exempted from obligation to perform if not otherwise prescribed under the contract or the circumstances.

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[85] For the first time this doctrine has been revealed in the decision in re: *Minera Park Land Co. v. Howard, 156, 458 (1916)*, cited in: *Osadare B.,* Force Majeure and the Performance Excuse: A Review of the English Doctrine of Frustration and Article 2-615 of the Uniform Commercial Code, 2010, 11.

[86] See decision: *Krell v Henry [1903] 2 KB 740* in the articles: *Knutson R.*, Common Law Development of the Doctrines of Impossibility of Performance and Frustration of Contracts and their Use and Application in Long Term Concession Contracts, Presented at the IBA Committee T, Berlin, ICLR, 298, 1997, 7; *Ciematniece I.,* Contract Renegotiation and Adaptation, Concept of Contract Renegotiation and Adaptation in International Commercial Law Contracts, Lambert Academic Publishing, Saarbrücken, 2010, 24. With the Court decision the tenant has been exempted from obligation of implementation as the flat rented for monitoring on coronation of the King, due to postponement of the ceremony on the basis of disease of the King, lost the value for the tenant. Thus, the basis of the contract has been nullified. The debtor has been exempted from implementation of the contractual obligation objectively feasible. See: *Rohwer C.D., Skrocki A.M.,* Contracts in a Nutshell, 7th ed., West Nutshell Series, 2010, 321; *Blum B.A., Chemerinsky E., Epstein R., Gilson R. F., Krier J.E., Neumann R.K., Syverud K.D., Warren E., Farndsworth E.A., Hazard G.S., Wolfman B.* (eds.), Contracts, Examples and Explanations, 3rd ed., Aspen Publishers, New York, 2004, 463. The mentioned decision on the basis of the doctrine of frustration of contract, is recognized in the legal doctrine by virtue of which validity of strict responsibility principle has been drastically alleviated in Anglo-American law. See: *Smythe D.J.*, Bounded Rationality, the Doctrine of Impracticability and the Governance of Relational Contracts, S. Cal. Interdisc. L.J., Vol. 13, No. 2, 2003-2004, 228, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=799328>, [22.07.2014].

[87] *Southerington T.*, Impossibility of Performance and Other Excuses in International Trade, 2001, <http://www.cisg.law.pace.edu/cisg/biblio/southerington.html>, [23.07.2014].

[88] *Frey M.A., Frey Ph. H.,* An Introduction to the Law of Contracts, 4th ed., Delmar Cengage Learning, 2007, 399, See: paragraph 261 of the Restatement Second of the contracts.

[89] *Ciematniece I.,* Contract Renegotiation and Adaptation, Concept of Contract Renegotiation and Adaptation in International Commercial Law Contracts, Lambert Academic Publishing, Saarbrücken, 2010, 10.

In this part, the American doctrine is similar to Georgian law inasmuch as the Article 398 I of the CCG relates to changed circumstances considered as the basis of the contract by the parties for possibility to modify the contractual obligation and exempt from responsibility.

Hence, first the Court determines the contractual purpose of the parties and in the event it detects that in case of absence of the circumstances considered as the basis for the contract, the parties would not conclude the contract, then the above-mentioned fact shall be used as the ground for exemption from responsibility by the Court.[90]

The Court widely interprets the doctrine of frustration of purpose and considers the absolute frustration of the contractual purpose as the basis for exemption from responsibility. In the event, if the party fails to be completely satisfied with the expected contractual interests due to the circumstances, however performance remains of certain benefit, then such changes in the circumstances shall not appear sufficient for establishment of absolute frustration of contractual purpose.[91]

One of the forms of frustration of the contract – frustration of contractual purpose – with its essence echoes the doctrine of impracticability: in the event of frustration of contractual purpose, the changed circumstances reduce the economic value of obligation to the extent that it is unreasonable to demand acceptance of such implementation from the creditor and payment of the contractual price. Similarly, in case of impracticability, performance of obligation affected by changed circumstances, is connected to the extremely vast hardship, expenditures and losses for the debtor.[92]

Likewise, the CCG provides the changes in the circumstances, upon which the contractual interest and value of performance are subject to reduction at the extent that enforcement of the binding force of the contract is unreasonable.

Thus, the doctrine of Anglo-American system of exemption from responsibility comprises three main segments: (1) physical or legal impossibility of performance; (2) despite of the obligation objectively feasible, loss of the contractual purpose and benefit out of performance; and (3) economic aggravation of obligation performance of which is still objectively possible.[93]

As a result of analysis of the scopes of validity of the Anglo-American doctrine, it can be stated that the basics for exemption from responsibility unify the elements of hardship as well as of absolute impossibility, which in Continental-legal system is provided as the separate ground for liability exclusion. For instance, impossibility to perform and the extreme aggravation of performance in the CCG are codified

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90 *Hillman R.A.,* Principles of Contract Law, 2nd ed., The Concise Hornbook Series, West, 2009, 318.

91 *Farnsworth E.A.,* On Contracts, 2nd ed., New York, 1998, §9.7, 625-626.

92 See: *Fla. Power & Light Co. v. Westinghouse Elec. Corp. 517 F. Supp. 440 (E.D. Va. 1981).* In referred case, the Uranus provider party demanded exemption from liability on the basis of unforeseen growth of prices, relevantly commercial non-performance endorsed under the Article 2-615 of the OECD, emerged beyond the control of the debtor. *Trakman L.,* Pluralism in Contract Law, Buff. L. Rev., Vol. 58, No.5, 2010, 1066, <http://heinonline.org/HOL/Print?collection=journals&handle=hein.journals/buflr58&id=1041>, [26.07.2014].*Brunner Ch.*, Force Majeure and Hardship under General Contract Principles, Exemption for Non-performance in International Arbitration, Kluwer Law International BV, The Netherlands, 2009, 93.

93 *Karampatzos A.,* Supervening Hardship as Subdivision of the General Frustration Rule: A Comparative Analysis with Reference to Anglo-American, German, French and Greek Law, Eur. Rev. Private L., Kluwer Law International, The Netherlands, Vol. 13, No. 2, 2005, 106-107, <http://www.heinonline.org/HOL/Print?handle=hein.kluwer/erpl0013&div=13&collection=kluwer&set_as_cursor=0&men_tab=srchresults>, [22.07.2014].

as the independent basics for exemption from responsibility. Although, even in the Continental law, despite of independent regulation of the basics excluding responsibility, legal pre-conditions of the mentioned basics are often mutually involving. For instance, most of the pre-conditions prescribed under the Article 398 I of the CCG, can be considered as legal characteristics not only of hardship but of inculpable impossibility of implementation. Even the sign of extreme aggravation of implementation shall be considered as the pre-condition of relative (economic) impossibility.

2.2. Interrelation of the Doctrines of Commercial Impracticability and of Frustration of Purpose

The doctrines of frustration of contract and of commercial impracticability, in conceptual terms, are significantly approximated: both are applicable under the conditions of objectively feasible obligations. The scopes of application of the Article 398 of the CCG are as well defined with the contractual obligations aggravated, though physically feasible. Relevantly, the pre-conditions constituting the concepts of exemption from responsibility, prescribed under the Anglo-American law and the Article 398 of the CCG, are as well mutually involving.

The difference between the doctrines of frustration of contract and of commercial impracticability is manifested with the legal nature of the changed circumstances, which on the one hand, extremely aggravates implementation of obligation and abolishes the purpose of implementation on the other hand.[94]

The difference between the doctrines is as well demonstrated with the fact that commercial impracticability is the basis for exemption from responsibility for non-performance of obligation for the provider of goods or service, for which burden of performance has been extremely aggravated. Frustration of purpose for non-performance of obligation excludes the responsibility of the recipient of the goods or service, for which counter performance affected by the unforeseen circumstances has been drastically reduced at the extent that he/she is no longer imposed with obligation to cover the cost for acceptance of the goods and the price thereof.[95]

Hence, the Article 2-615 of UCC is basically applied to the seller, though the debtor as well may be exempted from obligation of performance on the basis of commercial impracticability if performance by the seller has lost value and relevantly, contractual interest for the buyer.[96]

On the basis of the above-mentioned examples, we clearly is seen that in one case – acceptance of performance and in another case – performance put the relevant party of the contract under the extreme onerous conditions, which in terms of good faith and justice, is inadmissible and nullifies the contractual purpose.

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[94] *Blum B.A., Chemerinsky E., Epstein R., Gilson R. F., Krier J.E., Neumann R.K., Syverud K.D., Warren E., Farndsworth E.A., Hazard GS., Wolfman B. (eds.),* Contracts, Examples and Explanations, 3rd ed., Aspen Publishers, New York, 2004, 463.

[95] *Treitel G.H.,* The Law of Contract, 9th ed., Sweet and Maxwell, London, 1995, 779; *Brunner Ch.,* Force Majeure and Hardship under General Contract Principles, Exemption for Non-performance in International Arbitration, Kluwer Law International BV, The Netherlands, 2009, 797; *Corbin A. L.,* Corbin on Contracts, West Pub. Co., 1952, Chicago, 1091-1099.

[96] *Burton S.J.*, Contract Law: Selected Source Materials, 1995, 157, (Official Comment No.4 on § 2-615 UCC, Comment No. 9 on 2-615).

Thus, the hereby considered two categories are significantly compatible considering their legal nature. Correspondingly, upon exemption from responsibility, they entail similar legal consequences.[97]

2.3. Advantage of the Doctrine of Commercial Impracticability and Legislative Regulation thereof

The doctrine of frustration has been developed in judicial practice and is not clearly stated in UCC.[98] Though, the Courts more supremely consider commercial impracticability as the legal basis for exemption from liability in regards with the frustration of purpose.[99]

The American doctrine of commercial impracticability[100] is endorsed in the UCC[101]

Article 2-615 (a)[102] and the paragraph 261 of Restatement (Second) of the Contracts.[103][104] According to UCC[105] article 2-615, violation of contractual terms of supply by the seller or total

[97] *Blum B.A., Chemerinsky E., Epstein R., Gilson R. F., Krier J.E., Neumann R.K., Syverud K.D., Warren E., Farndsworth E.A., Hazard GS., Wolfman B. (eds.),* Contracts, Examples and Explanations, 3rd ed., Aspen Publishers, New York, 2004, 462.

[98] *Farnsworth E. A.,* On Contracts, 2nd ed., New York, 1998, §9.7, 623-623, referred in the book: *Brunner Ch.*, Force Majeure and Hardship under General Contract Principles, Exemption for Non-performance in International Arbitration, Kluwer Law International BV, The Netherlands, 2009, 98.

[99] *Farnsworth E. A.,* On Contracts, 2nd ed., New York, 1998, §9.7, 624-625.

[100] Establishment of this doctrine was facilitated with the model case *Mineral Park Land Co. v. Howard, 172 Cal. 289 (1916),* where the basis of non-performance entailed exemption of the parties from contractual binding. See: *Smythe D.J.*, Bounded Rationality, the Doctrine of Impracticability, and the Governance of Relational Contracts, S. Cal. Interdisc. L.J., Vol. 13, No. 2, 2003-2004, 228, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=799328>, [22.07.2014].

[101] Uniform Commercial Code, Cornell University Law School, Legal Information Institute, Copyright 1978, 1987, 1988, 1990, 1991, 1992, 1994, 1995, 1998, 2001. The American Law Institute and the National Conference of Commissioners on Uniform State Laws; reproduced, published and distributed with the permission of the Permanent Editorial Board for the Uniform Commercial Code for the limited purposes of study, teaching, and academic research, 2003, <http://www.law.cornell.edu/ucc/ucc.table.html>, [23.07.2014].

[102] *Stone B., Adams K.D.,* Uniform Commercial Code in a Nutshell, 7th ed., Thomson-West, 2008, 115-117; *Bridgeman C.,* Reconciling Strict Liability with Corrective Justice in Contract Law, *Fordham L.,* Rev., Vol. 75, 2007, 3036, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=669504>, [23.07.2014]; *Frey M.A., Frey Ph. H.,* An Introduction to the Law of Contracts, 4th ed., Delmar Cengage Learning, 2007, 398.

[103] Restatement (Second) of Contracts, American Law Institute (ALI), § 261, 1981, <http://www. lexi n ter.net/LOTWVers4/restatement_%28second%29_of_contracts.htm>, [23.07.2014]; *Bridgeman C.,* Reconciling Strict Liability with Corrective Justice in Contract Law, Fordham L. Rev., Vol. 75, 2007, 3036, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=669504>.

[104] Except commercial non-performance, the Restatement (Second) of Contracts includes the doctrines of impossibility and frustration of contractual purpose. It shall be noteworthy that the articles of Restatement (Second) of Contracts concerning commercial non-performance and frustration of contractual purpose, are similar to OECD as OECD provisions have been applied as the model upon formation of the relevant provisions of the Restatement (Second) of Contracts. See: *Kovač M.*, Comparative Contract Law and Economics, Ultrecht, 2008, 229.

[105] Uniform Commercial Code, Cornell University Law School, Legal Information Institute, Copyright 1978, 1987, 1988, 1990, 1991, 1992, 1994, 1995, 1998, 2001. The American Law Institute and the National Conference of Commissioners on Uniform State Laws; Reproduced, Published and Distributed with the

failure of performance thereof shall not be considered as the breach of contractual obligation if obligation appeared to become impracticable due to emergence[106] of unforeseen circumstances[107] and the contract has been concluded with the primary assumption that such circumstances would never emerge,[108] also, if the bargain between the parties was based in line with the good faith principle on foreign and internal legal act, statute which appeared annulled afterwards.[109]

On the basis of the legal analysis of the Article 398 I of the CCG we can find the additional pre-conditions outlined necessary for emergence of hardship and impossibility of performance, however peculiarly unformulated under the article. Namely, if the changes in circumstances at the stage of conclusion of the contract appear unforeseen by the party, it likely means that another pre-condition of unpredictability of the changed circumstances is encountered, which at the same time implies the inevitable, unavoidable nature of the impediment. Namely, if the party failed to consider and appeared unable to consider the changes in circumstances, relevantly he/she is inculpable and the event is beyond his/her control inasmuch as the party is deprived of the objective capability to prevent and overcome the change or eliminate the negative outcomes thereof. The pre-condition for the party being inculpable excludes contractual liability for hardship and impossibility of performance.

The paragraph 261 of Restatement Second of the Contracts prescribes: if the event, emerged independently from the fault of the debtor after the contract has been concluded, made performance of obligation extremely hard (impracticable) and if the contract was based on the basic assumption of the parties that the above-mentioned event would never emerge, then the debtor shall be exempted from obligation of performance if the circumstances and the essence of the contract do not otherwise indicate to the contrary.

The paragraphs 262 and 264 of Restatement (Second) of Contracts outline three cases which may entail impracticability of contract performance: incapability or decease of the debtor[110] (§262), demolition of the individual item (§263) and legislative prohibition (§264).[111] The State act establishing prohibition may be not only the law but administrative or legal orders.[112]

Permission of the Permanent Editorial Board for the Uniform Commercial Code for the Limited Purposes of Study, Teaching, and Academic Research, 2003, <http://www.law.cornell.edu/ucc/ucc.table.html>, [23.07.2014].

106 *Stone B., Adams K.D.,* Uniform Commercial Code in a Nutshell, 7th ed., Thomson-West, 2008, 116.

107 See: *Calvin V. Koltermann Inc. v. Underream Piling Co, 563 S.W.2d 950, 1979; Ellwood v. Nutex Oil Company, 148 S.W. 2d 862 (Tex. Civ. App. 1941)*, cited in: *Jacobs D.L.,* Legal Realism or Legal Fiction? Impracticability under the Restatement (Second) of Contracts, New York, Com. L. J., Vol. 87, June/July, 1982, 293.

108 *Schwenzer I., Hachem P., Kee Ch.,* Global Sales and Contract Law, Oxford University Press, New York, 2012, 658.

109 *Ciematniece I.,* Contract Renegotiation and Adaptation, Concept of Contract Renegotiation and Adaptation in International Commercial Law Contracts, Lambert Academic Publishing, Saarbrücken, 2010, 26.

110 *Farnsworth E.A.,* Farnsworth on Contracts, 3rd ed., Vol. 2, Aspen Publishers, 2004, 626.

111 *Jacobs D.L.,* Legal Realism or Legal Fiction? Impracticability Under the Restatement (second) of Contracts, New York, Com. L.J., Vol.87, June/July, 1982, 292, <http://heinonline.org/HOL/LandingPage?collection=journals&handle=hein.journals/clla87&div=70&id=&page=>, [24.07.2014].

112 *Farnsworth E.A.,* Farnsworth on Contracts, 3rd ed., Vol. 2, Aspen Publishers, 2004, 625.

2.4. Legal Preconditions for Application of the Doctrine of Commercial Impracticability

The commercial impracticability is entailed with unforeseen windfall, which makes agreed obligation unfeasible and upon frustration of purpose, the windfall circumstance saliently, fundamentally nullifies the primary purpose of the contract.[113]

The analysis of the paragraph 261 Restatement (Second) of Contracts reveals four pre-conditions necessary for emergence of commercial impracticability:

1) performance of obligation affected by changed circumstances with the initially stipulated content is **impracticable.[114]** At that, the mentioned pre-condition comprises objective impracticability.[115]

2) Upon conclusion of the contract the assumption of the parties that the contractual circumstance as that would not emerge, was the **main purpose of the bargain;**[116] in this case it should be determined the default pre-conditions and assumptions which served as the basis of the contract.[117] The criterion of objective consideration again applies to analysis of the mentioned pre-condition.[118]

3) Non-performance shall not be the consequence of **culpable** action by the party.[119]

4) The party, demanding to be exempted from obligation of performance, shall not have **broader obligation[120]** assumed by the contract then endorsed under the law.

2.4.1. Objective Impracticability of Performance

In case of impracticability performance of contract is connected with unreasonable vast expenses[121] or other significant losses[122] for one party[123] or is physically impracticable, despite of the reasonable measures undertaken by the party to overcome the circumstances hindering, impeding the obligation.[124]

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113 *Farnsworth E. A.,* On Contracts, 2nd ed., New York, 1998, §9.6, 605-606, §9.7, 623.

114 *Rohwer C.D., Skrocki A.M.,* Contracts in a Nutshell, 7th ed., West Nutshell Series, 2010, 316; *Farnsworth E.A.,* Farnsworth on Contracts, 3rd ed., Vol. 2, Aspen Publishers, 2004, 634.

115 *Rohwer C.D., Skrocki A.M.,* Contracts in a Nutshell, 7th ed., West Nutshell Series, 2010, 317..

116 *Schwenzer I., Hachem P., Kee Ch.,* Global Sales and Contract Law, Oxford University Press, New York, 2012, 658; *Rohwer C.D., Skrocki A.M.,* Contracts in a Nutshell, 7th ed., West Nutshell Series, 2010, 318.

117 *Kim N.,* Mistakes, Changed Circumstances and Intent, U. Kan. L. Rev., Vol. 56, 2007-2008, 507, <http://www.law.ku.edu/sites/law.drupal.ku.edu/files/docs/law_review/v56/Kim_Final.pdf>, [25.07.2014].

118 *Smythe D.J.,* Bounded Rationality, the Doctrine of Impracticability, and the Governance of Relational Contracts, S. Cal. Interdisc. L.J., Vol. 13, No. 2, 2003-2004, 237, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=799328>, [24.07.2014].

119 *USA Taylor Edwards Warehouse & transfer Co v. Burlington Northern, US Ct App (9th Cir) 12* September, 1983, 715 F2d 1330, referred: *Schwenzer I., Hachem P., Kee Ch.,* Global Sales and Contract Law, Oxford University Press, New York, 2012, 658. Article 2-613 of OECD as well endorses non-culpability criterion. See: *Rohwer C.D., Skrocki A.M.,* Contracts in a Nutshell, 7th ed., West Nutshell Series, 2010, 318.

120 *Farnsworth E. A.,* Farnsworth on Contracts, 3rd ed., Vol. 2, Aspen Publishers, New York, 2004, 634; *Rapsomanikas M. G.,* Frustration of Contract in International Trade Law and Comparative Law, Duq. Bus. L. J., Vol. 18, 1979-1980, 559, <http://www.cisg.law.pace.edu/cisg/biblio/rapsomanikas.html#39>, [23.07.2014]; *Rohwer C.D., Skrocki A.M.,* Contracts in a Nutshell, 7th ed., West Nutshell Series, 2010, 318-319; *Kim N.,* Mistakes, Changed Circumstances and Intent, 56 U. Kan. L. Rev., 2007-2008, 507, <http://www.law.ku.edu-/sites/law.drupal.ku.edu/files/docs/law_review/v56/Kim_Final.pdf>, [25.07.2014].

Commercial impracticability may be entailed of the circumstances, such as strict deficit caused by the war of raw materials and resources, imposition of embargo, destruction of local crop, closure of the main source of production,[125] on the basis of which performance of obligation appears to be physically impracticable or the cost of implementation drastically increases for the debtor.[126]

Commercial impracticability may exist even in the case when performance of obligation may inflict damage to one of the parties or the property thereof, which is disproportionate to the contractual interest derived from performance.[127]

At that, the fact is to be taken into account that moderate change in the degree of hardship and costs of implementation is normal risk characteristic for civil turnover and it accompanying event which does not entail basis for using commercial impracticability as ground for liability exclusion.[128] The pre-condition of impracticability of obligation includes the concepts of economic "unaffordability"[129] and hardship of performance.[130] According to one of the pre-conditions of force majeure, the debtor shall be exempted from obligation of performance if he/she appeared unable to prevent, overcome the impediment or eliminate consequences thereof.[131] The criterion of non-performance becomes similar to this sign of force majeure as well.[132]

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[121] *Kim N.,* Mistakes, Changed Circumstances and Intent, U. Kan. L. Rev., Vol. 56, 2007-2008, 506, <http://www.law.ku.edu/sites/law.drupal.ku.edu/files/docs/law_review/v56/Kim_Final.pdf>, [25.07.2014].

[122] *Smythe D.J.,* Bounded Rationality, the Doctrine of Impracticability, and the Governance of Relational Contracts, S. Cal. Interdisc. L.J., Vol. 13, No. 2, 2003-2004, 236, < http://papers.ssrn.com/sol3/papers.cfm?abstract_id=799328>, [26.07.2014].

[123] *Frey M.A., Frey Ph. H.,* An Introduction to the Law of Contracts, 4th ed., Delmar Cengage Learning, 2007, 399; *Brunner Ch.*, Force Majeure and Hardship under General Contract Principles, Exemption for Non-performance in International Arbitration, Kluwer Law International BV, The Netherlands, 2009, 96.

[124] Restatement (Second) of Contracts, American Law Institute (ALI), §205, 1981, <http://www.lexinter.net/LOTWVers4/restatement_%28second%29_of_contracts.htm>, [26.07.2014].

[125] *Brand R.A.,* Fundamentals of International of International Business Transactions Documents, Kluwer Law International, The Hague, London, Boston, 2000, 528; *Stone B., Adams K.D.,* Uniform Commercial Code in a Nutshell, 7th ed., Thomson-West, 2008, 116.

[126] *Farnsworth E.A.,* Farnsworth on Contracts, 3rd ed., Vol. 2, Aspen Publishers, 2004, 637; *Burton S.J.,* Contract Law: Selected Source Materials, Uniform Commercial Code, West Publishing Co., St. Paul, Minn., 1995, 156, (Official Comment No. 4 on § 2-615 UCC).

[127] *Brunner Ch.*, Force Majeure and Hardship under General Contract Principles, Exemption for Non-performance in International Arbitration, Kluwer Law International BV, The Netherlands, 2009, 96.

[128] *Burton S.J.,* Contract Law: Selected Source Materials, Uniform Commercial Code, West Publishing Co., St. Paul, Minn., 1995, 156.

[129] *Economic Unaffordability.*

[130] *Hardship.*

[131] *Schwenzer I., Hachem P., Kee Ch.,* Global Sales and Contract Law, Oxford University Press, New York, 2012, 658.

[132] *Brunner Ch.*, Force Majeure and Hardship under General Contract Principles, Exemption for Non-performance in International Arbitration, Kluwer Law International BV, The Netherlands, 2009, 99.

In line with the paragraph 268 of Restatement (Second) of Contracts, the party is entitled to demand the guarantee of performance of obligation in the event if with the available reasonable basis he/she assumes that impracticability of performance or frustration of purpose[133] may emerge in the future.

2.4.2. Fundamental Change of the Legal Nature of Performance

The basis of exemption of the debtor from responsibility under the doctrine of commercial impracticability may be converted into the unforeseen growth of prices which essentially change the nature of performance.[134] Unforeseen increase of market prices solely does not create the pre-condition for exemption from responsibility,[135] if it does not essentially impact the content of performance[136] and does not entail obligation of drastically different essence than it has been defined, agreed by the parties upon conclusion of the contract.[137]

Insignificant hardship of performance manifested in deficit of resources, does not unconditionally entail commercial impracticability.[138] In the event, when increase of prices is unforeseen, the most of the Courts elucidate that the doctrine of commercial impracticability shall be strictly enacted if increase of costs is significant at the extent that performance of obligation entails the unfair consequences.[139]

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[133] *Jacobs D.L.,* Legal Realism or Legal Fiction? Impracticability Under the Restatement (second) of Contracts, New York, Com. L.J., Vol. 87, June/July, 1982, 292, <http://heinonline.org/HOL/LandingPage?collection=journals&handle=hein.journals/clla87&div=70&id=&page=>, [26.07.2014].

[134] See: *Farnsworth E.A.,* Farnsworth on Contracts, 3rd ed., Vol. 2, Aspen Publishers, 2004, 637; *Burton S.J.,* Contract Law: Selected Source Materials, Uniform Commercial Code, West Publishing Co., St. Paul, Minn., 1995, 156.

[135] R*ohwer C.D., Skrocki A.M.,* Contracts in a Nutshell, 7th ed., West Nutshell Series, 2010, 317; *Speidel R. E.,* On Change and the Law of Contracts: A Tribute to Joe Perillo, Fordham L. Rev., Vol. 71, 2002-2003, 978, <http://heinonline.org/HOL/LandingPage?collection=journals&handle=hein.journals/flr71&div=5&id=&page=>, [26.07.2014]; *Brand R.A.,* Fundamentals of International of International Business Transactions Documents, Kluwer Law International, The Hague, London, Boston, 2000, 528; *Farnsworth E. A.,* Farnsworth on Contracts, 3rd ed., Vol. 2, Aspen Publishers, New York, 2004, 637.

[136] *Stone B., Adams K.D.,* Uniform Commercial Code in a Nutshell, 7th ed., Thomson-West, 2008, 116; *Burton S.J.,* Contract Law: Selected Source Materials, Uniform Commercial Code, West Publishing Co., St. Paul, Minn., 1995, 156 Official Comment No. 4 on § 2-615 UCC); *Speidel R. E.,* On Change and the Law of Contracts: A tribute to Joe Perillo, Fordham L. Rev., Vol. 71, 2002-2003, 977, <http://heinonline.org/HOL/LandingPage?collection=journals&handle=hein.journals/flr71&div=5&id=&page=>, [26.07.2014].

[137] *Davis Contractors Ltd. v. Fareham U.D.C. 119561 A.C. 696 at 729 per Lord Radcliffe, r*eferred: *Roberts Th. E.,* Commercial Impossibility and Frustration of Purpose: A Critical Analysis, Can. J.L. & Jurisprudence, Vol. 16, 2003, 139, <http://heinonline.org/HOL/Page?handle=hein.journals/caljp16&collection=journals&page=129>, [26.07.2014].

[138] *Farnsworth E.A.,* Farnsworth on Contracts, 3rd ed., Vol. 2, Aspen Publishers, 2004, 626.

[139] *Speidel R.E.,* Contracts in Crises, Excuse Doctrine and retrospective Government Acts, Carolina Academic Press, Durham, North Carolina, 2007, 207.

2.4.3. The Assumption on Non-Emergence of the Event as the Main Basis of the Bargain

It is important to define for the doctrine of impracticability that the contract for the parties has been based on the main assumption that the event, extremely further complicating performance of obligation, would not be emerged.[140]

The doctrine of commercial impracticability shall be applied even if the source of a certain provision has by default been defined by the parties upon conclusion of the contract on the basis of the analysis of actual circumstances.[141] If affected by the circumstances beyond the control of seller, the source communicated by the parties, failed to promptly provide goods, then the debtor may be exempted from responsibility if performance by the communicated source has been the primary presumption serving as the basis for the contract.[142]

In the event, if the sold corn purposed to be seeded on a certain land plot, is destructed, then exemption from performance may be admissible as with the pre-condition of destruction of the individual item so with abolishment of the basis of the contract, the unaltered validity of which was the main assumption of the parties upon conclusion of the contract.[143]

Upon interpretation of the contract, the Court always privileges determination of the intent of the parties in regards with filling the gaps.[144] It is universally recognized that one of the most primary tasks of the contract law is realization of the intent of the parties, performance of purpose[145] and manifestation of their personal autonomy - the principle of contractual freedom.[146]

Thus, the rule of exemption from obligation of performance on the basis of impracticability shall not be applied if changes in circumstances on the basis of the analysis of economic state upon conclusion of the contract have been foreseen by the parties amongst the expected business risks.[147] For instance, the parties typically assume that the act issued by the state will not prohibit performance

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[140] *Jacobs D.L.,* Legal Realism or Legal Fiction? Impracticability under the Restatement (second) of Contracts, New York, Com. L.J., Vol. 87, June/July, 1982, 292, <http://heinonline.org/HOL/LandingPage? collection= journals&handle=hein.journals/clla87&div=70&id=&page=>, [26.07.2014].

[141] *Burton S.J.,* Contract Law: Selected Source Materials, Uniform Commercial Code, West Publishing Co., St. Paul, Minn., 1995, 156.

[142] *Brand R.A.,* Fundamentals of International of International Business Transactions Documents, Kluwer Law International, The Hague, London, Boston, 2000, 529.

[143] *Burton S.J.,* Contract Law: Selected Source Materials, Uniform Commercial Code, West Publishing Co., St. Paul, Minn., 1995, 157.

[144] *Hillman R.A.,* Principles of Contract Law, 2nd ed., The Concise Hornbook Series, West, 2009, 318.

[145] *Kim N.,* Mistakes, Changed Circumstances and Intent, U. Kan. L. Rev., Vol. 56, 2007-2008, 479, <http://www.law.ku.edu/sites/law.drupal.ku.edu/files/docs/law_review/v56/Kim_Final.pdf>, [25.07.2014].

[146] *Barnett R.E.,* Some Problems with Contract as Promise, Cornell L. Rev., Vol. 77, 1992, 1023-1024, <http://www.bu.edu/rbarnett/some.htm>, referred: *Nancy K.S.,* Reasonable Expectations in Socio-cultural Context, Wake Forest L. Rev., Vol. 45, 2010, 642, <http://heinonline.org/HOL/LandingPage?collection =journals&handle=hein.journals/ wflr45&div=25&id=&page=>, [26.07.2014].

[147] *Burton S.J.,* Contract Law: Selected Source Materials, Uniform Commercial Code, West Publishing Co., St. Paul, Minn., 1995, 157.

of obligation, the debtor will be alive and capable upon performance of obligation, the subject of contract will exist and be valid for contract performance, etc.[148]

2.4.4. Non-Culpability of the Debtor

Requirement of non-culpability of the debtor, necessary for establishment of impracticability of performance, does not reveal essential difference in regards with the pre-conditions of force majeure. Upon culpability of the debtor, the risk of emergence of the changed circumstances shall be considered in the sphere of control of the party which in its turn, excludes exemption from obligation of implementation. It is natural that the party shall not be exempted from obligation of implementation which with own culpable, deliberate or indiscreet action, facilitated to emergence of changed circumstances.[149]

In opposite to this, non-culpability of the debtor does not imply exemption of the debtor from obligation of implementation on the basis of non-performance. For instance, if non-culpable party has assumed the risk of emergence of changed circumstances, correspondingly he/she, despite of non-culpability shall be imposed with the negative consequences of changed circumstances which in itself, exclude exemption from obligation of performance.[150]

The issue of contractual risk is in details provided in the next sub-chapter.

2.4.5. Expanded Responsibility is Excluded with Default or Contractual Distribution of Risk

The factor of contractual risk, in terms of definition of responsibility, obtains particular importance in the Law of Obligations. One of the most important pre-conditions for application of the doctrines of exemption from responsibility is exclusion of the risk of changed circumstances and non-performance of obligation from the sphere of responsibility of the party.

The fourth pre-condition of commercial non-performance implies that the party demanding exemption from obligation of performance, shall not have the wide obligation assumed on aspects endorsed under the law. The mentioned legal characteristic corresponds to one of the necessary requirements of force majeure, according to which the pre-condition necessary for exemption from implementation is that the party shall not, on the basis of preliminary agreement, assume the risk of emergence of changed circumstances. Comparing the primary basis of the contract with the criterion, we hereby attach attention not as to the sphere of risk of debtor but to direct or default distribution of

[148] *Brunner Ch.*, Force Majeure and Hardship under General Contract Principles, Exemption for Non-performance in International Arbitration, Kluwer Law International BV, The Netherlands, 2009, 99 next reference: *Farnsworth E.A.,* On Contracts, 2nd ed., New York, 1998, §9.6, 612.

[149] *Brunner Ch.*, Force Majeure and Hardship under General Contract Principles, Exemption for Non-performance in International Arbitration, Kluwer Law International BV, The Netherlands, 2009, 100, hereinafter: *Farnsworth E.A.,* On Contracts, 2nd ed., New York, 1998, §9.6, 606, 613-614..

[150] *Brunner Ch.,* Force Majeure and Hardship under General Contract Principles, Exemption for Non-performance in International Arbitration, Kluwer Law International BV, The Netherlands, 2009, 100.

contractual risk. If the party considered possibility of emergence of changed circumstances, he/she shall be imposed with the risk of negative consequences thereof.[151]

Analyzing the above-mentioned pre-condition, it is of utmost importance to determine the party, assuming responsibility for non-performance of obligation upon conclusion of contract.[152] In view of justice, the Court may deviate from the main task, according to which the debtor, as a rule, shall be imposed with the risk of hardship of contract performance.[153] Risk distribution is the most complex issue in American law inasmuch as UCC, so the Restatement (Second) of Contracts, bypass direct regulation of the mentioned problem.[154]

One of the pre-conditions mentioned above, necessary for establishment of commercial impracticability concerning the primary basis of the bargain, corresponds to one of the necessary requirements of force majeure that the party, peculiarly or by default, shall not be imposed with the risk of emergence of changed circumstances, as well as emergence of this event shall not be attributed to the sphere of control of the debtor. Resolution of the issue – whether the assumption of the parties that the event as that would not emerge in the contractual relations, was the primary basis of the contract – implies definition whether any of the parties have considered possibility of emergence of this event[155] and correspondingly, whether any of the parties assumed the risk of emergence of this event upon conclusion of contract.[156] Hence, the criterion of consideration of possibility of impediment is the legal mechanism of re-imposition of the contractual risk in the event of absence of relevant contractual reservation.[157]

Thus, if the risk of changed circumstances is detected to be assumed in direct or default, by one of the parties,[158] then the assumption of the parties on non-emergence of the event in the future cannot be the main basis of conclusion of the contract inasmuch as the party, assuming the risk of emergence of event, at the same time considered possibility of emergence of changed circumstances.

At that, the assumption of both parties is to be taken into account instead of view of separate parties.[159] Upon absence of the peculiar clause on delegation of risk, with consideration of the objectives of the parties, the content of negotiations and the trade practice default, implied distribution of risk amongst the parties can be determined.[160]

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[151] *Brunner Ch.*, Force Majeure and Hardship under General Contract Principles, Exemption for Non-performance in International Arbitration, Kluwer Law International BV, The Netherlands, 2009, 100 hereinafter: *Farnsworth E.A.*, On Contracts, 2nd ed., New York, 1998, §9.6, 64, 616-618.

[152] *Stone B., Adams K.D.,* Uniform Commercial Code in a Nutshell, 7th ed., Thomson-West, 2008, 115.

[153] *Farnsworth E.A.,* Farnsworth on Contracts, 3rd ed., Vol. 2, Aspen Publishers, 2004, 6.

[154] *Brunner Ch.*, Force Majeure and Hardship under General Contract Principles, Exemption for Non-performance in International Arbitration, Kluwer Law International BV, The Netherlands, 2009, 96.

[155] *Farnsworth E.A.,* Farnsworth on Contracts, 3rd ed., Vol. 2, Aspen Publishers, 2004, 640.

[156] *Brunner Ch.*, Force Majeure and Hardship under General Contract Principles, Exemption for Non-performance in International Arbitration, Kluwer Law International BV, The Netherlands, 2009, 99.

[157] *Posner R.,* Economic Analysis of Law, §4.9, 7th ed., 2007, 115, cited: *Yorio E., Thel S.,* Contract Enforcement, Specific Performance and Injections, Aspen Publishers, Wolters Kluwer Law and Business, 2011, 8-22.

[158] *Hillman R. A.,* Principles of Contract Law, 2nd ed., Concise Hornbooks Series, West, New York, 2009, 317.

[159] *Farnsworth E.A.,* Farnsworth on Contracts, 3rd ed., Vol. 2, Aspen Publishers, 2004, 640.

[160] *Transatlantic Fin. Corp. v. United States,* 363 F. 2 d 312, 316 (D.C. Cir. 1996), cited in: *Hillman R.A.,* Principles of Contract Law, 2nd ed., The Concise Hornbook Series, West, 2009, 318.

The hereof sub-chapter is extensively dedicated to definition of responsibilities of the parties on the basis of interpretation of stipulated as well as implied terms of the contract in changed circumstances.

2.4.5.1. Theory of Contractual Risk and Normative Rule of Distribution Thereof

Posner and Rosenfield, by means of economic analysis of the doctrines of impossibility of performance, impracticability of performance and frustration of contractual purpose, have developed, in view of definition of issue of exemption from responsibility, the theory on the party bearing the contractual risk.[161] According to the hereof theory, the issue of exemption from responsibility is closely linked with the problem of risk distribution inasmuch as responsibility shall be imputed basically on the risk-bearer party.[162]

For instance, exemption of the debtor from responsibility implies delegation of risk of emergence of impediment of implementation to the creditor, and responsibility of the debtor considers impeding circumstance in his/her risk sphere.[163]

In view to determine the responsible party, the contractual party should be identified who was able to prevent risk,[164] the cause action and reduce the consequences of it.

Upon impossibility performance, the issue of risk shall be solved according to which of the parties was capable to control the circumstances, entailing the breach of obligations; as to the second criterion, which of the parties was capable to foresee the risk, this criterion is not applied under impossibility of performance as impossibility may be caused of the circumstance solely, consideration of emergence of which is equally impossible for the parties upon conclusion of contract.[165] The contractor, capable to control the events entailing impossibility, shall be imposed with duty of prevention thereof. This fact exactly creates the basis of imputing responsibility.

Theory on the party mainly bearing the risk has further been developed by the Judges, who filling the gaps, defined the context of the provision unforeseen under the contract if the parties have had agreed thereon.[166]

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[161] *Posner R. A., Rosenfield A.M.,* Impossibility and Related Doctrines in Contract Law: An Economic Analysis, J. Legal Stud., Vol. 6, 1977, 83-118; *Jenkins S. H.,* Exemption for Non-performance: UCC, CISG, UNIDROIT Principles - A Comparative Assessment, Tul. L. Rev., Vol. 72, 1998, 2017, <http://www.cisg. law. pace.edu/cisg/biblio/jenkins.html>, [17.04.2014].

[162] *Goldber V. P.,* Framing Contract Law, An Economic Perspective, Harvard University Press, Cambridge, Massachusetts and London, England, 2006, 325-326.

[163] *Posner R. A., Rosenfield A.M.,* Impossibility and Related Doctrines in Contract Law: An Economic Analysis, J. Legal Stud., Vol. 6, 1977, 87, <http://www.jstor.org/stable/pdfplus/724191.pdf?acceptTC=true>, [17.04.2014].

[164] *Goldber V.P.,* Framing Contract Law, An Economic Perspective, Harvard University Press, Cambridge, Massachusetts and London, England, 2006, 326; *Buxbaum R.M.,* Modification and Adaptation of Contracts: American Legal Developments, 1985, 33-34, in book: *Horn N. (ed.)*, Adaptation and Renegotiation of Contracts in International Trade and Finance, Deventer/The Netherlands, Kluwer Law and Taxation Publishers, 1985.

[165] Ibid, 345.

[166] *Posner R. A., Rosenfield A.M.,* Impossibility and Related Doctrines in Contract Law: An Economic Analysis, J. legal Stud., Vol. 6, 1977, 87, 88-89.

According to *Posner and Rosenfield,* the theory on the party mainly bearing the risk is being considered as the criterion of exemption from responsibility basically by Court in Common Law. Opposite to this, the *Professor Brunner* supposes that the hereof theory cannot be used as the general principle of law for definition of responsibility upon changed circumstances or force majeure. As the reasons, he names sundry circumstances: definition of risk sphere of the responsible party is a very extensive criterion in terms of determination of responsibility. At that, when risk spheres of parties are not defined upon conclusion of the contract, the parties do not know what are the measures imposed thereon subject to undertaking to prevent risk and responsibility.[167] The said principle shall be considered inadmissible for the contractors as the risk-bearer party on the basis thereof, is being defined by the Court only after changes in circumstances. Though, it pushes the wise contractual parties to attach privilege to the rule of definition of potential risk of emergence of impediments and responsibility of the party upon conclusion of the contract.[168]

In the event, if the contract does not provide risk distribution issue, then the normative rule[169] of the contractual risk and the basics established under the law excluding responsibility shall be applied. For instance, prior to provision of goods typically, prior to conveyance of the subject of contract under the seller's subordination, the risk of unforeseen increase of market prices shall be imposed on the seller. Impediments attributed to the sphere of development, organization and performance of obligation, shall be considered in the risk sphere of the debtor as a rule.

Hence, the risk of non-performance of contractual obligation is on the party until he/she is not exempted from initial obligation on the basis of performance in kind. In this event, the "scope of responsibility of the obliged person shall be defined not as with the behavior but with the sphere thereof from which impediment to performance derives".[170]

Shall the impeding circumstance of performance be attributed to the sphere of responsibility of the debtor? It may be determined on the basis of the content of the contract solely or on the basis of the agreement reasonably communicated by the parties.[171]

In the event, if the sole obligation of the seller is conveyance of the goods to the buyer (*Schic-kschuld*), then the risk of non-performance of obligation shall be delegated to the creditor upon the moment of conveyance of the property solely, meanwhile the debtor shall be considered as the bearer of the hereof risk,[172] which means that if the property, prior to conveyance to the buyer, is diminished, the seller shall no

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167 *Brunner Ch.*, Force Majeure and Hardship under General Contract Principles, Exemption for Non-performance in International Arbitration, Kluwer Law International BV, The Netherlands, 2009, 144.

168 *Kull A.*, Mistake, Frustration, and the Windfall Principle of Contract Remedies, Hastings L.J., Vol. 43, 1991, 46-47, <http://heinonline.org/HOL/Page?handle=hein.journals/hastlj43&div=11&g_sent=1&collection =journals>, [17.04.2014].

169 *Brunner Ch.*, Force Majeure and Hardship under General Contract Principles, Exemption for Non-performance in International Arbitration, Kluwer Law International BV, The Netherlands, 2009, 117-118.

170 *Pelegrino M.,* Subjective of Objective Contractual Responsibility? Jubilee Collection of Works "Sergo Jorbenadze – 70", Tb., 1996, 160 (In Georgian).

171 Compare: *Stoll H.,* in: Kommentar zum Einheitlichen UN-Kaufrecht, 2, Aufl., München 1995, *Caemmerer E., Schlechtriem P.,* (Hrsg.) Art.79 Rdnr.7; *Keil A.,* Die Haftungsbefreiung des Schulners im UN-Krankfurt am Main 1993, 105 ff., referred*: Pelegrino M.*, Subjective of Objective Contractual Responsibility? Jubilee Collection of Works "Sergo Jorbenadze – 70", Tb., 1996, 162 (In Georgian).

172 *Lookofsky J.L.,* Understanding the CISG: A Compact Guide to the 1980 United Nations Convention on Contracts for the International Sale of Goods, 3rd ed., Publishing Copenhagen, Wolters Kluwer Law and Business, Austin, Boston, Chicago, New York, The Netherlands, 2008, 100.

longer be obliged to commence one more attempt of implementation of obligation despite of the fact that obligatory relations have not been terminated with implementation.[173] In this event, the debtor shall be exempted from the initial obligation of implementation. The same rule applies in the event of destruction of the item, defined with the individual sign:[174] Negative consequences of risk of performance of obligation for the debtor is manifested in obligation of the debtor to refund the contractual value of goods to the seller.

According to the general rule, the risk of obtaining of generic goods, necessary for contract performance is imposed on the seller inasmuch as the subject of contract is objectively affordable on the commodity market or by means of provision source under the contract.[175] The debtor shall substitute the subject of contract with the similar generic item. If prompt performance of hereof appears to be impossible, then the party shall prove that impediment of performance has been entailed with uncontrollable and unforeseen event.[176] Responsibility of the debtor shall not be excluded on the basis of non-performance of obligation by the provider.[177] Though, the debtor shall be entitled to demand refund for the damage from the provider by regress means.[178] The mentioned obligation of the seller is opposed with the risk of loss of benefit of goods of the seller. The seller shall not reject acceptance of performance on the basis that he/she will not able to sell goods at all or at the desirable price. The basis of rejection of acceptance of performance cannot be the circumstance if the goods appear inapplicable for the buyer or there are better and newer goods available on the market.[179]

The hereof normative rule of risk distribution may, on the basis of agreement between the parties, be altered and exclude responsibility for emergence of changed circumstances from the control sphere of the debtor. For instance, the party may under the contract assume dispatch of goods to the buyer in substitution to provision (delivery) obligation thereof, which naturally, excludes the risk of accidental decease or destruction thereof during transportation of goods from the control sphere of the debtor.

The normative rule of responsibility shall not apply when the risk-bearer party is defined under the contract. Thus, *Posner* and *Rosenfield* theory is of auxiliary importance upon interpretation of the contract in terms of definition of the risk-bearer party,[180] which in capacity of auxiliary rule, may be applied for definition of responsibility when traditional criterion appears insufficient.[181]

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[173] See: German Civil Code - Bürgerliches Gesetzbuch, Bundesministerium der Justiz, Juris GmbH, Saarbrücken, 2005, §362.

[174] *Markesinis S.B., Unberath H., Johnston A.,* The German Law of Contract – A Comparative Treatise, 2nd ed., Hart Publishing, Oxford and Portland, Oregon, 410.

[175] *Schlechtriem P., Schwenzer I.,* Commentary on the UN Convention on the International Sale of Goods (CISG), 3rd ed., Oxford University Press, 2010, 1074; *Brunner Ch.*, Force Majeure and Hardship under General Contract Principles, Exemption for Non-performance in International Arbitration, Kluwer Law International BV, The Netherlands, 2009, 148.

[176] *Schlechtriem P., Schwenzer I.,* Commentary on the UN Convention on the International Sale of Goods (CISG), 3rd ed., Oxford University Press, 2010, 1074.

[177] Ibid.

[178] Ibid, 1076.

[179] Ibid, 1077

[180] *Posner R. A., Rosenfield A.M.,* Impossibility and Related Doctrines in Contract Law: An Economic Analysis, J. Legal Stud., Vol. 6, 1977, 87, 90.

[181] *Brunner Ch.*, Force Majeure and Hardship under General Contract Principles, Exemption for Non-performance in International Arbitration, Kluwer Law International BV, The Netherlands, 2009, 146.

2.4.5.2. Definition of Responsibility Sphere and Contractual Risk Distribution on the Basis of Mutual Agreement

The parties, by mutual agreement, may consider distribution of risk unlike from the contract law. Deriving from the principle of private autonomy, determination of the will and intent of the contractual parties prevails upon solution of contractual risk issue.

On the basis of mutual agreement, the risk of contract performance may be imposed on one of the participants of contract according to which of the participants of contract is capable to prevent circumstances entailing non-performance taking expediency and justice into account.[182] According to the reports, the contractual risk in legal literature shall be imputed on the party capable to foresee probability of emergence thereof or prevent it.[183]

In view of determination of scopes of contractual risk, it shall be defined whether directly or by default, the risk of non-performance of obligation is imposed on the debtor. Whether party has excluded from own responsibility sphere the risk of impediment or vice versa, expanded control sphere on the basis of the objective interpretation of the contract, shall be implemented by means of reasonable discuss of the actual circumstances and determination of contractual purpose of the parties.

The sphere of responsibility is expanded or it, directly or by default, guaranteed the outcome to be achieved under the contract. In this event, the debtor shall be imposed with responsibility not only for the impediments inclusive in his/her control and influence spheres but beyond. Upon impossibility of implementation, the demand of additional implementation shall be excluded from the rights of the creditor of secondary demand, but in the event of assumption of the risk of windfall non-performance of obligation by the debtor, affordability of the right of demand for remuneration of damage is unrestricted.

The contract may enhance the provisions confirming evident existence of certain actual circumstances upon conclusion of contract, which creates the primary motif and basis for another party to be involved in contractual relations. If the actual circumstances appear false, then the party, guaranteeing authenticity of the facts, shall be unconditionally imposed with responsibility regardless his/her awareness of the above-mentioned.[184]

2.4.5.3. Imposition of the Contractual Responsibility or Restriction-Exclusion thereof with Parties' Mutual Agreement

In the trade sphere, deriving from the circulation features, the risk of economic crisis always exists.[185] It is noteworthy that in international trade relations, change of market prices is expected with

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182 *Gordley J.,* Foundations of Private Law: Property, Tort, Contract, Unjust Enrichment, Oxford University Press, New York, 2006, 406..

183 *Gordley J.,* Foundations of Private Law: Property, Tort, Contract, Unjust Enrichment, Oxford University Press, New York, 2006, 345.

184 *Brunner Ch.*, Force Majeure and Hardship under General Contract Principles, Exemption for Non-performance in International Arbitration, Kluwer Law International BV, The Netherlands, 2009, 120.

185 Judgment of July 6, 2010 of the Civil Case Chamber of the Supreme Court of Georgia in re N as-7-6-2010 (In Georgian).

high degree risk in comparison with the internal-state civil circulation.[186] The hereof compels the parties, with contractual agreement, to restrict or exclude responsibility for emergence of circumstances inclusive in their responsibility or to assume responsibility for emergence of impediments. The above-mentioned shall be evaluated by means of interpretation of the contract.[187]

For instance, pursuant to the contract, the party may:

- Assume obligation of undertaking the actions necessary for contract performance instead of obligation of achievement of concrete goal;
- Link the right of avoidance from the contract to emergence of concrete circumstance;
- Restrict or exclude contractual responsibility for breach of obligation;
- Define necessity to determine renegotiation clause which would be directed on regulation of risk of change of contractual value in long-term relations;[188]
- Determine flexible mechanism of definition of contractual value which unlike fixed prices, will provide modification of prices in concord with changed circumstances;
- Limit own obligation with responsibility to dispatch goods instead of provide goods etc.

In this term, the decision of Appellate Court of Hamburg[189] is important, according to which the seller bears the obligation of inquiry of the subject of contract from the provider and the relevant risk. The basis of exemption of the debtor from responsibility may be disappearance of similar or identical quality goods on the market. The Court attributed the risk of threefold increased market prices to the sphere of responsibility of the debtor as the contract between the parties has been evaluated as high-quality speculative agreement.

Fixed definition of contractual value is impossible under the speculative agreement. In this event, the party may be required to pay triple market price. Such variations of the prices are quite expected and characteristic for speculative agreement.[190]

Responsibility of the seller for inquiry of subject of implementation may be restricted on the basis of clearly formulated contractual term solely, the burden of proof existence of which lies on the seller himself/herself.[191]

Thus, possibility of imposition of responsibility for inquiry of goods necessary for implementation on one of the contractual parties within the contractual freedom, has been basically recognized by judicial practice.[192]

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[186] *Uribe M.,* The Effect of a Change of Circumstances on the Binding Force of the Contracts, Comparative Perspectives, Intersentia, 2011, 193.

[187] *Schwenzer I.,* Force Majeure and Hardship in International Sales Contracts, VUWLR, Vol. 39, 2008, 715, <http://www.austlii.edu.au/nz/journals/VUWLawRw/2008/39.pdf>, [27.06.2014].

[188] *Draetta U., Lake R. B., Nanda V.P.,* Breach and Adaptation of International Contracts, An Introduction to the Lex Mercatoria, Butterworth Legal Publishers, 1992, 172.

[189] OLG Hamburg, Appellate Court Hamburg (Iron molybdenum case), 1 U 167/95, 28 February, 1997, <http://cisgw3.law.pace.edu/cases/970228g1.html>, [27.06.2014].

[190] *Schlechtriem P., Schwenzer I.,* Commentary on the UN Convention on the International Sale of Goods (CISG), 3rd ed., Oxford University Press, 2010, 1076.

[191] *Schlechtriem P., Schwenzer I.,* Commentary on the UN Convention on the International Sale of Goods (CISG), 3rd ed., Oxford University Press, 2010, 149.

In regards with force majeure clauses, it shall be necessarily determined whether it stipulates exemption of the party from defined risk solely or restricts responsibility of the debtor.[193]

The Courts are equipped with extensive discretions by virtue of which the terms on restriction or exclusion of means of legal protection shall not be applied if they with essence thereof, significantly contradict with the principles of justice, good faith and diligence and violate the contractual balance.[194] Hence, the contractual term of exclusion or restriction of legal protection means shall not be applied, which with essence thereof, is unfair and significantly violates the balance of interests of the parties.

Imposition of contractual risk on the party with contractual clauses is particularly noteworthy not in view of emergence of concrete circumstances and certain consequences thereof but of enhancement of general responsibility of the debtor regardless of manifestation of any changed circumstances on implementation of obligation. The similar contract cannot be binding as in terms of good faith and justice principles, it may entail unjust grave consequences for the responsible party. Thus, delegation of the risk of emergence of changed circumstances with the contractual agreement to the party is possible for the purpose of emergence of concrete circumstances and certain scopes thereof solely as imposition of the risk of emergence of any changed circumstances on the debtor upon unawareness of the scopes and the volume of expected negative outcomes, would be unjust in terms of the principles of justice, legal definition and contractual balance. Thus, distribution of responsibility and risk with contractual reservations in the legal doctrine is recognized only for the events of concrete circumstances instead of emergence of any unforeseen factors in general.[195]

Relevantly, the Court interprets force majeure clauses narrowly and indicates to these concrete circumstances as the basis of exemption from responsibility, which has been prescribed with the agreement by the parties and does not admit possibility of generalized and similar application of the circumstance.[196]

It is important that the basis of imposition of responsibility on the party will not be valid if the changed circumstance is mainly entailed due to the party, for the benefit of which the hereof reservation has been enhanced.[197]

In the event, if not emergence of changed circumstances but frequent intensity thereof entailed extreme hardship of performance, then the party is empowered, in line with the law-prescribed re-

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[192] *Swiss Federal Tribunal, 05.04.2005, 5.1, 4C.474/2004, CISG-online No. 1012; BGH 12.01.1994, VIII ZR 165/92; BGHZ 49, 388 (1968).*

[193] *Brunner Ch.*, Force Majeure and Hardship under General Contract Principles, Exemption for Non-performance in International Arbitration, Kluwer Law International BV, The Netherlands, 2009, 156.

[194] *Lando O., Beale H.,* Principles of European Contract Law, part I and II, Kluwer Law International, The Hague/London/Boston, 2000, 388-390; Comment No. 5 on art. 7.1.6 UPICC.

[195] *Böckstiegel K.H.*, Hardship, Force Majeure and Special Risks Clauses in International Contracts, 1985, 160 in the book: *Horn N.* (ed.), Adaptation and Renegotiation of Contracts in International Trade and Finance, Deventer/The Netherlands, Kluwer Law and Taxation Publishers, 1985.

[196] *Kel Kim Corp. v. Central Mkts., Inc., 519 N.E.2d 295, 296 (N.Y. 1987),* cited in: *Hillman R.A.,* Principles of Contract Law, 2nd ed., The Concise Hornbook Series, West, 2009, 317.

[197] *Uribe M.,* The Effect of a Change of Circumstances on the Binding Force of the Contracts, Comparative Perspectives, Intersentia, 2011, 206.

levant pre-conditions, to appeal to the means of legal protection defined for hardship, as distribution of contractual risk with the agreement between the parties is possible to go beyond emergence of concrete circumstances and certain volume of consequences solely.[198]

2.5. Legal Consequences of Commercial Impracticability

Anglo-American and Georgian laws with the legal nature of exemption from responsibility are essentially approximated with each other but conceptually they differ in terms of legal consequences: contract of existence of legal basis of commercial non-performance shall be automatically terminated and correspondingly, existence of demand of implementation of obligation shall be excluded.[199]

In the event, if the problem of exemption from responsibility cannot be solved on the basis of definition of the context of the norm, then the issue shall be solved in line with the principles of target interpretation and good faith.[200]

The American law, similar to English and unlike Continental law, does not prescribe adaptation of the contract with changed circumstances as the rule to be primarily applied. Application of this legal mechanism is attributed to discretion of the Judge and is not the legal instrument to be supremely applied. Thus, the Article 2-615 of UCC, in capacity of the exception and deriving from the good faith principles, empowers the Judge to adapt the contract with the changed circumstances.[201]

UCC authorizes the Court to fill the gap in the contract – on the basis of justice and reasonable discussion to solve the issue of additional performance.[202] One of the important decisions on adaption of the contract with changed circumstances may be the case: *Aluminium Co. of American vs. Essex Group, Inc.,*[203] upon hearing of which the Court, on the basis of the doctrine of commercial impracticability, decided traditionally not exemption from obligation of performance but adaptation of the contract to unforeseen changed circumstances by means of distribution of risks and damages amongst the parties.[204]

According to the paragraph 2-209 of UCC, the binding force of the contract envisaging change of the contractual terms, shall not be disputable. Though, the changes as those shall be impracticable in line with good faith principle. At that, evasion of implementation of the initial contractual terms breaching the good faith principles or coercion of modification of contract without legitimate com-

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[198] Ibid, 205-206.

[199] *Stone B., Adams K.D.,* Uniform Commercial Code in a Nutshell, 7th ed., Thomson-West, 2008, 117.

[200] *Burton S.J.,* Contract Law: Selected Source Materials, Uniform Commercial Code, West Publishing Co., St. Paul, Minn., 1995, 156; *Brand R.A.,* Fundamentals of International of International Business Transactions Documents, Kluwer Law International, The Hague, London, Boston, 2000, 529.

[201] *Burton S.J.,* Contract Law: Selected Source Materials, Uniform Commercial Code, West Publishing Co., St. Paul, Minn., 1995, 157.

[202] *Hillman R.A.,* Principles of Contract Law, 2nd ed., The Concise Hornbook Series, West, 2009, 331.

[203] *Aluminum Co. of American vs. Essex Group, Inc., 449 F. Supp.53 (W.D. Pa.1980).*

[204] *Halpern S.W.,* Application of the Doctrine of Commercial Impracticability: Searching for "The Wisdom of Solomon", University of Pennsylvania Law Review, Vol. 135, No.5, 1987, 1125, <http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=3961&context=penn_law_review>, [24.06.2014].

mercial reason or interest, shall be considered as breach of good faith principle.[205] However, UCC-regulated rule of adaptation of the contract with the changed circumstances is rarely applied in the judicial practice.[206]

IV. Conclusion

Research of legal pre-conditions of the basis, excluding responsibility under the scarce regulation of Georgian legislation enables interpretation of the legal nature and essence of pre-conditions establishing impossibility and hardship of contract performance.

The research revealed that despite of conceptual differences, upon aggravated contractual obligation, the basics of exemption from responsibility under Georgian Law, are approximated to the system of basics excluding responsibility, formed in Anglo-American law though, conceptual differences are revealed upon analysis of interrelation between legal consequences of impediment of performance.

It is true, that legal systems with different legal mechanisms achieve realization of the principles of contractual justice and good faith for insurance of peaceful co-existence of stability of civil turnover and interests. Though these legal mechanisms are essentially similar as they are motivated with the common objective of realization of the protective function of interests of civil turnover participants.

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[205] Uniform Commercial Code, Cornell University Law School, Legal Information Institute, Copyright 1978, 1987, 1988, 1990, 1991, 1992, 1994, 1995, 1998, 2001. The American Law Institute and the National Conference of Commissioners on Uniform State Laws; reproduced, published and distributed with the permission of the Permanent Editorial Board for the Uniform Commercial Code for the limited purposes of study, teaching, and academic research, 2003, <http://www.law.cornell.edu/ucc/ucc.table.html>, [24.06.2014].

[206] *Uribe M.,* The Effect of a Change of Circumstances on the Binding Force of the Contracts, Comparative Perspectives, Intersentia, 2011, 235; *Goldber V. P.,* Framing Contract Law, An Economic Perspective, Harvard University Press, Cambridge, Massachusetts and London, England, 2006, 326.

LashaTsertsvadze*

Directorate (director) Obligations on Merging of Companies and Acquiring Control Packet

(Comparative Law Analysis)

1. Introduction

Directorate duties in the company management are immeasurable, especially its responsibilities in important operations such as reorganization of an enterprise, i.e. transformation, merging and partition. Alienation of the controlling stock is a transaction of no less importance. The Georgian juristic literature concerning these issues is very scanty, so it can be concluded that this sphere is not properly studied.[1]

Decisions connected with the reorganization of the enterprise can be made because of different reasons. For example enterprises can be merged in order to operate more effectively and successfully in competitive environment on market or considering business objects one legal form might be transformed into the other legal form and etc. In this process according to the American corporate law the directorate *(Board of Directors)*plays a crucial role, which can't be said about the Georgian legislation.

According to the law about entrepreneurs the decision connected with reorganization is made by partners (stockholders). The law does not state special involvement or responsibility standard of the directorate in this process, while the American legislation and court practice are very rich from this point of view.

On one of the famous cases *Smith vs. Van Gorkom*[2] Court of Appeals of Delaware explained that the *fiduciary* duties of directors in relation to the enterprise comprise *Duty of Care* and *Duty of Loyalty*[3]. There are no similar unique indications and segregation of duties in Georgian legislation.

Considering the article format it does not concern tax legislation issues accompanying a merging process of enterprises because of a simple reason that its volume does not give such opportunity. Here it must be noted that the discussion of this issue in the aspect of tax legislation is very important and in the future it might become a subject of an individual article.

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

1 Juristic literature about the issue to be discussed after making changes in 2008 to the law "About Entrepreneurs" is rather difficult. This fact is emphasizing that this question has not been studied so far and consequently it is very important to discuss it in the context of the work.

2 Supreme Court of Delaware*, Smith v Van Gorkom, 488A. 2d 858 Delaware 1985.* <http://international. westlaw. com/find/default.wl?sp=intbucrs000&rp=%2ffind%2fdefault.wl&sv= Split&rs =WLIN11.04&cite= 488A.2d+858+&fn=_top&mt=314&vr=2.0&findjuris=00001>

3 *Welch E.P, Turezyn A J.*, Folk on the Delaware General Corporation Law, Fundaments, 2005 Ed. "Aspen Publisher" 2005, 82.

As the revival of principles of law is done by courts, in the article there will be used court practice, giving more practical purpose to it.

In connection with the issue to be studied there is scantiness of Georgian scientific literature and court practice. Therefore studying comparative law on the basis of court practice and doctrine for the legislation of such a young and inexperienced country, as Georgia, is especially important.

Duties of the directorate in the reorganization process of the enterprise will be discussed on the example of a joint-stock and limited liabilities companies, as they represent classical type of capital enterprises, where the directorate's duties and functions are most distinctly revealed.

The present article concerns one of the reorganization forms, merging of enterprises and the involvement of directors in this process, alienation of controlling stock and using of defensive measures. In spite of this the article can't be perfect without a short description of reorganization forms of enterprises, specifically merging.

Considering the article format all the forms of reorganization can't be discussed perfectly, so as it is seen from the title in this work more widely are discussed comparatively problematic issues connected with merging of companies and acquisition.

Corporation, as an entity of private law is a practical realization of one of the basic constitutional right - the right of amalgamation of persons with a purpose of getting material profit.[4]Interests of the members (stockholders, partners) and leaders of this corporation do not always have the same interests.

The main duty of the director is to run his/her enterprise honestly. The guidance of the enterprise means reasonable creation of competent management, which will form the enterprise policy and is a high ring of leadership[5].

Accordingly the directorate is obliged to find golden mean and run the enterprise without causing any harm to interests of their stockholders, persons engaged in the enterprise and their own interests, which is a rather hard task.

Taking into account the above mentioned idea the aim of the present article is to become a modest adviser to directors, lawyers, attorneys and judges of the companies acting in Georgia, as their viability is provided by a practical assignment.

2. Enterprise Transformation Forms according to the Georgian Law about Entrepreneurs

2.1. Enterprise Transformation (Change of a Legal Form)

On setting up an enterprise its organizational-legal form is chosen considering a number of factors, though the modern market economics is developing dynamically and after passing some time a form of a certain business chosen by the founders in the past might not answer modern business

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4 *Schramm H. (Schramm H.,-Joachim)* Control of Society Organizations by the State *(Die Kontrolle der Geselschaftsorgane durch der Staat)*. Honest guidance duties and responsibility in joint-stock companies according to Georgian and German law, symposium materials, II German-Georgian symposium in Corporation Law, Tb., 2003, 167(In Georgian).

5 *Qoqrashvili Q.,* Entrepreneurship Law, Tb., 2005, 103 (In Georgian).

demands. Just for this reason on the basis of the principle of a private autonomy of entities of civil law entrepreneurs can choose an enterprise form freely not only on founding the organization, but also during activities and change the chosen form for another one.[6]

According to paragraph $14^{4.}$2 of law about entrepreneurs partners can transform an enterprise of one legal form into an enterprise of the other legal form. As entrepreneurial societies, as well as individual entrepreneurs have the opportunity of transformation, as the law does not give any kind of restriction from this point. In case of transformation partners are making decision about redistribution of their functions and duties in the transformed enterprise, but they must take into account restrictions imposed by the law about entrepreneurs to a legal person resulted from the transformation.

As it is seen from the law about entrepreneurs in order to transform the Ltd into the joint-stock (JSC) or vice versa it is necessary to have a decision adopted by 75 % (in case of joint-stock company 75%+1) of the attended partners who have the right of voting but in all the other cases the decision is adopted unanimously.[7]This rule is ambiguous and it needs to be explained, namely it is interesting what is meant under "the attended partner (partners) who has the right of voting". For example, if the partners meeting are attended by 45% partners who have the right of voting and they support the transformation of Ltd into JSC, will the decision be counted as adopted? But according to the law legitimate is the decision made by 75% of the attended partners who have the right of voting, then in our concrete case it turns out that the decision was supported by 100% of the attended partners who have the right of voting.

According to paragraph 9^{1}.2 of the law about entrepreneurs "The meeting is capable to make decision, if it is attended by a partner (partners) who has the majority of votes. The meeting adopts the decision by the majority of votes". According to paragraph "k" of part 5 of the same article the decision connected with the reorganization and liquidation of the enterprise is made by the partners meeting. This standard of the law answers the question. The decision made by a partner (s) having 45% votes can't be consistent with the law, as the law about entrepreneurs envisages having a quorum and the meeting will be capable to make decision, if it is attended by the partners having the majority of votes and in usual cases the meeting adopts the decision by the majority of the attended votes.

In connection with the transformation of Ltd the meeting must be attended by all the partners (partner) having the right of voting and 75% from attendees must support the transformation of Ltd into JSC, so that the decision will be legal. As for the transformation of JSC into Ltd it is necessary assent of more than 75% votes of partners having the right to presence.[8]

According to the law about entrepreneurs the transformation of Ltd into the joint-stock (JSC) or vice versa is simplified and the analogous decision requires 75%[9]votes of partner (partners) having the right to presence. (In case of joint-stock company as we mentioned it is necessary to have 75%+1 votes of partner (partners) present and voting) though it is possible that adoption of such a decision might be regulated in a different way. "If it is not stated otherwise by the regulations, this part of the law can be explained in two ways:

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6 *Chanturia L., Ninidze T.,* Commentary to the Law about Entrepreneurs, III Ed., Tb., 2002, 185(In Georgian).

7 "About Entrepreneurs" Georgian law, Article $14^{4.}$3(In Georgian).

8 "About Entrepreneurs" Georgian law, Article 54.6<b>,54.7(In Georgian).

9 "About Entrepreneurs" Georgian law, Article, 14^{4}.3 (In Georgian).

The first: in connection with the adoption of the analogous decision the regulations might consider higher standard, a legislator sets a minimal requirement which must be satisfied by all means, if the decision about the transformation is not supported by 75% partners having the right to presence, this decision won't be legitimate, even if the lower standard is considered by the regulations.

And the second: the above mentioned rule of the law can be understood in the following way, that if the regulations do not say anything in connection with the reorganization, then there will be used rules of the law according which: The meeting must be attended by all the partners (Georgian Law "on Entrepreneurs", article $9^1$7), the meeting will make decision by the 75% of the votes of all presented partners who have the right of presence (In case of JSC 75%+1). It is possible to change by the regulation of the company, the standard set by the law, either increase or decrease it. In case of decrease of the standard set by the law, it is logical that it will not be considered legitimate if it will be set to lower then to 50%+1 votes, just because one simple reason, that generally the law on Entrepreneur while carrying out common duties considers the meeting legitimate if there are 50%+1 partners having the voting rights present.

It should be said undoubtedly, that it is essential to determine the lower boundary. Even such a well-known liberal Corporate law of the Delaware State, sets the importance of having the lower boundary, in particular it may take into account setting of the lower boundary of votes than the one of the simple majority, (Quorum) however it cannot be lower than 1/3 of the votes.

In discussing a concrete case it is important how the court explains the above mentioned rule. Considering the principles of fairness, protection of partners and creditors of the enterprise the second explanation is more accessible, as the adoption of the decision even by 50%+1 of attendees won't be able to protect the partner properly in the reorganization process.

"In all the other cases the decision connected to the reorganization must be adopted unanimously"[10]. Decision about the transformation of a commandite company and joint liability group into capital societies must be adopted by all 100% owning partner (partners) unanimously. If even one partner is against the transformation, the decision will not be adopted.[11]

Setting a lower standard for Ltd and LSC by the law is due to the fact that these two legal organizational forms have more or less similar rights and duties. Both of them are societies of capital type and such transformation does not need any significant organizational change. Moreover the law about entrepreneurs states that the transformation of Ltd into JSC and vice versa is not assumed as the ability decrease of creditors satisfaction[12]and in such a case creditors are not entitled to ask the enterprise for fulfillment the charged obligations ahead of time.

As for legal persons (e.g. commercial banks) acting on the basis of a special license in case of their reorganization it is necessary to have the assent of the organization issuing the license (National Bank).[13]

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10 "About Entrepreneurs" Georgian law, Article 14^4.3 (In Georgian).

11 *Chanturia L., Ninidze T.,* Commentary to the Law about Entrepreneurs, III Ed., Tb., 2002, 187.

12 "About Entrepreneurs" Georgian law, Article 14^4.6(In Georgian).

13 Organic law "About National Bank", Article 2 (g), law" About Activities of Commercial Banks", Article 1<z, k> (In Georgian).

2.2. Merging (Consolidation, Joining)

Merging of companies in market economics conditions might be of vital importance for them. In strong competition conditions the only chance of surviving for a company is often consolidation or joining with other company. The stronger competition is, the less is chance of surviving of small companies and accordingly the opportunity of merging of companies is increasing.[14]

Merging of enterprises is an absolutely natural event in enterprises activities. Just for this reason the law admits the opportunity of merging of enterprises; as in case of the reorganization of the enterprise the law here also states a minimal standard for adoption of the decision about merging and gives the entrepreneur entities the opportunity of setting a higher standard by means of the regulations. For the adoption of the decision about merging of Ltd and a cooperative it is necessary to have 75% votes of the presenting partner (partners) having the right of voting, in case of a JSC to have more than 75% votes of the presenting partner (partners) having the right of voting. In all the other cases the decision is adopted unanimously.[15] (For details connected with these questions see in the above mentioned work[16])

According to the law about entrepreneurs in the decision about merging it should be noted whether one enterprise is joining the other enterprise (joining) or two enterprises are uniting into one enterprise (amalgamation). Despite such formulation of the law text it should be definitely remarked that it is possible joining as well as amalgamation of more than two enterprises[17]and accordingly the text of the law must not be understood in such a way as if it bans joining or amalgamation of two or more enterprises.

As it was seen merging can be carried out by joining or amalgamation. It is interesting what the difference between them is. Amalgamation is meant when two or more enterprises are united to form one enterprise, joining is meant when one or several enterprises are joined to the other already existed enterprise.[18]Merging of enterprises is carried out by concluding an agreement on merging between the enterprises to be joined, which is signed by managers of these enterprises, in case of Ltd and JSC – by their directors, after the decision has been adopted by the partners in accordance with the legislation connected with it. Of course directors' duties in relation to the enterprise will not only be confined to signing the agreement, the directorate has the biggest role and responsibility in this process that will be discussed below.

Partners' rights and duties must be defined in the decision about merging. If in the agreement about merging nothing is said about partners' rights and duties, this issue will be regulated according to the law about entrepreneurs and in the capital there will be considered the proportionality coefficient of their shares, i.e. their rights and duties will be redistributed according to their shares in the capital.

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14 *Chanturia L., Ninidze T.,* Commentary to the Law about Entrepreneurs, III Ed., Tb., 2002, 193(In Georgian).

15 "About Entrepreneurs" Georgian law, Article 144.4(In Georgian).

16 See subchapter 2.1.

17 *DjugeliG., Nadaraia L,* Reorganization Forms of Enterprises according to the Law "About Entrepreneurs" , Bar Association Journal of Georgia, "Profession Lawyer" #2, 2007, 36-56(In Georgian).

18 *DjugeliG., Nadaraia L***,** Reorganization Forms of Enterprises according to the Law "About Entrepreneurs" , Bar Association Journal of Georgia, "Profession Lawyer" #2, 2007, 36-56 (In Georgian).

2.3. Division (Split-off, Spin-off)

The common reorganization form of enterprises is division of enterprises. According to $14.^{4}.5$ article of the law about entrepreneurs the enterprise can be divided into two or more enterprises and they can continue their activities as independent enterprises. The decision about the division might consider the former partners' share change in the capital of the entities created as a result of the division. If in the agreement there is nothing said about the share change in the capital, it will be left unchanged in new enterprise(s) created as a result of the division.

There is difference between split-off and spin-off. When the enterprise is splitting into two or more enterprises, the first enterprise stops its existence, it is liquidated. When the enterprise is spinning-off the first enterprise does not stop its existence, one or several enterprises are separating from it.[19]

Merging of enterprises can be done by dividing-joining, which means the following: the spin-off enterprise might be joined or amalgamated (merged) with the other enterprise.

As in consequence of the division the existed enterprise is liquidated, the decision about the reorganization of this form can be adopted by the majority of votes envisaged for the liquidation of enterprises.[20]

In case of Ltd and cooperatives this decision must be adopted at the meeting conducted with participation of 50%+1 partners and the decision must be counted as adopted, if it is supported by the majority of the attendees. In case of the JSC such a decision will need more than 75% votes. In all the other cases (Commandite Company and Joint Liability Company) the decision must be adopted unanimously, which means the adoption by all (100%) partners.[21]

2.4. Procedures Connected with the Reorganization

The decision about the enterprise reorganization must be registered in the register of non-productive (non-commercial) legal entities, the information about starting the reorganization process is sent to a public entity, the incomes service, included into the management sphere of the Ministry of Finance, which within 10 days from the date of receiving the information sends the registering agency the information about the tax obligations of the entity. If the registering agency does not receive the information about the tax debt of the entity within 10 days, it means that the entity does not have the tax debt. Within 10 days the incomes service sends the information about the possible debts to the registering agency and points out the deadline for the proper checking of the entity, which must not exceed 90 days from starting the reorganization of the enterprise. In case of need this deadline can be prolonged but not more than two months.[22]

If the change of a legal form does not cause the decrease of capability of the enterprise to satisfy its creditors or the 100% daughter company is joined to the enterprise, then the rules foreseen by articles

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19 *Qoqrashvili Q.,* Entrepreneurial Law, Tb., 2005, 165(In Georgian).

20 *Chanturia L., Ninidze T.,* Commentary to the Law about Entrepreneurs, III Ed., Tb., 2002, 199(In Georgian).

21 The basis of this noted conclusion is the analysis of Articles 2.3, 91.2., $9.^{1}5$ <k>, 14.1, $14^{4}5$, 54.6<b>, 54.7, 63.2 of the Law about Entrepreneurs (In Georgian).

22 "About Entrepreneurs" Georgian law, Article 14.3 (In Georgian).

14.3-14.4 of the law "About Entrepreneurs" are not extended; but creditors will not have the right envisaged by paragraph 14^4.8 of the law "About Entrepreneurs" to demand from the enterprise to perform obligations ahead of time.

Indebtedness of the enterprise to the state does not cause automatic suspension of registration. The law "About Entrepreneurs" states exceptions, namely: if it is required to reorganize the enterprise created by more than 50% share participation or in consequence of the reorganization the capability of the creditors satisfaction is not decreasing, or there is a consent of the Ministry of Finance to reorganization of the enterprise which has debts.[23]

Considering the above mentioned situation, if the enterprise has indebtedness to the budget, the directorate has to apply the Ministry of Finance and get consent from it in order to avoid the further sanctions, because whether the creditors' satisfaction ability is decreasing or not as a result of the reorganization of the enterprise might become a disputable issue. Transformation of Ltd into JSC or vice versa is not counted as the decrease of the creditors' satisfaction ability.[24]Accordingly the directorate must receive the consent from the Ministry of Finance in all the other cases.

The executive organs participating in the reorganization are obliged to carry out the above mentioned actions. The law does not point out directly in connection with it, but it is clear that the decision adopted by the company's partners must be performed and controlled by the directorate and supervising authority (if any).

2.5. Protection of Creditors during the Reorganization Process

Protection of creditors during the reorganization process is an important issue, because in such a case creditor's legal status is changing. On reorganization the original debtor is often nullified and consequently on the reliability of a new debtor, as a rule, the creditor has no information. As a result of the property redistribution after the reorganization the property status of the enterprise might be worsened, that significantly decreases the chance of the creditor's satisfaction.[25]It's true that in case of the enterprise transformation the debtor as a subject is not changed, but the debtor's legal status is changed, which might be a danger to the creditors.[26]Just for this reason the law about entrepreneurs includes standards for protection of creditors in the process of reorganization.

With the request for registration of starting the reorganization process of the enterprise it is necessary to submit to the registration body the information about the enterprise's creditors and indicate terms of their satisfaction. The information about starting the reorganization must also be sent to all the known creditors, indicating the terms of their satisfactions.[27]

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[23] "About Entrepreneurs" Georgian Law, Article 14^4.7(In Georgian).

[24] "About Entrepreneurs" Georgian Law, Article 14^4.6, last sentence(In Georgian).

[25] *DjugeliG., Nadaraia L.,* Reorganization Forms of Enterprises according to the Law "About Entrepreneurs" , Bar Association Journal of Georgia, "Profession Lawyer" #2, 2007, 36-56(In Georgian).

[26] *DjugeliG., Nadaraia L.,* Reorganization Forms of Enterprises according to the law "About Entrepreneurs" , Bar Association Journal of Georgia, "Profession Lawyer" #2, 2007, 36-56(In Georgian).

[27] "About Entrepreneurs" Georgian law, Article 14.4 (In Georgian).

The law about entrepreneurs gives a creditor the right to demand fulfillment of obligations ahead of time, if the creditor finds out that the reorganization of the enterprise is being planned, in their turn guiding bodies of the enterprise are obliged to provide all the known creditors with the information about the reorganization.

Article 102 (b) (7) of corporation law of Delaware envisages limited liability of the director in case of violation of the duty of care if in the company's regulations there is a note about the limitation on the director's responsibility.[28]There is no analogous note in corporation law of Georgia, on the contrary such consent between the directorate (supervising authority) and the enterprise is annulled by the law about entrepreneurs, when in order to satisfy the creditors it is necessary reimbursement of the damage inflicted on the enterprise by director or any member of the supervising body. The leaders' responsibility is not ceased even when they are acting to perform the partners' decision..[29]

In order to provide stability in economic relations and to protect creditors' interests the Georgian law about entrepreneurs is definitely states that the enterprise to which the other enterprise(s) is joined or the enterprise created by uniting of enterprises is a legal successor of the original enterprise/enterprises.[30]The protection of the enterprise's creditors is served by the last sentence of article $14.^{4}5$ of the law about entrepreneurs, according to which for the obligations existed before the division, the enterprises created after the division must have joint obligations. As for the original legal successor it will be defined by the decision about the division.

3. Mergers & Acquisitions (M&A)

In America and generally in the world merging of enterprises and acquisition are very frequent. Development of market economics induces an issue of merging of companies so that they won't cease their existence on free market. There are also often cases when two corporations don't want to merge. In such a case an acquiring company - *Acquirer* is trying to acquire a company to be merged or as it is called *Target* in spite of the latter's consent. There are several types of such acquisition.

When the decision connected with acquisition is approved and confirmed by the directorate of the target company such acquisition is called friendly acquisition, but when the acquiring company is conducting negotiations directly with a stockholder bypassing the directorate of the target company, then such acquisition is called *Hostile Takeover.* It is obvious that in this case the directorate (*board*) is against merging.[31]

From the very beginning hostile takeover, which means the acquisition of the target company bypassing its board, was considered to be violation of business ethics and it was not often used.[32]It is true that today an analogous transaction is considered to be an absolutely natural occasion, but in compliance with the accumulated experience there is stated a number of standards which must be observed by stockholders and directors of the enterprises participating in the transaction. Accordingly

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28 Delaware General Corporation Law, subsection 102 <b><7>,2013-2014 Ed., Lexis Nexis, Delaware, 2013.

29 "About Entrepreneurs" Georgian law, Article 9.6(In Georgian).

30 "About Entrepreneurs" Georgian law, Article $14^{4.}4$, last sentence(In Georgian).

31 *GevurtzA.F.,*Corporation Law, West Group, St.Paul, Minn, 2000, 673.

32 *GevurtzA.F.,*Corporation Law, West Group, St.Paul, Minn, 2000, 673.

fight between the companies is interesting from the point of view of legal framework and regulation of these relations.

We must distinguish acquisition from the type of acquisition which is followed by merging. The acquisition of the company can be carried out by acquiring the majority of shares assumed to trading by the target company (acquiring of a control packet of shares/share deal). The acquiring company becomes a majority shareholder of the target company.

It is also possible to merge the target and acquiring companies, after which the shareholder of the acquiring company becomes a majority shareholder of the company generated as a result of merging and will have the opportunity to make important decisions (Merger). So acquisition cannot always be followed by merger. It can be possible that the object of the acquiring company will be not merging but merely acquiring of the target company, i.e. one company (it can be physical person) will acquire a control packet of shares of the second (target) company, the target company continues its activities, but the acquiring company has control over the enterprise (Acquisition).

So *Merger* can comprise *Acquisition* while in case of *Acquisition* it is not meant that it comprises *Merger.*

Acquisition of the company can be carried out by purchasing all its assets *(Assets Deal).*

It is clear that when both companies agree on merger, problems are less and there are not many points to be discussed. In such a case the directorate has generally recognized fiduciary duties to the enterprise. It is obliged to serve faithfully to the enterprise, take care of it and act honestly. The board of the both companies is obliged to act considering the best interests of the companies. More interesting is the case when there is no coincidence between the interests of the board and shareholders.

As it was already mentioned in most cases an offer must be approved by the board. It was assumed that the board of the target company would have the right to use protection measures, if it considered that merger or carve-out of control packet was against the interests of the company's shareholders; though modern tendencies of the development of entrepreneurial law show that the board is obliged to consider not only shareholders' interests, but also the interests of the Company itself, Company employees and generally the society where this company is operating.[33]

Moreover the board is authorized not to adopt the decision, which is only within the shareholders' interests, if in case of need it can confirm that the decision was dictated by public interests which deserve stronger protection than the shareholders' interests.[34]

According Georgian legislation the decision connected with the reorganization of the enterprise is adopted by partners, while according to American legislation the board is actively involved in this process and in a number of cases merger is only carried out after the board's approval. If negotiations concerning merger are done bypassing the board, then it is a case of hostile takeover.

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[33] *Murray H.J.,* Choose Your Own Master: Social Enterprise, Certifications, And Benefit Corporations, American University Business Law Review, 2012 <http://heinonline.org/HOL/Print?collection=journals&handle=hein.journals/aubulrw2&id=95>.

[34] *Murray H. J.,* Choose Your Own Master:Social Enterprise, Certifications, And Benefit Corporations ,American University Business Law Review, 2012 <http://heinonline.org/HOL/Print?collection=journals&handle=hein.journals/aubulrw2&id=95>.

4. Poison Pills and Other Protective Measures Used by the Board

Directors don't act like scientists, lawyers, architects and so on. Their duties mainly imply supervision of business, defining corporation policy and making decision about choosing business transaction which will be more profitable for the enterprise.[35]

In the present chapter there will be discussed more usable protective measures of target enterprises in Delaware State, to what extent is effective and acceptable to give carte blanche to the board to work out protection measures, to use its discretion within the granted authorization.

In Georgia there are no legislative regulations connected with protective measures to be used by a target company, neither in practice nor in decisions of Georgian court analogous issues are considered just for a simple reason that market economics in our country is not so developed as in the USA.

For the last 30 years after achieving independence by Georgia there have hardly ever been carried out any mergers of enterprises in its classical meaning and moreover it isn't worth talking of hostile takeover and the use of protective measures by the board. The only method which the board in Georgia can use against the possible reorganization is assuring, i.e. it must try to assure the company's partners that merger is not the best solution. If the board is able to assure the partners, merger will not be carried out, but if the partners don't change their minds, the board does not have a legal instrument to stand up to this process.

In the USA, particularly in Delaware State, the board is authorized to use protective measures against the hostile takeover. The board decides which type of protective measures to use. In such a case it acts within the granted discretion. In the USA have never been regulations which would prohibit the board from using protective measures.[36]

In Delaware State the target company's board has always acted at its own discretion in working up and using a protective mechanism. Delaware court is discussing the legality of protective tactics proceeding from each concrete case, so there are not existed any stated rules concerning which protective tactics will be considered to be legal and which won't. Court appreciates proportionality and conformity of using protective tactics proceeding from each concrete case.[37]

One of the protective means is *to initiate tactical litigation* by the board of the target company,[38] also *"Management buy-out" (MBO)*, which implies buying of shares assumed to trading in order to impede the hostile takeover. Redemption of stocks assumed to trading by the company employees and

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35 *Hanks, J.Jr.*, Evaluating Recent State Legislation on director and Officer Liability Limitation and Indemnification in: Reprinted from The Business Lawyer Vol. 43, No.4, August 1988, a Publication of the Section of Business Law <Formerly section Section of Corporation, Banking and Business Law> American Bar Association. Copyright 1988, American Bar Association, 1232.

36 *Stokka S. H.,*Defense Tactics in Hostile Takeovers - An Analysis of The Rule Imposed on the Pursued Target, 2013, 23 <http://home.heinonline.org/>.

37 *Stokka S. H.,*Defense Tactics in Hostile Takeovers - An Analysis of The Rule Imposed on the Pursued Target, 2013, 23. <http://home.heinonline.org/>.

38 *Stokka S. H.*, Defense Tactics in Hostile Takeovers - An Analysis of The Rule Imposed on the Pursued Target, 2013, 23. <http://home.heinonline.org/>

friendly persons in relation to the company is very common, so called *Employee Stock Ownership Plan (ESOP)* against the hostile takeover.[39]The latter is the plan worked out by the board and is very popular because it promotes motivation of the employees.

The target company's board can apply to court and demand to ban the merger by a reason that merger transaction is against antimonopoly law. This protective means will be successful, if court confirms that the acquiring company after merger will gain power and influence on market.[40]

There are a lot of means of protective mechanism, but we won't discuss them in details because of the shortness of the present work volume. So more widely we will talk about the most common and disputable means of protective measures.

On one know case *Unocal Corpovs Mesa Petrolium*[41]court of Delaware stated that the board of the target company is authorized to work out protective tactics in proportion to the actions of the acquiring company, if it has the ground to think that because of not using protective measures target company's legitimate interests will be suffered. Besides the board of the target company must prove the rationality and reasonability of using a concrete protective mechanism.[42]This rule of estimation of the board's actions has been firmly established in American corporation law and it is known as "*Unocal Test".*

*Unocal Test*is important in using such protective measures, as "*Poison Pills".* It can be said that it is assumed to be the most effective protective measure and accordingly it is used quite often.[43]

Poison Pills- represent convertible stocks issued by company in the name of its stockholders, as dividends. These stocks might not originate the right to vote and get a dividend. It is not their main characteristic feature. Their main feature that turns them into so called poison pills is their conversion right.[44]

If an acquiring company buys a certain amount (stated by the regulations) of the target company's stocks issued for trade and then merges with the target company, the owners of the above mentioned privileged stocks have the right to make profitable conversion of these stocks (exchange) for the acquirer's stocks, which means for example, the target company's one privileged stock will be exchanged for two stocks of the acquiring company (there might be stated the other conversion rule). By this way the acquiring company loses votes in the company originated by reason of merging and it will not have the right to make individual decisions, dismiss the board and etc. Of course using of such a mechanism is an obstacle for the acquiring company, it is impeding the acquirer's process of hostile takeover.[45]

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39 *Gevurtz A.F.,*Corporation Law, West Group, St.Paul, Minn, 2000, 675.

40 *Clarkson K. W., Miller R. L.,Cross F. B.*, Business Law, Text and Cases , 12thEd., 2012, 802.

41 *Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946 (Del. 1985)* <http://www.law.illinois.edu/aviram/Unocal.pdf>

42 *Stokka, S. H.*, Defense Tactics in Hostile Takeovers - An Analysis of The Rule Imposed on The Pursued Target, 2013, 24<http://home.heinonline.org/>.

43 *GevurtzA.F.,*Corporation Law, West Group, St.Paul, Minn, 2000, 675.

44 *GevurtzA.F.,*Corporation Law, West Group, St.Paul, Minn, 2000, 675.

45 There are different kinds of using "*Poison Pills*", which are called: *Flip-over, Flip-in, Back-end*, and etc, in this case the usage of "*Poison Pills"*is discussed for the case of Flip-over. The discussion of them completely is impossible because of the Article format.

In answer to “poison pills” a stockholder of the company wanting the hostile takeover might contact some stockholder of the target company who is loyal to the merger and assure him/her to change the existed board for desirable candidates; it will enable the hostile takeover wisher to exclude the use of poison pills, though it is not easy, when along with the rule “poison pills” there is *staggered board provision.*[46]

Staggered board provision implies that even the assurance of the stockholder might be achieved, if directors of the board are chosen in such a way that their terms of office expires at different time, in this case the board can’t be dismissed in one year, because the authorization term of each of them will be expired a year later (sometimes 1/3 of the board is chosen by this rule, i.e. at any concrete date the authorization term expires for 1/3 of the board and not for the whole board[47]). Consequently it will take at least 3 years to change the board completely, but postponement of merging is not the acquiring company’s interest.

In hearing air-gas case *Air Products and Chemicals Inc v Airgas Inc*[48] Delaware court confirmed that “poison pills” can be used by the registered companies in Delaware. The court emphasized again the importance of the so called *Unocal Test* and remarked that requirements of the mentioned test must be observed.[49]

In spite of the above mentioned decision a number of skeptical persons towards the “poison pills”, as to the protective measure, is increasing, according to statistics the number of the registered enterprises using this protective measure is getting less. However in Great Britain and European Union [50]the usage of this protective measure is prohibited.[51]

How will the questions connected with the hostile takeover be balanced? It depends on how the conflict of interests, which might exist between the shareholder and the Board, will be balanced. Great Britain legislation is friendly to shareholders, as the Board does not have the right to oppose the merger offer, if a shareholder expresses readiness for it.[52] Accordingly there is in practice a *board neutrality rule.*

There is a dispute about which approach is better: to be friendly to the shareholder, which prohibits the board to act against merging without the consent of the shareholder (*board neutrality rule)*or to be friendly to the board and there has not been an unambiguous answer yet.

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46 *Stokka, S. H.*, Defense Tactics in Hostile Takeovers - An Analysis of The Rule Imposed on The Pursued Target, 2013, 24<http://home.heinonline.org/>.

47 *Zwecker A.,* The EU Takeover Directive:Eight Years Later, Implementation But Still No Harmonization Among Member States on Acceptable Takeover Defenses , 2012, 239.

48 *Air Products and Chemicals Inc v Airgas Inc, C.A. Nos. 5249, 5256*<Del. Ch. Feb. 15, 2011>. <http://courts.delaware.gov/opinions/download.aspx?ID=150850>

49 *Stokka S. H.*,Defense Tactics in Hostile Takeovers - An Analysis of The Rule Imposed on The Pursued Target, 2013, 25 <http://home.heinonline.org/>.

50 Directive 2004/25/EC of The European Parliament and of the Council of 21 April 2004 on Takeover Bids, <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:142:0012:0012:EN:PDF>.

51 *Stokka, S. H.*, Defense Tactics in Hostile Takeovers - An Analysis of The Rule Imposed on The Pursued Target, 2013, 25. <http://home.heinonline.org/>.

52 *Stokka, S. H.*, Defense Tactics in Hostile Takeovers - An Analysis of The Rule Imposed on The Pursued Target, 2013, 25<http://home.heinonline.org/>.

If we admit that the role of the target company's board is only to increase the shareholders' wealth, it means that the board is passive, but if we admit that the board must also consider the interests of other persons connected with the company (company employees, creditors, customers), then the board will be active.[53]

Supporters of the board neutrality rule think that giving freedom to the director is dangerous, because as a rule after merging the board is dismissed, the director might act at his/her own discretion and will not foresee the interests of the shareholders and the company and might oppose the offer of merging, even it will be profitable for the company.

On the other hand the board runs the enterprise's everyday activities and it knows better what is good and what is bad for its enterprise. So the shareholder might be wrong easily, because he/she does not have the complete information and is not obliged either to know everything about the business activity of the enterprise. Hence it will be better if the board can stand up to the offer about merging despite the shareholder's position.

Protection guarantee of minority shareholder is under question in case when the decision is only adopted by the majority shareholder. The board is obliged to protect rights of all shareholders equally, when the shareholder has the right to sell his/her own shares at acceptable price and at the same time he/she is not obliged to take care of the other shareholder and help him/her in carve-out of shares.[54]

If the board is prohibited to use protective measures, the acquirer will achieve success easily and merging of companies will help them with strengthening and their share in market economics will be increased. This argument talks of as if in favor of the supporters of *board neutrality rule,* but as it was shown by researches the use of protective mechanisms in conditions of the hostile takeover is causing the growth of the value of the target company, which finally will be reflected positively on the target company's shareholders. The experience of Delaware State shows that granting discretion to the board is much more effective than the existence of *board neutrality rule.*[55]

After comparing it can be said that the law about entrepreneurs is friendly to shareholders, as according to the law the decision connected with the reorganization of the enterprise is adopted by partners.[56]Accordingly Georgian legislation shares the principle of *board neutrality rule.*

At first sight according to Georgian legislation the board performs technical function, is sending a proper message, is holding a partners' meeting and etc.

It's true that shareholders are adopting a decision about the reorganization of the enterprise, but it is clear that for adopting such an important decision they must have the complete and authentic information, in order not to make mistake on adopting the decision.

The information and the project about merging or division must be prepared by the board of directors. In this case towards directors will be spread article 9.6 of the law about entrepreneurs, according to which directors and members of the supervising committee must run society's affairs honestly and care for the company so as a sensible person at the analogous position and in the analo-

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[53] *Palmiter A. R.,*Corporations, 5th Ed., Aspen Publishers, New York, 2006, 652-653.

[54] *Gevurtz A.F.,*Corporation Law, West Group, St.Paul, Minn, 2000, 631.

[55] *Stokka S. H.*, Defense Tactics in Hostile Takeovers - An Analysis of The Rule Imposed on The Pursued Target, 2013, 26 <http://home.heinonline.org/>.

[56] Georgian law "About Entrepreneurs", Article14[4] (In Georgian).

gous conditions does. The leaders of the enterprise must be acting in the belief that their actions are the most profitable for the society. If directors violate this duty they will answer before the society jointly with all their property straight and directly.

To what extent is fair to set analogous responsibility on directors when they don't have chance to oppose the offer of merging? Namely, it is interesting will the board be held accountable, if it was trying to reassure the partners, but was not able to. As it was mentioned above the board fulfills the shareholders' decision, signs the agreement about merging and etc. How must the board of the Georgian company behave, if it is against the reorganization? Does it have a real instrument to stand up to such a transaction? Or will the director be held accountable according to the note of article 9.6 of the law about entrepreneurs which does not release the director from responsibility even he/she is acting to perform the partners' decision.

The law about entrepreneurs does not give exhaustive answers to these questions. On this basis we can conclude that Georgian corporation law has a deficit of such effective mechanisms, which promote fast and effective usage of law standards in everyday business life.

Unfortunately this situation is not put right by court practice either, while in Delaware State courts represent important institutions, which promote fulfillment of corporation law standards and to establish and develop new, modern regulations of corporation management.

To remark only that the law is defective and needs to be changed can't give relief to the directors. For them it is important how to behave under the conditions of the existed law so that to escape responsibility. The only possible way for the director is to write a refusal of participating in this transaction and give the explanation of his refusal; though for such an action he might lose his job. A

He has to make a choice: either to take this step or despite his inner belief to be involved in the fulfillment of the decision about merging, which later might cause his personal responsibility.

From all the mentioned above it must be said that this honestly acting board is much more competent compared to the partners' meeting, in connection with the offer of merging the board believes frankly that it is acting in the interests of the enterprise to make decision within the granted discretion. In the process of merging of enterprises the law "About Entrepreneurs" on the one hand does not exclude the responsibility of the director in case of his acting in compliance with the shareholders' decision, on the other hand it does not grant the director responsibility to influence on this decision. So it is required to make amendments to the law according to which the board of directors will be granted the responsibility to stand up to the offer of merging on the basis of the company's interests in spite of the shareholders' position.

As for danger of putting forward own interests, the law must foresee Unocal Principle, according to which the board must take burden of proving about the proportionality of using protective mechanisms. At the same time unique and unambiguous indication must be made that in relation of the board's decision there is in force discretion of entrepreneurial decisions - *Business Judgment Rule.* If the director violates *Duty of Loyalty* and *Duty of Care* in relation to the enterprise he will have to answer for the damage and he won't be able to defend himself with indicating the *Business Judgment Rule*.

5. Business Judgment Rule- as Standard in Estimating the Adequacy of Protective Measure

Enterprise leaders are expected to take proper care in relation to the company and to act considering the company's best interests, but of course it is clear that they are not the guarantee of business success.

The fate of the enterprise –it will be profitable or not – mostly depends on capability and skills, experience and means of the director. At the same time the director answers for consequences in relation to the enterprise.[57]

Business Judgment Rule by its contents consolidates the right of the director (board of directors) to take a decision from several possible ones honestly, considering the best interests of the enterprise and the shareholders. At the same time he must frankly believe that this decision complies with the best interests of the enterprise and the shareholders, i.e. *Business Judgment Rule*s states a legislative framework within which the directorate has freedom to act. If the director is honest in taking a decision, there won't be his accountability before the company and shareholders because of a mistaken and unsuccessful business decision. Correspondingly the decision is not subjected to be revised by the shareholders or other persons.[58]

Business Judgment Rule institute is an offspring of American court practice and today it plays an important role in in the enterprise management. Judging from its contents in relation to the actions carried out by the director it can be called "presumption of innocence".

It protects the director from accountability, if his action satisfies reasonableness requirements.[59]

Directorate will be protected by the *Business Judgment Rule,* if there are the following preconditions:

1. Directorate has used all the possible means to get the information;
2. Director has a reasonable ground for taking a decision;
3. There is no interests' conflict between the director's personal and the company's interests.[60]

Business Judgment Rule(discretion of the entrepreneurial decision) gives the director freedom to take decision within the framework stated by legislation. Court won't judge to what extent is relevant the entrepreneurial decision taken by the director, if there is no ground to have any suspicion about honesty and rationality of the director.[61]

In American practice the *Business Judgment Rule* has the presumption nature of protection of enterprise leaders, which must be "overcome" by a complainant, which means that the complainant must ground reliably the fact of violation of the fiduciary duty of care by the director that the director was not acting honestly. Court will begin consideration only when the complainant is able to confirm

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[57] *Chanturia L., Ninidze T.,* Commentary to the Law about Entrepreneurs, III Ed., Tb., 2002, 115 (In Georgian).

[58] *Clarkson K. W., Miller R. L.,Cross F. B.*, Business Law, Text and Cases, 12th Ed., 2012, 779 (In Georgian).

[59] *Djugeli G.,* Protection of the Capital in JSC, 2010, Tb., 185(In Georgian).

[60] *Clarkson K. W., Miller R. L.,Cross, F. B.*, Business Law, Text and Cases, 12thEd., 2012, 779.

[61] *Clarkson K. W., Miller R. L., Cross, F. B.*, Business Law, Text and Cases, 12thEd., 2012, 779.

all these. In this case the burden of proof will be on the director and then he will be already obliged to give grounds that he was acting on the basis of the interests of the enterprise.

Only for a reason that director's decision turned out to be harmful for the enterprise, a question of accountability of director will not be arisen, if it is confirmed that in taking the decision director was acting honestly within his/her authorization, which is one of the positive features of the *Business Judgment Rule*.

"To allege that a corporation has suffered a loss as a result of a lawful transaction, within the corporation's powers, authorized by a corporate fiduciary acting in a good faith pursuit of corporate purposes, does not state a claim for relief against that fiduciary no matter how foolish the investment may appear *post factum"* by American court practice was recognized as inadmissible strictness towards director to demand unmistakable actions from him.[62]

Supreme Court of Delaware in connection with case *In Revlon, Inc. v MacAndrews & Forbes Holdings, Inc* explained that director won't be able to point out the *Business Judgment Rule,* if he/she is only acting in order to maintain personal authority. If director wants to be under protection by the *Business Judgment Rule,* he/she must confirm that the used protective measure was in proportion with the danger directed to the corporation policy and effectiveness.[63] In the same court decision it was said that if selling of the company is inevitable and there are several clients willing to buy it, the role of the target company's directorate is to hold a "profitable auction" between the clients in order to raise the company's price.[64]

In carving-out the control packet of shares the directorate is obliged to confirm that its action was reasonable in relation to the selling process itself, as well as to the price[65], in such a case the directorate will be able to be protected by the *Business Judgment Rule.*

According to the Georgian law about entrepreneurs directors and members of the supervising committee must conduct the company's activities honestly and care for the company so as an ordinary, sensible person at the analogous position and in the analogous conditions does. The leaders of the enterprise must be acting in the belief that their actions are the most profitable for the society.[66]

If they violate this duty, for the harm arisen before the company they will have to answer before the society jointly with all their property straight and directly.

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[62] *Gagliardi v. Tri Foods Intern., Inc*., 683 A.2d 1049, 1051. <Del. Ch., 1996>: "to allege that a corporation has suffered a loss as a result of a lawful transaction, within the corporation's powers, authorized by a corporate fiduciary acting in a good faith pursuit of corporate purposes, does not state a claim for relief against that fiduciary no matter how foolish the investment may appear in retrospect"; see also: *Cinerama, Inc. v. Technicolor,* Inc., 1991 WL 111134, at 15 <Del. Ch., 1991> Referred to *Djugeli G.,* Protection of the capital in JSC, 2010, Tb., 87(In Georgian).

[63] *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173,* <Del., 1986> <http://www.law.illinois.edu/aviram/revlon.pdf>.

[64] *Zwecker A.,* The EU Takeover Directive: Eight Years Later, Implementation But Still No Harmonization Among Member States on Acceptable Takeover Defenses , 2012, 240-241. <http://home.heinonline.org/>

[65] *Zwecker A.*, The EU Takeover Directive: Eight Years Later, Implementation But Still No Harmonization Among Member States on Acceptable Takeover Defenses , 2012, 241 <http://home.heinonline.org/>.

[66] Georgian law "About Entrepreneurs", Article 9.6(In Georgian).

If compensation is compulsory, the duties of corporation's leaders are not ceased, because they were acting to perform partners' decisions.[67]

Georgian legislation and court practice don't know discretion of the entrepreneurial decision *Business Judgment Rule*, though on the basis of the pointed standards it is clear that in making decision Georgian law about entrepreneurs sets a certain standard and does not demand from director making absolutely unmistakable decisions. The main thing is that the decision must be made by director reasonably in a good faith.

The reason of critique of this institute is that there is not defined the reasonableness boundary, there are no concrete principles to be observed by director in making decision in order to be protected by this rule. Court must try and assess each concrete case independently. From this point of view court practice of Delaware is very rich and flexible. Protection of directors' rights most of all are guaranteed here.[68]

Court of Appeal of Delaware on one of the world-known cases *Paramount case* clarified: "In ordinary situation neither court nor shareholders have the right to intervene in the decision-making process".[69]

Considering that as a result of the reforms carried out in Georgia director's role in the enterprise management is increased, it becomes compulsory that director must feel protected and not think that he will be punished for making an "unprofitable" decision, if this decision was made in a good faith basing on the assessment of facts and in the belief that it was the best for the enterprise.

In case of argument Georgian court must foresee experience and practices existed in Delaware State and charge a plaintiff with a burden of overcoming *Business Judgment Rule.* as director runs the business on the basis of personal responsibility and the liberty principle of making decision[70], and the violation of this rule will lessen the director's will to take a certain risk in order to bring success to the enterprise.

6. Conclusion

Considering the format of the present article of course it will not give a perfect and exhaustive picture about directors' duties in merging and acquisition processes of enterprises, though certain conclusions can be made.

As it was mentioned above in the work is mainly emphasized on acquiring a control packet of shares (*Acquisition)* and acquisition which is followed by merger (*Merger)*.

The directorate of a target company resists the offer of merging. On the one hand directors have their own interests to maintain position and control over the enterprise, on the other hand they have

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67 Georgian law "About Entrepreneurs", Article 9.6(In Georgian).

68 *Hamilton R. W.,* The law of Corporations, 5th Ed., St. Paul , 2000, 461.

69 *Paramount Communications, Inc. v. QVC Network,* 637 A. 2d 34, February 04, 1994 .<http://international.westlaw.com/find/default.wl?sp=intbucrs000&rp=%2ffind%2fdefault.wl&sv=Split&rs=WLIN11.04&cite=637+A.2d+34&fn=_top&mt=114&vr=2.0&findjuris=00001>.

70 *Lazarashvili L.,* Theoretical and Practical Issues of the Modern Corporation Law, Office Agreement with Enterprise Director, Partner and Director in Internal Public Relations, 2009, 339(In Georgian).

fiduciary duty in relation to the enterprise and shareholders to act in a good faith and in the belief that they are acting in compliance with the best interests of the company.[71] M

Sometimes taking care of the enterprise by directors is caused by their personal interests; in such a case a shareholder (partner) which could have had a profit in a result of merging, has the right to commence a legal action in court against directors and to allege that the usage of a protective measure by directors was not reasonable in this concrete case and that directors violated fiduciary Duty *of Care* and *Duty of Loyalty.* In such a case court is using *Business Judgment Rule* to state to what extent was reasonable the directorate's action.[72]If director comes to be under the *Business Judgment Rule*[73], then the case will be dismissed and director will not be responsible only because *post factum* decision did not turn out to be profitable.

In Delaware State directors have more discretion than in Georgia, though this discretion might cause rather a big risk of making them answer for. American directorate in many cases is authorized to resist merging offer, while in Georgia directorate have not a legislative ground for it.

Board has authority as of a supervising committee, as well as of a directorate, which turns it into the strongest and the most influential body of the corporation.[74]

The only means of resisting reorganization of the enterprise for the Georgian company's directorate is persuasion of shareholders instead of the above mentioned protective measures.

In the USA directorate has authority. It can use protective measures at its sole discretion. The main thing is it must act within fiduciary duties.[75]

Director is obliged to act within his own authority, *Duty to act within Authority,* otherwise he will be made answer for[76].

Directors in relation to the enterprise have *Duty of Loyalty* and *Duty of Care,* each of them states a general standard of director's action.[77]Director's action standards are different depending on a concrete matter. For example, in case of merging directorate's action must be relevant to a higher standard of care and loyalty, than in case of taking ordinary daily decisions.

Similar obligations of directors are also foreseen by the Georgian law about entrepreneurs, though Georgian legislation needs refinement and improvement in this direction.

According to the established practice in Georgia directors must perform instructions of shareholders and members of the supervising committee; otherwise they will lose a job.[78]The mentioned practice of course does not correspond to the note of the Georgian law about entrepreneurs,

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[71] *Clarkson K. W., Miller R. L., Cross F.B.*, Business Law, Text and Cases , 12th Ed., 2012, p 801-802.

[72] *Clarkson K. W., Miller R. L., Cross F. B.*, Business Law, Text and Cases , 12th Ed., 2012, 801-802.

[73] See Chapter 5.

[74] *Chanturia L.,* Corporation Management and Leaders Responsibility in Corporation Law, Tb., 2006, 113 (In Georgian).

[75] *Zwecker A.,* The EU Takeover Directive: Eight Years Later, Implementation But Still No Harmonization Among Member States on Acceptable Takeover Defenses , 2012, 260 <http://home.heinonline.org/>.

[76] *Kleinberger D. S.,* Agency, Partnerships and LLCs, 2nd Ed., Aspen Publishers, New York, 123.

[77] *Palmiter A. R.,* Corporations, 5th Ed., Aspen Publishers, New York , 193.

[78] See: The decision of Georgian Supreme Court decree of June, 26, 2003 <case #as 68-767-03>.The Supreme Court returned the case for retrial. The case was about dismissing the director and the reason was conflict between the director and shareholders.

according to which the obligations of the company's leaders are not ceased by the reason that they were acting to perform partners' decisions.[79]

The role and accordingly the responsibility of directorate are very big. So putting a manager in charge of an enterprise choice must be made on a qualified, skilled, experienced person, capable to achieve the objective and this issue must not be solved by personal acquaintance.

It's true that the law about entrepreneurs is aware of directors' responsibility and charges them with certain duties in relation to the company, but the law only concerns these issues in general. On conditions that court practice does not exist either, a lot of questions are arisen which are actually impossible to be answered unambiguously.

Practical lawyers and company directors have to find way in very obscure conditions. It's very hard to give practical advice to persons involved in business, because the law, as it was already mentioned, is not clear and neither court practice gives an answer to these obscure notes of the law.

Business development and stimulation of investors in the country must just be started by putting legislation in compliance with the international standards. From this point of view especially important is the law about entrepreneurs, because it regulates formation, management and reorganization of enterprises, rights and obligations of their leaders.

Taking into account the entire mentioned above *Professor Lado Chanturia's* consideration about the necessity of working out a new law still maintains its actuality.

"So many unsystematic and hard-to-explain changes entered into the law about entrepreneurs for years that the necessity of working out a new law has been on agenda for a long time."[80]

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79 "Georgian law "About Entrepreneurs", Article 9.6 (In Georgian).

80 *Chanturia L.,* Private Society of Europe – Novelty in European Corporation Law, Journal of Law #1, 2009, 41(In Georgian).

Maka **Nutsubidze***

The Right of the Internally Displaced Persons to the Return to their Homes and Request Restitution of the Property

1. Introduction

During the last decades, the international community, in the number of the countries, encounters the grave problems like solution of the problems of the persons, forcefully displaced from their homes as a result of war (hereinafter referred to as „IDPs"). The international law agrees that none of the wars, catastrophes and development plans shall not be considered as an excuse when we deal with and speak about the right of the person to maintain own rights home, land and property under his/her legal ownership.

Granting the legal status to some particular persons, implying recognition thereof as IDPs, means recognition by the country, issuing the status that the latest enjoys the right to return, to restitute own property (land, house, property) and/or on remuneration of damage.

2. „Right to return" and the Legal Context of the Right on Restitution

The international Law qualifies expel of people from their dwelling not only as the crime against the mankind but the international law recognizes the right of the affected persons to obtain adequate legal protection by filing of the relevant suit.

2.1. „Right to Return" in the Legal Context Recognized by the International Law

The IDPs, on the basis of violation of the requirements of the international law, are entitled to return to their homes within the right, recognized and denominated under the „right to return". The most of the international instruments of human rights recognize and protect the right of a person to return to his/her country (home) – „1. All people have the right of free movement and residence within the scope of any country. 2. All people has right to leave any country, including own country, and to return to his country of origin.[1] Even if any of the international treaties do not directly recognize the „right to return" of the IDPs, each of them envisages the obligation of the country at minimal extent to provide return of own population to their „own homes". For instance, the Article 12 of the International Treaty on Social and Political Rights recognizes the right of a person to return to his own country.

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* The Assisting Professor of Faculty of Law of Tbilisi State University, the Doctor of Public Law (Paris 10 Nanterre La Defense Universite, France), the Master of Comparative Public Law of European Countries (Paris 1 Pantheon-Sorbonne Universite, France).

[1] The Article 13 of the UN Human Rights Universal Declaration of December 10, 1948.

The Treaty as well protects the right of free choice of residence, which is integrated with the right to return to the region of origin:

"1. Any person, legally residing on the territory of any of the countries, has the right, within hereof territories, to freely move and choose his/her residence.

2. Any person has the right to leave any country, including his/her own country.

3. Hereof rights cannot be restricted, other than the events, prescribed under the law, which are necessary for state security, public order, health and morality of the population or protection of other rights and freedom, and correspond to other rights, recognized under hereof Treaty.

4. No one shall arbitrarily be deprived of the right to return to own country. In some events, the right to return to the old dwelling is enhanced with the rights of family reunion and protection of family. In accordance with the UN High Commissioner on Refugees, "the right to return to own country is more and more approximated and attached to the right of adequate residence.[2]

According to the Sub-Commission on Human Rights, "all IDPs and refugees enjoy the right, in the event of their will, to return to their country, region/venue of residence".[3]

The UN Security Council, as well as all other bodies of UN, reiterate and underline importance of the right to return to own home. In regards with Bosnia and Herzegovina, in line with the Resolution of the UN Security Council[4], "all IDPs are entitled to return to their homes and obtain relevant aid in this term". The Security Council has many times reiterated hereof phrase in the number of Resolutions – on Georgia, Azerbaijan, Bosnia and Herzegovina, Cambodia, Croatia, Cyprus, Namibia and Tajikistan.

2.2. Legal Context of the "Right of Restitution" Recognized under the International Law

"The right of restitution" comprises – the right to restitute residence, land and property in the initial condition.

In the term description – the property restitution – legislation of Georgia envisages restitution of the lost dwelling or any other real estate on the territory of Georgia to the legal owner, and the right of restitution is explained as "restitution of property of the affected natural person, provision thereof with adequate (substitute) real estate and compensation of damage of the property".

Under the international law, the right of the property restitution is the original right, which remains unchanged regardless of return of the IDP with the property right of failure to return thereof.

The international law elucidates property restitution as the property right, allowing the affected person or the group of the persons, to return to the condition, existent prior to the damage or infliction of the damage.

The UN Committee on Elimination of Racial Discrimination, concerning the Article 5 of the International Convention against All Forms of Racial Discrimination, has stated that "all refugees and

[2] EC/GC/02/5, 25 avril 2002 Consultation mondial sur la protection internationale, Rapatriement librement consenti.

[3] UN Sub-Commission on the Promotion and Protection of Human Rights Resolution 1998/26 on Housing and Property Restitution in the Context of the Return of Refugees and Internally Displaced Persons. 26.08.1998

[4] UN Security Council Resolution 820 (1993) on the situation in BiH. 17/4/1993.

IDPs, after returning to their homes, are entitled for restitution of the property, possessed thereby prior to the conflict and are as well entitled to obtain the remuneration fordamage of property in adequate manner as a substitute to the property, impossible to be restituted".

The Human Rights Commission has numerously indicated to necessity of property restitution, as an effective protection subject to apply to the victims of internal displacement.[5] Inter-American Court of Human Rights has imposed the obligation of reparation of the damage towards the IDPs, losing the property and possessions upon return.[6]

The Statute of the International Criminal Law equates restitution with "restoration" and states: "the Court resolves the principles, according to which the initial condition shall be restored for the affected persons, i.e. restitution and remuneration of damage".[7]

In the context of right to return, the right of free privacy, guaranteed under the Article 9 of the European Convention on Human Rights is peculiarly attached to the right of restitution.[8]

The practice of states evidences frequent events, when houses of IDPs are demolished, which on its turn, is the impediment for realization of right to return. The European Court of Human Rights in re Akdivar and Others v. Turkey, has determined: "no doubt that the burnt houses as a result of fire, are in direct connection with the right of respect of family life and right of ownership (protection of property of plaintiffs). The Government failed to submit any argumentation, justifying hereof interference. The Government has indicated to participation of defensive forces solely in hereof incident. Thus, the Court intends to determine violation of right of respect of house and property".[9]

Thus, it is crystal clear that international law, not only under the Conventions and Resolutions, but with the practice of international courts, utterly recognizes and protects the right of restitution for the affected persons.

2.3. Restitution upon the Property Disputes in Line with the Orders of the European Court of Human Rights

The Court has numerously reiterated regarding the restitution upon the property disputes, that it is authorized not to be limited with solely recognition of violation.

In sundry events of nationalization of the property, where the applicants proved violation of the Article 1 of the Protocol 1 of the Convention[10], the Court required restitution of the property from the

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[5] UN Commission on Human Rights, Resolution 2005/35 on Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, 19 April 2005.

[6] The Report on Human Rights State – in terms of the population "Miskito" of origin, November 29, 1983.

[7] The Article 75 of the Rome Articles of the International Criminal Law of July 17, 1998, UN.

[8] The Article 8 of the CoE Human Rights European Convention of November 4, 1950.

[9] Aktivar and Others v. Turkey, September 16, 1996; Cyprus v. Turkey, May 10, 2001; Loisidou v. Turkey, December 18, 1996.

[10] The First Protocol of the European Convention on Human Rights, Article 1 on Protection of Property. Every natural person and legal entity enjoys the right of uninterrupted usage of their own property. Deprivation of property is admissible only for the public needs in line with the law and the general provisions of the

defendant country and reminded that in the event of failure to fulfill hereof requirement, it would entail obligation thereof to issue relevant reimbursement to the applicant.[11]

In re Broniovski v. Polone, the Great Chamber determined violation of the Article 1 of the Protocol 1 due to failure of reimbursement of the lost property of applicant and his family after repatriation to Poland in the end of the World War II (nowadays the property is in Ukraine, Lviv). In re Loizidou v. Turkey, the European Court recognized concept of the continuing violation in the context of property. In hereof case, the owner was in Northern Cyprus and had to leave the country in 1974 after Turkey occupied this part of the island. He appealed to the Court on the basis of the paragraph 1 of the Protocol 1 regarding that the Turkish Armed Forces prohibited him to have access to his property during the continuing period of time.

The Government of Turkey, inter alia, stated that the property of the applicant has been expropriated without the right to restitute on the basis of the Article 159 of the Constitution of May 7, 1985 of Turkish Republic of the Northern Cyprus (the “TRNC”) in January, 1990, prior to recognition of authority of the Court by Turkey. Inasmuch as the international practice and the Resolutions of various international organizations evidenced that the international community, on the basis of the international law, refused to recognize Turkish Republic of Northern Cyprus and the Republic of Cyprus still remained the only legitimate authority, the Court, for the purpose of the Convention, failed to grant the legal force to the Provisions, such were the Article 159 of the Constitution of the Turkish Republic of Northern Cyprus.

Correspondingly, the applicant could not be considered as with the property right lost, and thus, presumable violation was of continuing character. Inasmuch as the applicant was the legal owner, the Court has resolved that due to failure to access to the property since 1974, he/she has lost the control over hereof property, as well as lost all opportunities of usage thereof. Thus, continuing refusal to access has been declared as equal to interference in the rights, protected under the Article 1 of the Protocol 1. As the Government of Turkey has not attempted to argument interference, the Court considered total disparagement of the property rights as unjustifiable.

Deriving from the above-mentioned, the approach of the European Court of Human Rights is crystal clear, being oriented on valuable protection of property rights, the rights of restitution and remuneration of damage, being put within the scope of the legal frames thereof in terms of the IDPs under the condition that the appealed violations shall take place after accession of the state (implies the defendant state – M.N.) to the Council of Europe.

3. The Principles of Property Restitution for IDPs (“Pinheiro Principles”)

On August 11, 2005, the UN Sub-Commission on the Promotion and Protection of Human Rights endorsed the property restitution principles for refugees and IDPs (“Pinheiro Principles”). The principles result from the seven-year process, launched by the Sub-Commission in 1998 with adoption of the Resolution “On Property Restitution in the Context of Return of the Refugees and IDPs”

international law. At that, hereof provisions in no manner decline the right of the state to apply the laws, under which it considers it necessary in accordance with common interests, for control of usage of property, or for provision of payment of taxes, fees or fines.

[11] Bozat v. Italy, July 28, 1999; Papamichalopoulos and others v. Greece, October 31, 1995.

N1998/26-E. It was followed by the researches in 2002-2005 and the principles, developed by Paolo Sergio Pinheiro, the special representative of the Sub-Commission on property restitution issues.

"Pinheiro Principles" are the legal, procedural, institutional and technical implementation mechanisms for property restitution. The "Principles" are the guideline for development of concrete policy in order to provide practical enforcement of the right of the property restitution and implementation of the laws, programs and policy, based on valid international and national standards on human rights, humanitarian and IDP issues.

"Pinheiro Principles" (see the attached material) consist of 23 principles and they are characterized with the extremely wide and comprehensive nature, they recognize the concrete rights of the property restitution, enhance the number of related rights, in details outline the legal, procedural and institutional mechanisms, which are necessary for realization of the rights of restitution.

In line with the Pinheiro Principles, the right of IDPs to return comprises the right on house, lands and property. Realization of the property restitution shall start in the very process of peaceful negotiations. The decision made shall contain the right of restitution in order to allow the IDPs to enjoy hereof right upon return within the scopes of the norms of the international law on human rights and the national legislation in compliance thereof.

We consider it expedient to analyze sundry important and crucial issues, related to the right of restitution in line with the Pinheiro Principles.

The right of residence and property restitution[12] in accordance with the Pinheiro Principles, are being elucidated as "the right of each and every Internally Displaced Person, to regain residual place, land or property, which have been arbitrarily or illegally deprived, or the right to gain compensation for the dwelling, land or property, restoration of which, according to the independent and impartial Court resolution, is actually impossible.

The states shall outline restitution as the primary priority, as the transcendent legal mechanism and the integral part of the restitutional jurisdiction.

The right of restitution is the original right, which remains unchanged regardless of return of the Refugees or IDPs or failure thereof to return".[13]

Below we will review some most important issues, mandatory to be known to completely understand the right of restitution:

3.1. What is the Validity Term of the Right of Restitution for the IDP, if the Age Limit of any Type Applies to Realization of the Right of Restitution?

As we know, and as it is confirmed with experience of various countries, in the number of events, the IDPs expect return to their homes for decades and even more, to speak in other words, we deal with the continuing perspective of realization of right. Relatively, it is impossible to define the precise time, though we can make some specifications:

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[12] The Principles of the Property Restitution endorsed by the UN Sub-Committee on Human Rights on August 11, 2005 for Refugees and IDPs ("Pinheiro Principles"), Principles N2;

[13] The Principles of the Property Restitution endorsed by the UN Sub-Committee on Human Rights on August 11, 2005 for Refugees and IDPs ("Pinheiro Principles"), Principles N2;

1. The Pinheiro N2 principle clearly and unambiguously states that "the right of restitution is the original right, which remains unchanged regardless of return of Refugees and IDPs or failure thereof to return". The practitioners shall demarcate: 1. Mediation to the relevant state body, and 2. Enforcement of the decision, which is the protracted procedure. The right of restitution shall not be declined due to the fact solely that the IDP is not enabled to enjoy own rights, i.e. to return to his/her home.

2. If we recall the analysis of the world practice, we will see that the various countries have various terms established.

Demand on restitution in South Africa was possible in regards with the events, which were of discriminative nature and which took place in 1913-1990. The number of UN Resolutions of 1948 were concerning the property restitution for the refugees from Palestine. The UN Resolutions are as well noteworthy, requiring property restitution for the residents of the Eastern European countries, which after the WWII lost their property. The right to demand in this very situation emerged in 1945 and continued even after dissolution of Soviet Union in the end of 80s and till the beginning of 90s. Conversely to this, demands of property restitution after genocide in Ruanda in 1994 were considered in the events solely, if no more than 10 years were passed upon displacement of the applicant. The same reservation was made by the Czech Republic towards the persons, displaced upon the end of the WWII.

3. Despite of all above-mentioned, any restriction of realization of the right of restitution by the state in time shall be entailed with extreme urgency and shall be based on proportionality and legality principles.[14]

3.2. Does Restitution Necessarily Mean Return to the Initial Dwelling?

Even if theoretically we succeed to give the positive answer to this question, which will be the only adequate answer in terminological-legal angle, the practice will show that restitution may acquire various forms taking the local circumstances into account. Deriving from the fact that in the event of return, IDP may not find own house (at least due to actual demolition), international law and the national legislations in compliance thereof recognize various types of remuneration of damage. Though, the most important in terms with hereof issue is to realize and know the fact that 1. The right of restitution of the house and the property is the privilege of all IDPs. 2. All types of deviation from this reality shall be implemented in capacity of an exception and shall be completely argumented with the current legislation. 3. All IDPs shall know that realization of hereof right comprises (implies) sustainable and at the same time, continuing outcomes.

[14] Manuel sur la restitution des logements et des biens des réfugiés et personnes déplacées, Mars, 2007.

3.3. Restitution and Remuneration of Damage – do these two Factors Exclude each other?

We cannot consider remuneration of damage as a mere alternative of restitution. When the peacekeeping agreements in Bosnia and Herzegovina after the war provided the guarantees for restitution, as well as remuneration of damage, international community decided to focus on return and restitution.

Hence, the mechanism, prescribed under the Daytona agreement – remuneration of damage as a substitute of ruined property – has not been applied. On the contrary to this fact, the Iraq Commission, supposed to resolve the dispute on real estate, which has been illegally confiscated during Saddam Hussein regime. The affected persons were allowed to select restitution or remuneration of damage. At the same time, remuneration of damage in line with the law should be implemented by the state (Iraq).

3.4. Does Acceptance of Compensation by the IDPs Serve as the Basis for Refusal of Restitution?

Theoretically, the refugees always have the chance to return, and restitution is automatically attached to return. Correspondingly, in view to refusal to the IDP on restitution, there shall exist refusal, received in observance of the procedures under the legislation of the relevant state in accordance with the final resolution, made by the independent and the competent agency.

4. The Political Context of the Right to Return and the Right of Restitution

Realization of the right of restitution starts in the very process of peaceful negotiations. The decision made shall contain the right of restitution in order to allow IDPs realize hereof right upon return within the scopes of the norms of the international law on human rights and the national legislation in compliance thereof.

On the basis of the international experience we know that effective realization of the right of restitution requires the phases of development and adoption of the peacekeeping agreements to include the rights of restitution of the persons, to return of whom hereof agreements were concerning.

The Annex N7 of the Daytona Agreement, ending the Bosnia and Herzegovina conflict, is the most recognizable peacekeeping agreement, which at the same time, became the guarantee of protection of rights of restitution of the affected persons. Though, other peacekeeping agreements, ending the conflicts in Sierra Leone, Liberia or Guatemala, failed to provide the same. It is as well noteworthy that international practice recommends raising the issue of restitution on earlier stage – negotiations.

Peace-building after the conflict is the political basis to include the issue of return of IDPs to the agenda and relevantly, to allow the affected person, through the unbiased competent body acting within the law, conduct the procedure of realization of own right of restitution.

In any case, protection of right of restitution is the obligation of the state, on the territory of which the affected persons are displaced.

4.1. Problems in Georgian Reality and State Policy Regarding IDPs

No doubt that leaving home and being IDP as a result of the armed conflict is the most long-term problem. Besides the fact that this problem causes the subsistent difficulties for the persons, who were personally through the conflict, it entails long-term impediments on the path of reconciliation and political resolution of conflicts. Due to this fact, IDPs have the impression that they are the victims of political confrontations.

The policy of the Government of Georgia on IDPs has been improved through the years. Initially, the Government instigated displaced persons to make them believe that their return was inevitable. At the same time, the Government has been abstaining from facilitation to their integration into the new environment. During the recent years, the policy of the Government has tended to higher attention to integration, development of state strategy on IDPs and higher attention to their living conditions and settlement.

Nowadays, the issues of long-term solution of the IDP problems, provision of their participation in social life, legal aspects of displacement, problems with integration and return, strategy and action plan, transparency of aid, security monitoring, settlement, accommodation, creation of incomes and solution of confrontations between the “old” (90s) and “new” (2008) IDPs are very relevant.

IDPs are the most vulnerable part of the population. They are damaged due to unavailability of houses, land, jobs, social service and health care. Recently, the Government has been reluctant to take care of their integration but the situation started to improve prior to August war, 2008 and this process became even more intensive after the 2008 summer conflict.

Development of state strategy on IDPs and adoption of the action plan for implementation thereof shall be evaluated as the leap ahead.[15]

4.2. Regard of Right to Return to Local Integration

Many of IDPs fear that after the aid and shelter provided by the state, they may lose the right of return and the right on the property. Naturally, it is misconception, often based on wrong information and lack of knowledge about own rights. Insufficiency of information and lack of transparency of decision-making process is relevant nowadays.

If we recall the data of the report on IDPs in Europe, we will see that there are 2,5 million IDPs, most of them in Turkey (1 million), and least in Macedonia (1 thousand). Majority of IDPs are put in this situation for about 15 years, and in Cyprus, there are internally displaced people for 30 years already.

Return of IDPs was the only solution of the problem till 2003; integration was considered as the synonym for assimilation. After the “Rose Revolution”, the accents were put on integration, which was considered as a possible alternative for reconciliation. Although, it is noteworthy that giving shelter does not mean integration and especially, does not mean return and refusal of right of restitution.

IDPs have two final ways to solve the problem: return or integration. The right of return is supported as on the national so on the international level. The fact is that return shall be voluntarily,

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[15] The report by the Public Defender of Georgia for 2008 on Human Rights State in Georgia. <http://www.ombudsman.ge/files/downloads/ge/dzympimgpvvrngdlhnno.pdf>.

safe and dignified. In this term, it is important that the Government of Georgia has the strategic plan for integration of IDPs.

In regards with displaced persons, the state strategy underlines necessity to achieve two primary goals: preparation of safe and dignified return of displaced[16] and improvement of living, social and economic conditions therefor.

The action plan for implementation of the strategic plan on displaced persons as well clearly indicates that the displaced persons shall enjoy improved living and social conditions.

As a conclusion we must state that the open dialogue on possibility to return is of crucial importance. In this term, international community may render the most valuable service, as the members thereof enjoy wider choice and more capacities to achieve the guideline principles on return and explanation of the rights. Besides, the international community shall convince de facto authorities to act in line with the UN guideline on internally displaced persons, i.e. "Pinheiro Principles".

5. Review of the Legislation of Georgia in Regards with the Right of Restitution

First of all, we shall note that the property restitution of the affected persons and the legal regulation thereof are the most important pre-conditions for elimination of the consequences of the conflict, for development of the state and social stability, as the factor, conditioning stability is the property right and availability of the mechanisms, guaranteeing protection (restoration) thereof.

The national legislation imposes the obligation on the Government of Georgia to compensate material damage inflicted to the population as a result of war.

The legislation of Georgia recognizes and endorses that the war-affected person is authorized, to be remunerated for the material damage inflicted as a result of war. Hereof legislative acts are as follows:

1. The Law On "Property Restitution and Compensation for the Persons on the territory of Georgia, Affected as a result of Conflict in Former South Ossetia Autonomous District"[17]; 2. The Law On "Internally Displaced Persons – Refugees".

In line with the part 2 of the Article 5 of the Law On "Property Restitution and Compensation for the Persons on the territory of Georgia, Affected as a result of Conflict in Former South Ossetia Autonomous District", the law defines the guarantees for reparation of the property, residence or other real estate, lost on the territory of Georgia as a result of conflict to the legal owners, which implies the right of the affected, to regain the real estate, or in the event of impossibility to regain real estate or other property, gain the adequate (substitute) residence of the equal value, and in the event of impossibility to convey the adequate (substitute) residence of the same value, to gain compensation for property damage.

The article 13 of the Law of Georgia "On Martial Law" envisages the obligation of the state, to compensate material damage[18], inflicted to the population during the martial law[19]. Hereof Law

[16] In terms of return, there is the religious program "My Home", issues documents to the displaced persons on the property, which they were forced to leave. More than 67.000 families have already registered their property. Later, existence of this property shall be confirmed by the ad hoc commission working in the post-conflict zone, which currently is unfortunately impossible.

establishes the following obligations for the state: a) provision of war-affected population with residual dwellings; b) remuneration of material damage to war-affected population; c) support to the war-affected population with employment; d) other various types of aid.

On January 1, 2007 the Law of Georgia On "Property Restitution and Compensation for the Persons on the territory of Georgia, Affected as a result of Conflict in Former South Ossetia Autonomous District" entered into force[20].

With hereof Law, the state recognizes the human rights and freedom, universally enhanced under the Constitution of Georgia and the international law, namely right of every person on property and adequate living standards regardless of the race, color, gender, language, ethnic and social affiliation, religion, conception, political or other views, the state assumes obligation to restore the rights of the affected in 1989-1992 as a result of conflict and in the post period, and to comply it with the international standards.

According to the Article 1 of the Law on "Property Restitution and Compensation", the law aims at: "property restitution of the natural persons on the territory of Georgia, affected as a result of the conflict in former South Ossetia Autonomous District, or provision with the adequate (substitute) real estate, or at compensation of property damage".

The Article 3 of hereof Law directly provides the principles of restitution (Pinheiro Principles), endorsed by the UN Sub-Commission on Human Rights:

1. Justice and equality;
2. Legality;
3. Respect and provision of human dignity, universally recognized rights and freedom;
4. Right of a person to obtain comprehensive information in state structures on the issues, related thereto;
5. Right of a person, to be provided with effective lawful needs;
6. Accountability of the state and responsibility thereof to the citizens and to the persons residing on the territory thereof;
7. Guaranteeing the right of free and voluntary return of the internally displaced persons.

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[17] According to the Sub-Paragraph "a" of the Article 2 of the Law On "Property Restitution and Compensation for the Persons on the territory of Georgia, Affected as a result of Conflict in Former South Ossetia Autonomous District", "the conflict is the armed conflict in former South Ossetia Autonomous District in 1989-1992 and post period and/or confrontation between Georgian and Ossetian population in other regions of Georgia".

[18] The Article one of the Law on Martial Law: "Martial Law implies declaration of special rules on the whole territory of Georgia in the event of attack on Georgia, which corresponds to the defense interests of the country. Martial Law shall be declared in line with the Constitution and hereof Law and aims at provision of territorial integrity, state security and public order in the country". The Article two of hereof Law: "Martial Law on the whole territory of Georgia shall be declared by the President of Georgia".

[19] Upon martial law, or in view to prevent thereof, the citizens, affected in regards with liquidation works, shall be provided by the state with residual dwellings, remunerated with material damage inflicted, aided in employment and otherwise rendered with support", the part one of the Article 13 of the Law on Martial law.

[20] In 2006, the Law has been submitted to the Parliament On "Property Restitution and Compensation for the Persons on the territory of Georgia, Affected as a result of Conflict in Former South Ossetia Autonomous District", developed in the Ministry of Justice and which in 2006 was approved by the CoE Venice Commission.

In view to implement the objectives, stipulated under the Law on Property Restitution and Compensation, in line with the Articles 6: the Commission on Restitution and Compensation shall be set up with the term of three years, and in the event, if the Commission, within the authority term, fails to completely solve the disputes, the Commission shall make the decision on extension of authority for the specific period of time. In line with the Article 7 of hereof Law, the objective of the Commission is to provide the persons on the territory of Georgia, affected as a result of conflict, with:

- Reparation of property;
- Adequate (substitute) residence;
- Compensation of damage of the property.

The right of restitution is also provided in the law of Georgia "On Internally Displaced Persons – IDPs", in line with the Article of which, if internally displaced person returns to his/her home, the executive authorities and municipal authorities, including the Ministry of Refugees and Settlement, shall provide him/her with realization of the rights, granted thereto under the Constitution of Georgia, shall undertake measures to create safe socio-economic conditions for the refugee at the permanent residence; shall repair personal property to the refugee or his/her legal heir, including the house and the privatized crofts in the form available at the moment; shall compensate the inflicted damage after definition of the limit amount thereof in line with the rule established by the Government, as well as in the event of restoration of the apartments unsuitable for residence, the citizen shall be granted with the guarantee to return.

Deriving from the above-mentioned, we may conclude that the right of restitution is universally recognized under the legislation of Georgia, i.e. there is the legal basis, according to which the war-affected person on the territory of Georgia, with inflicted damage of the property, is entitled to demand and obtain property restitution.

6. Conclusion

In total, we may conclude that the legislation of Georgia in general is in compliance with the Pinheiro Principles in regards with the right of restitution of the internally displaced persons.

In line with the Pinheiro Principles, it would be preferable to:

- Start speaking of the right of restitution for the refugees at the very stage of peaceful negotiations of the conflict;
- Include the right of restitution for the refugee in the peacekeeping agreements;
- Oblige the states to develop equal procedures and mechanisms, transparent and non-discriminative in order to study the applications and to apply them within the voluntary repatriation and peacekeeping agreements.

Inasmuch as negotiations on return and peacekeeping agreements are always ahead of the process of organized return, consideration of the accommodation and property issues shall be conducted upon the negotiations. Legal, judicial or other mechanisms necessary for protection of hereof right, shall be explicitly taken into account in the negotiation texts.

- Residence and property restitution issues shall be included into the procedures of registration of IDPs.

The states shall develop the systems, in order to at maximal extend, obtain the detailed information upon registration of IDPs about the property state of the persons prior to the conflict, shall mark down the address, type of residence and other information, which later shall be used to eliminate complications related to restitution in the event of return.

- The measures, subject to be undertaken related to restitution, shall be scheduled in the political and legal angle;

The states shall include the procedures related to property restitution, institutes and mechanisms in peaceful agreements and in the voluntary repatriation programs. The peacekeeping agreements shall envisage the specific obligations of the parties in view to solve the property issues, requiring availability of effective means for solution of displacement consequences within the international law. In the event of failure of solution – envisage danger, which will impede the peacekeeping process. At that, the right of restitution shall be clearly outlined as the paramount form of liquidation of the displacement consequences.

- The legislative norms in compliance with the international standards shall be developed.

The concurring legislative and administrative spaces are necessary to solve the accommodation and property problems. All the countries, encountering necessity of accommodation and property restitution of the IDPs on own territory, had to change the national legislations and adopt the series of amendments thereto. The practice clearly revealed that the clear and flexible legislative frame is paramount in order to realize the restitution programs.

As a general recommendation, we can state that the state is imposed with obligation – to provide IDPs with mandatory introduction of the relevant rights and current legislation.

Guram Nachkebia*

Juridical Thinking Rule and Resolution Part of the Verdict of Guilty

1. Introduction

Criminal law and the Criminal law Procedure are the constitutive elements of the Legal System, due to which the connection problem between these two fields of law requires the systematic methodology; hence this position goes to philosophical stage. Philosophical view will not only determine the specificity and connection between these two fields of law, but also will display the rule of Juridical thinking in each of them. Unfortunately, as we will see below the rule of Juridical thinking was mangled, when in Georgian Juridical Literature sociological terms such as: "Guilty" and "not guilty", "Subject of crime" and "the person of crime" were established. Neither of these terms or concepts expresses the legal condition of the person and for this their usage by the juridical meaning is inadmissible. The term **"Presumption of Innocence**" causes special confusion, which by no means is connected to the procedural condition of the accused person, therefore it causes the mangling of the real condition of the case**: Accused person, by his/her objective, procedural condition in not guilty, until the court proves the presumption of innocence otherwise, by proving the wrongful action of the accused person in the form of verdict of guilty**. Long research is needed this theses to be proven, rather it is presented in the following article, however we think that this introduction has the outmost essence, in order next research to be carried out fruitfully.

2. Problem Setting and Analyzes

Close connection between criminal law and a process of criminal law (also criminal procedural law) is not doubtful. But it comes out that criminal law is called "substantive law" in relation to the process of criminal law and it comes out that law of criminal procedure is as if "formal criminal law".

On the background of such circumstances it must be also clear that the close connection between these two fields of law must be expressed in adequate concepts. As it is known concept is a logical form of the thought which expresses essential features of a thing. But unfortunately in Georgian juridical science a serious research about the interrelation between these two fields of law has not been written. Practice and theory are going separately. By this reason many problems have been distorted in Georgia. For example the term "presumption of innocence" has been almost prevailed in Georgia (paragraph one of article 40 of the prior edition of Georgian Constitution) instead of the term "presumption of guiltlessness". The point is that the term "guilty" or "not guilty" expresses

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* Doctor of Legal Science, Academician of Academy Philosophy Science of Georgia, Emeritus Professor, Member of Dissertation Board, Director of the Scientific-Research Institute of Criminal Law and Criminal law Procedure of the TSU Law Faculty.

a rule of sociological thinking, as in this relation juridical thinking is impossible. Particularly for the juridical thinking rule a legal status of a person is crucial, and a legal status of a "guilty" or "guiltless" person does not exist. But unfortunately the term "presumption of innocence" as a principle has also been spread in Georgian code of practice of criminal law, namely according to the first part of article 5 "A person will be admitted to be guiltless until his/her guiltiness is affirmed by a guilty verdict of court become effective in law". It's not clear who this "abstract" person is, when in part 5 of article 3 (in the definition of terms) of the new Georgian code of practice of criminal law a person procedurally is called as "accused" (at investigation stage), on the basis of the guilty verdict delivered by the court - as "convict", but if the court acquitted the accused, then this person procedurally is called as "acquitted". So a person procedurally is "accused", but at the investigation stage the accused procedurally is not "innocent" but "not guilty". We must not forget that procedurally that accused is a person arraigned on a criminal charge. If a person arraigned on a criminal charge is "innocent", as it is foreseen in the first part of article 5 of Georgian procedural code of criminal law, then it comes out that we have arraigned on a criminal charge the innocent person while according to article 146 of Georgian criminal code it is an act of crime ("intentional arraignment of the innocent person on a criminal charge").

Hence it's absurd to allege that the person arraigned on a criminal charge, which is procedurally accused, as if is "innocent". Actually the accused procedurally is still not guilty. Therefore arraignment on a criminal charge does not represent criminal responsibility so far.

As it is seen a person at the investigation stage is more "accused", if he/she is arraigned on a criminal charge, but procedurally he/she is still "**not guilty**", until the court annuls this legal status (that he is "**not guilty"**) of the accused and puts him/her into the legal status - "**guilty**" by the guilty verdict delivered by it and from this position this person procedurally will be called **"convict"** (if this verdict is entered into effect).

In connection with this we have raised several times an issue about building this and other terms and concepts according to the juridical thinking, but our attempts were not followed by any results. For example, even in 1992 we were discussing a question about the crime composition, which as one of the fundamental concepts of material criminal law (though this concept has a procedural origin), is the basis of the presumption of innocence. Particularly, body of the crime, as a rule, is descriptive reasoning of the fact, but crime as the basis of blaming of the person or evaluative concept, can't be a component of the body of the crime[1] Correctness of our judgment was confirmed by the first part of article 7 of Georgian criminal code, which entered into effect from the 1st of June, 2000, according to which crime is an unlawful and accusative action envisaged by criminal law (as a German model of the crime concept).

As it is seen, in this concept of crime a criminal guilt is taken beyond the body of the crime, as well as beyond the frame of unlawfulness of this action. Hence it is obvious that **according to the material criminal law a person carrying out the body of the crime is innocent so far, as the guilt is taken beyond the body of the crime.** So it can be concluded that a person carrying out the body of

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1 See: *Nachkebia G.,* Corpus Delicti, as the Basis of Presumption of Innocence, "Law", 1992, # 8-9 (In Georgian).

the crime can't be "a criminal", because neither crime nor criminal can be without guilt, but at the same time this person can't be "guiltless" either, as it is supposed that in the form of the crime body this person has committed a crime. Moreover arraignment on a criminal charge without the intention called guilt forms or warning is impossible, but a form of the guilt is not guilt yet, as a "form" does not express "contents".

So it is obvious that a three-member division of the guilt concept, envisaged by the first part of article 7 of Georgian criminal code, is not a basis of **"presumption of guiltlessness"**, as it has been assumed up today, but it is a basis of "**presumption of innocence**". We repeat that the accused, which has carried out the crime body and by this reason he is arraigned, is **guiltless** yet, because the structure of the action does not involve guilt. So at the investigation stage of a criminal case the accused by his/her real procedural status will be **guiltless,** unless his/her guilt in committing an unlawful action, specified by the criminal law, has been stated by a form of guilty verdict.

The term "verdict of guilty" itself attracts attention. Of course there might also be verdict of not guilty, but the term "guilty" in relation to verdict means that **the accused is not right, is already guilty and so can't justify himself/herself.** [2]

As it is seen a principle of presumption of innocence expresses the unity of criminal law and a process of criminal law. On the one hand accusation is the last, third element of guilt and so carrying out the action unlawfully by the person does not even talk of the accusation of the person yet. On the other hand this fact must be taken as a basis of the procedural status of the "accused" at the investigation stage, which is objective and does not depend on any person.

An issue concerning the contents of the term "presumption of innocence", which is not juridical completely, was raised in our other work as well,[3]but there was no help for such type of thinking. Moreover, in Georgia in the verdict of guilty judges are stating that person "**must be recognized as "guilty",** when according to the juridical thinking rule the person (the accused) must be recognized as "**the accused**" **in committing an unlawful act specified by this or that article of Georgian criminal law,** moreover as it was already said legal status of the "guilty" does not exist.

Of course in committing the mentioned act the ascertainment of guilt of the accused confirms that **crime is committed,** but for one thing it is inadmissible to make logical conclusion on a "criminal" from the concept of guilt, as such a conclusion is sociologism, which does not take into account the person's procedural status or it represents disregard of a criminal process. For the other thing criminal law does not state a legal status of the person committing a crime. The point is that the commitment of a crime is not creating the relation between the crime committer and the state, as it has been spread up to now in Russian juridical literature, on the contrary it will take the crime committer beyond the criminal legal relationship with the state, where does not generally exist a legal status of the crime committer (a person committing a crime is not "guilty" yet, but he/she is not "guiltless" either, as it is not excluded that this person might have committed a crime). And the second, in the

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[2] Here we involuntarily recollect "Khevisberi Gocha" by *Al. Kazbegi,* when Gocha seeing his son Onise having been recognized as a traitor addresses his son with the following words: "If you can, justify yourself!" But Onise is not able to justify himself, i.e. he is not right (so he is guilty).

[3] See *Nachkebia G*., For the Constitutional Principle of the Presumption of Innocence, "Man and Constitution", 2000, # 1 (In Georgian).

process of criminal law this term does not express a legal status of the person. A legal status of a "criminal" does not generally exist. A question is: **How must judges recognize this person as "criminal", whose corresponding legal status does not exist?**

It is obvious that if a person is "guiltless" in the process of criminal law and the form of our thinking is expressed by this term, we will find ourselves in the more serious contradiction, namely if a criminal is "guiltless", it comes out that we have arraigned a guiltless person, that according to article 146 of Georgian criminal code is **"a crime".** [4]

The term "criminal" ("преступник") in Russian juridical literature is also used, but in the verdict of guilty instead of being written "recognized as a criminal" ("признать преступником") is written: "recognized as guilty" ("признать виновным"), which is quite right from the juridical point of view. It's also strange when blame by the Russian model of a crime concept is assumed as guilt, as well as an element of its composition; so it identifies these concepts with each other and by this logic there is no criminal legal basis for the presumption of innocence and yet in the verdict of guilty a person is recognized as blamed and not as a criminal. **Just for the information:** Some persons have attributed the term "presumption of innocence" to the advantage of a Georgian language, as this presumption can't be pronounced directly in Russian and by this reason for more convenience the term in Russian is: "presumption of innocence"("презумпция невиновности"). This argument is so much weak, that the following commentary is quite enough: If a thinking rule established in science and a form of its expressing (concept or category) depended on any language specifics, then **science as a systemic unity of universal and necessary judgments (**I. Kant) **would be impossible.**

So the term "presumption of innocence" is an antiscientific attempt to imagine the juridical thinking rule as a sociological thinking rule, while according to the juridical thinking rule it means "presumption of un guiltlessness", which expresses the objective legal (procedural) status of the accused and the basis of this procedural status is a three-member division of the crime(act composition, its unlawfulness and offender's guilt), in which guilt is the last, the third element of the crime concept. So the accused will be guiltless, until this third element of the crime concept is proved.

Here the terminology issue goes even farther and demands to review a number of traditional issues (e.g. the basis of the criminal responsibility is not a crime, but guilt[5]), at this time we are confined to this terminological issue, as it is seen that the usage of the wrong, non-legal terminology leads us into the uneasy and contradiction situation. It is more uneasy, when **a judge in this document of justice, such as a verdict of guilt, thinks non-legally and establishes "a criminal", whose legal status does not exist.**

So it is obvious that in the resolution part of the verdict of guilty instead of: "The person must be recognized as a criminal" there must be written: "The accused must be recognized as guilty in committing an unlawful act envisaged by criminal code", **as the accused according to his/her procedural status is guiltless and court must annul this procedural status by ascertaining his/her guilt.** Unfortunately the juridical thinking rule is often changed for gnoseological contents of truthiness-wrongness and a problem of appraisal is hidden. For example in one of the books of logics

[4] See *Nachkevbia G.,* Methodological Alphabet of Criminal Scientists, 2006, 158-163 (In Georgian).

[5] See *Nachkebia G.,* Criminal Law, General part, text-book, Tb., 2011, 61 (In Georgian).

is said the following: “In a criminal justice process an example of proving the truthiness of the thesis is to substantiate accusation of the accused. It is the main theme of the whole court process”.[6]Of course without ascertaining the truth on a criminal case it is impossible to give a qualification of guilt to the committed act, but firstly “qualification” means “appraisal” which can’t be discussed in gnoseological judgment; secondly, “accusation”, as a basis of reproaching a person in the name of the state is estimating, because of which it needs to be ascertained in a completely different way rather than proving the truthiness-wrongness of some thesis. Unfortunately in the above mentioned text-book of logics annulment of any thesis is understood as substantiation of the wrongness of the thesis, which is done by means of true arguments.[7]There is also said that “In the process of a criminal case an example of annulment is the evidence of the defense about the innocence of the accused”.[8]

Firstly the evidence of the defense about the innocence of the accused does not mean factual innocence of the accused. Secondly the term “annulment” does not really express a pure gnoseological act. Here not least important is estimative judgments. The main thing is that the annulment of the presumption of innocence of the accused by the court, which is accomplished by establishing the accusation of the accused, does not mean that at the investigation stage the objective legal status of innocence of the accused must be declared as wrong, as it is represented in the above mentioned text-book of logics. In spite of the fact whether the accused is factually guilty or guiltless in committing an unlawful act at the investigation stage with his/her procedural status he/she is still innocent and annulment of this objective legal status can’t be done by the court which already recognizes the accused as guilty in committing an unlawful act envisaged by criminal code.

3. Conclusion

Reasoning in this relation can be continued, but it is clear that this present article can’t be comprehensive for the problematic raised here and it demands a further exhaustive methodological approach.

6 *Ivanov E.A.,* Logic, Handbook, Moscow., 1996, 249 (In Georgian).

7 Ibid, page 249.

8 Ibid, page 249.

David Tsulaia*

Prohibition of Torture According to the International Legal Norms

1. Introduction

International community, from the very beginning of establishment of human rights, was acknowledging the torture as a violent action and paid special attention to the necessity of its prohibition. Accordingly, there has never been dispute on whether to include the issue of torture in the international acts. Torture is considered as one of the most significant violation, among the violations of human rights and freedoms, and its prohibition is fundamental, imperative *(jus cogens)* norm of international law.

Obligation for punishment of torture for the states acknowledging human rights and freedoms recognised by the international community are based on number of universal normative instruments. In twentieth century number of effective steps were undertaken for the eradication of torture. First time the universal prohibition of torture was implemented after the Second World War, in 1948, when the universal declaration on the human rights was adopted. Principles of this declaration were used as the basis for the international laws on human rights and number of international acts on the torture prohibition.

Since 1948, an international community has developed number of international legal instruments for the protection of human beings from torture, which are effective for all legal systems. Some international legal instruments envisage only prohibition of torture; some instruments provide definition of torture and mechanisms for avoiding / preventing, controlling the torture. We have to mention also that guaranties directed against the torture in comparison with the international legal instruments, are provided in more details in so called "soft law" acts, which do not have legally binding force. Many mechanisms and special international instruments were established for the prevention of torture. 26th June has been announced world-wide as international day for the support to the victims of torture, and in 1993 World Convention on the Protection of Human Rights has unanimously condemned torture as an evil deed.

Despite the joined efforts of international community, eradication of torture is still in the centre of world's attention. There are still many facts of torture identified in the world, committed in a concealed, as well as, open manner. Mainly, torture is used for the purpose of punishment, obtaining the information or confession. However torture is also used for other purposes, namely, specific fact of torture in turn results in the negative effect, such as establishment of fear in society.

According to the international law, prohibition of torture has an absolute nature and is considered as such a heavy violation of law, justification and limitation of which is inadmissible without any exception. Despite the above fact, because of application of norm of torture in practice, scientists have often doubted about the absolute nature of torture. Disputes related to the torture are mainly

* Doctoral Student, TSU Faculty of Law.

based on the conceptual understanding of torture itself. In many cases the issue is complicated with the fact that along with torture other synonymous terms such as inhuman and humiliating/degrading treatment are provided as heavy violations of human rights; the above is causing problems in precisely defining the torture. Moreover, the issue is even more complicated as torture definitions are not identical in various international acts. And finally, above mentioned circumstances along with other legal difficulties cause some complexities in the process of classification of action as torture.

As a result of above mentioned, our attention in the present article is focused on the issue of torture prohibition in the international legal norms. The research covered such issues as prohibition of torture in the international and regional instruments; definition of torture in the international instruments; composing elements of torture and torture, and other forms of ill treatment in case (common) law; different approaches related to the definition of torture and justification of an absolute nature of torture prohibition and possibility to deviate from the absolute prohibition of torture.

In the concluding part of the present article, the shortcomings related to the torture definition are mentioned. It is noted that absolute prohibition of torture has preventive purpose. The position regarding the improvement of torture definition, as well as regarding the possibility to deviate from the absolute prohibition of torture is presented. In terms of practical application of torture definition and for the in-depth examination of issues provided in the concluding part, the relevant proposals are provided.

The Georgian and foreign language literature of scientists and active law practitioners interested in the issue, relevant international legal acts, materials from court practice, legal basis of foreign countries and internet resources were used in the process of working on the article.

2. Prohibition of Torture in the International and Regional Instruments

2.1. Prohibition of Torture in the International Instruments

2.1.1 Acts adopted by United Nations

The Universal Declaration on Human rights (UDHR)[1] is the first international legal act, and at the same time the first step towards the eradication of torture, in which, by the article I, the prohibition of torture has been declared for the first time: “no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”

It has to be noted that at the very initial stage of implementation of human rights the international community was acknowledging torture as one of the most serious crimes and was assigning high important to the need of its prohibition. Accordingly, inclusion of torture prohibition in the United Nations UDHR was never a subject of dispute.[2]

1 UDHR was adopted on 10 December 1948 by the General Assembly of United Nations; See <http://www.un.org/en/documents/udhr/index.shtml>, [17.11.2012].

2 Declaration principles are the basis for the International legislation on human rights and are acknowledged by the countries as the principles of international law.

Following the adoption of UDHR the formula for the prohibition of torture has been reproduced in the various international, regional and “soft law” instruments devoted to human rights.

Following the adoption of UDHR the works on the development of International *Covenant on Civil and Political Rights* (ICCPR)[3] has started, which should have given a legal power to the UDHR principles along with economic, social and cultural rights.

ICCPR, as well as UDHR, provides provisions on the prohibition of torture. Articles 7 and 10 of ICCPR, together with the prohibition of torture underlines the following circumstances: (1) no one shall be subjected without his free consent to medical or scientific experimentation; (2) all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person, and (3) obligates the member states to ensure human treatment of all arrested persons.

Convention on the Rights of the Child (CRC)[4] - with the important changes, in the article 37 (a) repeats the UDHR formula for torture prohibition and indicates that *“No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment.”*

2.1.2 Geneva Conventions and their Additional Protocols[5]

Based on the experience acquired during the Second World War, as a result of long term consultations implemented by the Red Cross International Committee the “Geneva Conventions for the Protection of War Victims” has been developed.[6]

Article 3 of Geneva Convention and article 147 of the Fourth Convention provides the prohibition of torture for the persons directly participating in the war actions, including the representatives of armed forces, who have laid down the arms or who due to the illness, wounds, arrest or some other reasons are not participating in the war actions. Article 3 of Geneva Convention indicates that these persons notwithstanding their race, skin color, religion or belief, gender and origins shall be entitled for the human treatment without any discrimination; their torturing is prohibited always and everywhere.

Four Conventions represent the key element of international humanitarian law. Despite the fact that “conventions” mainly deal with the international conflicts, some provisions (especially the 2nd additional protocol) are used in the context of internal conflicts, such as civil war, rebel and war actions of lower scale directed against the armed groups. There are often additional interactions

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3 ICCPR was adopted on 19 December 1966 by the general Assembly, and became effective on 23 March 1976 and represents fundamental international agreement for the human rights, See <http://www2.ohchr.org/english/law/ccpr.htm>, [17.11.2012].

4 CRC was adopted by United Nations General Assembly on 20 November 1989 via 44/25 resolution and became effective on 2 September 1990, See <http://www2.ohchr.org/english/law/crc.htm>, [17.11.2012].

5 Mentioned conventions have been adopted by the Swiss Confederation, by the representatives of 48 countries invited to Geneva on 12 August 1949.[5] Two additional protocols to the above mentioned conventions have been also adopted on 08 June 1977. See 1. National Library of the Parliament of Georgia, electronic resources, *Geneva Conventions of 12 August 1949 and additional protocols,* See <http://www.nplg.gov.ge/gsdl/cgi-bin/library.exe>, [17.11.2012].

6 For the additional information on torture, please see judgment dated 16 November 1998, case: No.: IT-96-21-T, *Prosecutor v. Zejnil Delali*, See <http://www.icty.org/x/cases/mucic/tjug/en/cel-tj981116e.pdf>, [15.12.2012].

between the standards from human rights and humanitarian norms for armed conflicts in such situations. However, under any circumstances any form of torture and violent treatment is forbidden.[7]

2.2. Prohibition of Torture in the Regional Instruments

2.2.1 European Instruments

With the objective to implement human rights acknowledged by UDHR the following documents have been adopted: *European Convention on Human Rights* (ECHR)[8] and *Charter of Fundamental Human Rights of the European Union* (CFR)[9]. Both documents shorten the formulation of the torture prohibition provided in UDHR with the deletion of word "cruel" and indicate that *"no one shall be subjected to torture or to inhuman or degrading treatment or punishment."*[10]

2.2.2. American Convention on Human Rights (ACHR)[11]

Article 5(2) of American Convention on Human Rights (ACHR) repeats word by word formulation of the torture prohibition provided in UDHR and further indicates that "all persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person".

2.2.3 African Charter on Human and Peoples' Rights (ACHPR)[12]

African Charter on Human and Peoples' Rights (ACHPR) does not repeat formulation of the torture prohibition provided in UDHR. The Charter prohibits the exploitation of human beings, all humiliating forms including torture.[13]

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7 Review of International Mechanisms for the Eradication of Torture, 6-7, See <www.bureau.kz/lib/ download/1617.doc>, [17.11.2012].

8 ECHR was adopted in Rome, on 04 November 1950; it became effective on 03 September 1953; ECHR is known as "European Convention of Human Rights", See <http://www.humanrightsinitiative.org/ programs/ ai/rti/international/laws_papers/uk/echr.pdf>, [17.11.2012].

9 Was adopted on 07 December 2000, See <http://www.europarl.europa.eu/charter/pdf/text_en.pdf>, [17.11.2012].

10 See ECHR, Article 3, CFR, Article 4.

11 ACHR was adopted on 22 November 1969 and became effective on 18 July 1978, See <http://www. hrcr.org/docs/American_Convention/oashr.html>, [17.11.2012].

12 ACHPR was adopted on 27 June 1981 in Nairobi and became effective on 21 October 1986, See <http://www1.umn.edu/humanrts/instree/z1afchar.htm>, [17.11.2012].

13 ACHPR, Article 5, "Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited."

2.2.4 Islamic Instruments

Universal Islamic Declaration of Human Rights (UIDHR)[14] does not repeat formulation of the torture prohibition provided in UDHR and avoids such terms as "cruel", "inhuman" and "punishment". UIDHR does not also use term "prohibition" and in the article devoted to "Right to protection against torture" indicates the following: "no person shall be subjected to torture in mind or body, or degraded..."[15]

Cairo Declaration on Human Rights in Islam (CDHRI) [16] has generalised torture prohibition. It can be said that with the exception of term "inhuman" CDHRI considers the formulation of the torture prohibition provided in UDHR. If we assume that term "inhuman treatment" belongs to the form of "*ill treatment*", then we can state that CDHRI is indirectly considering all elements of UDHR formulation on the torture prohibition.[17]

2.3. Interpretation of Torture Prohibition by the International Courts

Torture prohibition in the above indicated instruments represent *jus cogens* norm codification.[18] Article 15 of European Convention on Human Rights (ECHR) does not give to any State contracting to the agreement the right to deviate from the absolute prohibition of torture. Establishment of torture prohibition as the non-appealed norm of international law is illustrated in number of international court decisions.[19]

One can read the following in the judgment of International Criminal Tribunal for the Former Yugoslavia (ICTY) on Furundzija case:

"It should be noted that the prohibition of torture laid down in human rights treaties enshrines an absolute right, which can never be derogated from, not even in time of emergency . . . . This is linked to the fact . . . that the prohibition on torture is a peremptory norm or jus cogens. . . . This prohibition is so extensive that States are even barred by international law from expelling, returning

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14 UIDHR, was adopted on 18 September 1981, See <http://www1.umn.edu/humanrts/instree/islamic_declaration_HR.html>, [17.11.2012].

15 UIDHR, Article 7, "No person shall be subjected to torture in mind or body, or degraded, or threatened with injury either to himself or to anyone related to or held dear by him, or forcibly made to confess to the commission of a crime, or forced to consent to an act which is injurious to his interests."

16 CDHRI was adopted on 05 August 1990 in Cairo, by the Ministers of Foreign Affairs of 45 Countries, members of Organisation of Islamic Conference (OIC), at 19th Islamic conference, See <http://www1.umn.edu/humanrts/instree/cairodeclaration.html>, [17.11.2012].

17 CDHRI, Article 20: "It is not permitted without legitimate reason to arrest an individual, or restrict his freedom, to exile or to punish him. It is not permitted to subject him to physical or psychological torture or to any form of maltreatment, cruelty or indignity. Nor is it permitted to subject an individual to medical or scientific experiments without his consent or at the risk of his health or of his life. Nor is it permitted to promulgate emergency laws that would provide executive authority for such actions."

18 All Internationa instruments containing provision on torture prohibition has absolute nature. The above meaning that norm on torture prohibition does not allow the State to justify torture under any circumstances.

19 Decisions of European Court on Human Rights (ECtHR): *Ribitsch v. Austria*, 4.12.1995, paragraph 38; *Tekin v. Turkey*, 9.06.1998, paragraph 53; *Asenov v. Bulgaria*, 28.10.1998, paragraph 94.

or extraditing a person to another State where there are substantial grounds for believing that the person would be in danger of being subjected to torture. ”[20]

European Court on Human Rights in the case *Al-Adsani v. United Kingdom* has adopted similar position:

“*Within the Convention system it has been recognised that the right under Article 3 no one can be subjected to torture or to inhuman or degrading treatment or punishment, which implies one of the fundamental values of democratic society. It is an absolute right, permitting of no exception in any circumstances.”*[21]

Prohibition of torture as *jus cogens* principle is included in the strict norms of international law. In this regard ICTY notes:

“Because of the importance of the values it protects, this principle has evolved into a peremptory norm or jus cogens, that is, a norm that enjoys a higher rank in the international hierarchy than treaty law and even “ordinary” customary rules. The most conspicuous consequence of this higher rank is that the principle at issue cannot be derogated from by States through international treaties or local or special or even general customary rules not endowed with the same normative force”[22]

Torture prohibition principle was even more comprehensively illustrated in other international norms[23] and *“soft laws”*[24], in which an article 3 of ECHR have been generalised.

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[20] *Prosecutor v. Furundzija*, ICTY Case No. IT-95-17/1, Trial Chamber Judgment, 144 (1998), See *Cullen A.,* Defining Torture in International Law: A Critique of the Concept Employed by the European Court of Human Rights, California West International Law Journal, Vol. 34, #1, 2003, 30, See <http://ssrn.com/abstract=2217008>, [17.11.2012].

[21] *Al-Adsani v. United Kingdom*, App. No. 35763/97, 34, 11, 29 (2001), See *Cullen A.,* Defining Torture in International Law: A Critique of the Concept Employed by the European Court of Human Rights, California West International Law Journal, Vol. 34, #1, 2003, 31, ix. <http://ssrn.com/abstract=2217008>, [17.11.2012].

[22] *Prosecutor v. Furundzija*, ICTY Case No. IT-95-17/1, Trial Chamber Judgment, 144 (1998), See *Cullen A.,* Defining Torture in International Law: A Critique of the Concept Employed by the European Court of Human Rights, California West International Law Journal, Vol. 34, #1, 2003, 31, ix. <http://ssrn.com/abstract=2217008>, [17.11.2012].

[23] 1. For example, European Convention against Torture or degrading treatment or punishment (CPT), adopted in 1987 year in Strasburg and became effective on 01 February 1989; it was ratified by all member states of European Community, See <http://www.cpt.coe.int/en/documents/eng-convention.pdf> (obtained: 17.11.2012); 2. Convention is multi-facet document and is distinguished from other documents with the different approach. CPT is more inclined towards the preventive approach, in other words torture prevention, as the main mean for eradication of torture is its prevention and not its prohibition and repressions. Based on CPT the Committee On the prevention of Torture was established, with the responsibility to visit detention centres in order to identify the compliance of detention centre conditions with the Convention.

[24] International legal acts, belonging to so called “soft law” are not considered as sources of international law, however they play significant role and wide-scale moral-political importance. Examples for such acts are: Vienna declaration and action program; Declaration on police; Code of Conduct for the employees of law enforcement bodies; 10 key standards related to the human rights (which are the basis for the behaviour employees of law enforcement bodies); Collection of principles for the protection of arrested in any form or detained persons and etc.

3. Definition of Torture in the International Instruments

3.1. Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[25]

The first international act providing definition of torture is the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter referred to as “United Nations Declaration against Torture”). According to article 1, for the purpose of “United Nations Declaration against Torture” “torture” is defined as:

“1. Any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official or a person for such purposes as obtaining from him or a third person information or confession, punishing him for an act he has committed or is suspected of having committed, or intimidating him or other persons. It does not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions to the extent consistent with the Standard Minimum Rules for the Treatment of Prisoners

2. Torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment.”

According to the “United Nations Declaration against Torture” any act of torture represents the crime against the human dignity, which is considered as violation of human rights and freedoms declared under the United Nations statutes and UDHR.

Definition of “torture” in the United Nations declaration is considered as inaccurate and has been criticised many times. Discussions held made it clear that definition of “torture” had to be elaborated; the above has been reflected in the first paragraph, of article 1 of UNCAT.[26]

Actually, United Nations Declaration against Torture was considered as the initial position for launching the future work against torture. By the next resolution, adopted in the same year, on 9 December 1975, the General Assembly of United Nations for ensuring the efficient implementation of Declaration on Torture assigned the Human Rights Commission to study the torture and issues related to torture. After two years, on 8 December 1977, the United Nations General Assembly requested the Human Rights Commission to develop convention against the torture and other cruel, inhuman or degrading treatment or punishment with the consideration of principles provided in the United Nations Declaration against Torture (# 32/62 resolution).[27]

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[25] Adopted on 9 December 1975 by General Assembly by resolution # 3452 (XXX), See <http://www.un-documents.net/a30r3452.htm>, [17.11.2012], “United Nations torture declaration”, See <http://www2.ohchr.org/english/law/ declarationcat.htm>, [17.11.2012].

[26] *Danelius H.,* Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, United Nations Audio-visual Library of International Law, 1. <http://legal.un.org/ avl/pdf/ha/catcidtp/catcidtp_e.pdf>, [17.11.2012].

[27] *Danelius H.,* Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, United Nations Audio-visual Library of International Law, 1. ix. <http://legal.un.org/avl/pdf/ha/catcidtp/catcidtp_e.pdf>, [17.11.2012].

3.2. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT)[28]

United Nations Commission on Human Rights has started work on Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment UNCAT in February–March, 1978. Among numerous issues[29] development of "torture" definition was one of the disputable topics, as definition of torture in the "Declaration Against Torture" was considered as inaccurate.[30]

It has to be noted that in terms of eradication of torture, UNCAT is considered as the of world-wide rank legal agreement and accordingly contains torture definition acknowledged internationally. According to article 4 of UNCAT:

" Each State Party shall ensure that all acts of torture are offences according to the criminal legislation of the specific state. The same shall be extended for attempts to commit torture, and any action representing complicity or participation in torture and implemented by any person."

With the consideration of the above circumstances, in the process of analysis of torture definitions provided in other international legal acts, it is necessary to compare them with the torture definition provided in UNCAT.[31]

Differences between the torture definitions in the "United Nations Declaration against Torture" and "Convention against Torture" are as follows: a) instead of "other persons" UNCAT uses the notion of "third person"; b) instead of "intimidating other persons" the following words were inserted – " intimidating or coercing another person, or for any reason based on discrimination of any kind"; c) UNCAT expands the notion of crime subject and also the elements of objective action, which means that torture is inflicted not only "by or at the instigation of a public official" but also "with the permission or acquiescence of a public official or someone acting in an official capacity;" d) with regard to the circumstances excluding torture, UNCAT does not repeat the provision of "United Nations Declaration against Torture" *"Compliance with the standard minimal rules for the treatment*

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28 United Nations General Assembly via the resolution No 31/ 46, dated 10 December 1984 has adopted UNCAT[28], which became effective on 26 June 1987.[28] As for the convention indicated in the literature is known with the title "United Nations Torture Convention".

29 1. *Danelius H.,* Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, United Nations Audio-visual Library of International Law, 1-2. <http://legal.un.org/avl/pdf/ha/catcidtp/catcidtp_e.pdf>, [17.11.2012]; 2. Among the issues to be discussed there were such issues as for example: assigning status of "universal jurisdiction" for the torture prohibition, establishment of monitoring mechanisms and etc.

30 *Danelius H.,* Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, United Nations Audio-visual Library of International Law, 1-2. <http://legal.un.org/avl/ pdf/ha/catcidtp/catcidtp_e.pdf>, [17.11.2012].

31 Article 1 of UNCAT: " any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."

of prisoners under lawful sanction" and limits this provision with the indication of *"lawful sanction";* e) article one of "United Nations Convention against Torture" does not comprise of two section and accordingly, does not repeat the provision of section two of article 1 of the "United nations Declaration against Torture" that *"torture is the aggravating and intentional form of cruel, inhuman or degrading treatment or punishment."*

In the textbook for the torture prevention it is indicated that UNCAT clearly excludes the pain and suffering, which are based on, is integral part or caused incidentally by the lawful sanction; that lawfulness of sanctions shall be defined by the national and international standards, including the UN Standard Minimum Rules for the Treatment of Prisoners, as such approach acknowledges the absolute nature of torture prohibition as well as need for its application.[32]

The advantage and characteristic of UNCAT is that it is not static. The UNCAT does not exclude expansion of torture definition area and hence, does not restrict the use of wide definition of torture.[33]

Based on the above, wide definition of torture, which covers many aspects of situation, allows the application of other international, regional and national legislations. Based on the above, in case of application of wide definition the UNCAT definition could not be used for its narrowing.[34]

3.3. Rome Statute of the International Criminal Court[35]

The objective of adoption of Rome Statute *(hereinafter referred to as "Rome Statute")* was to establish international criminal court. This body represents permanently functioning international court, statutes of which have included torture as the crime directed against the human being and war crime along with the other heavy crimes causing concern of international community.[36]

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32 Preventing Torture: An Operational Guide for National Human Rights Institutions, Association for the Prevention of Torture, OHCHR, APT and APF, Sydney, Australia and Geneva, Switzerland May, 2010, 13, See <http://www.ohchr.org/Documents/Publications/PreventingTorture.pdf>, [17.11.2012].

33 (1) According to Article 1(2) of UNCAT: "This Article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application." This Article does not contradict with any international document or internal state legislation, covering or may cover provision on wider application; (2) According to Article 16 (2) of UNCAT: "The provisions of this Convention are without prejudice to the provisions of any other international instrument or national law which prohibit cruel, inhuman or degrading treatment or punishment or which relate to extradition or expulsion."

34 For the additional information on the boundaries of the torture definition in case law, please see chapter III.

35 Adopted on 17 July 1998 at the Conference of Authorised Representatives of United Nations, See <http://untreaty.un.org/cod/icc/statute/99_corr/cstatute.htm>, [18.11.2012].

36 The Article 5 of Rome Statute of International Court of Criminal Law, along with the torture as the crime against the humanity other crimes subject to the court jurisdiction are defined: genocide, war crimes and aggression.

3.3.1 Torture as the Crime Directed against the Human Being

According to the article 7 of Rome Statute torture as the crime directed against the humanity, is in place when it is committed against any civilian population as part of widespread or systematic attack, with the knowledge of the attack. Article 7 of Rome Statute has actually repeated the formulation of "torture" provided in the article one of UNCAT, namely, for the purposes of article 7, "Crimes against the Humanity", paragraph one "torture" means:

"*The intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions*" [37]

We can state that crimes against the humanity turned out to be the subject of acute discussions. Disputes were related to defining when to consider the actions as "*widespread*" or *"systematic";* and exactly which action could be considered as action which is envisaged under the article 7 of Rome Statute and what should be the elements composing this action?[38]

The common elements of crime against the humanity were defined as follows: *`action committed against any civilian population as part of widespread or systematic attack; the criminal was aware that action was part of such attack"*[39]

Accordingly elements of crime against humanity, torture are the following:[40] 1. Cruel physical or mental pain or suffering to one or several persons inflicted by the criminal; 2. Such person or persons must be under imprisonment or under the control of perpetrator; 3. Pain or suffering is not considered as torture if it is inflicted under the lawful sanction or integral to such sanction or was incidental to the execution process of sanctions; 4. Action shall be committed as a part of widespread and systematic attack against the civilian population; 5. The perpetrator's actions shall be intentional.

Based on the above, it is clear that despite the similarity of torture as the crime against humanity and the definition of crime in UNCAT, the main difference is represented in the absence of special purpose, and that article 7 of Rome Statute does not require committing crime on the discrimination basis.

3.3.2 Torture as War Crime

War crime with its description is relevant to the crime against humanity. First category of war crimes listed in the article 8 comprise of "Grave, serious violations" of 1949 Geneva conventions, as for the second category, it comprises of "serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law"[41]

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[37] See paragraph (e), Article 7 of Rome Statute.

[38] *Khutsishvili K.,* Competitive and Complementing Competences of United Nations Security Council and International Court of Criminal Law, Tbilisi, publishing house Universal, 2011, 62-63 (In Georgian).

[39] *Khutsishvili K.,* Competitive and Complementing Competences of United Nations Security Council and International Court of Criminal Law, Tb., publishing house Universal, 2011, 62-63 (In Georgian).

[40] See Articles 7(1) (f) and (2) (e) of Rome Statute; 2. UN, Preparatory Commission for the International Criminal Court Distr.: PCNICC/2000/1/Add.2, General 2 November 2000, 12. <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N00/724/27/PDF/N0072427.pdf?OpenElement>, [18.11.2012].

[41] *Khutsishvili K.,* Competitive and Complementing Competences of United Nations Security Council and International Court of Criminal Law, Tbilisi, publishing house Universal, 2011, 66-68 (In Georgian).

The torture elements of war crimes of the Rome Statute are:[42] 1. Cruel physical or mental pain or suffering to one or several persons inflicted by the perpetrator; 2. The pain and suffering inflicted by the perpetrator must serve the following purposes: obtaining information or confession, punishment, intimidating or coercion or any kind of discrimination for any reason; 3. Such person or persons are protected under one or more 1949 Geneva Conventions; 4. The criminal is conscious of factual circumstances, which determine such protection status; 5. Action is committed in relation to the international armed conflict and is associated with the international armed conflict; 6. The perpetrator is conscious of factual circumstances, which determine the existence of armed conflict.

Machteld Boot defines that necessary condition differentiating the crime against humanity from the torture of war crime under the Rome Statute is the purpose.[43] However torture, as the crime against humanity, according to the article 7 of Rome Statute provides the direct provision that it is not necessary to have special purpose.[44] List of purposes, provided in the elements of war crime torture has illustrative nature and is used in terms of wide interpretation.[45]

Moreover, torture in the war crimes unlike the torture in the crimes against humanity does not require person to be imprisoned or under the control of perpetrator. The element of grave violations requires that all injured persons are "persons protected" under one of Geneva Conventions. This requirement does not contain imprisonment and control criteria, provided in paragraph (e), section 1, article 7 of Rome Statute.[46]

3.4. Inter-American Convention to Prevent and Punish Torture (IACPPT)

Definition of torture in Inter–American Convention to Prevent and Punish torture (IACPPT)[47] clearly overruns the limits of "torture" definition in UNCAT[48]. The following aspects of given

[42] See Articles 8(2)(a)(ii) and (b)(i) of Rome Statute; 2. UN, Preparatory Commission for the International Criminal Court Distr.: PCNICC/2000/1/Add.2, General 2 November 2000, 19, See <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N00/724/27/PDF/N0072427.pdf?OpenElement>, [18.11.2012].

[43] *Boot M.,* Genocide, Crimes Against Humanity, War Crimes: Nulum Crimen Sine Lege and the Subject Matter Jurisdiction of The International Criminal Court, School of Human Rights Research, Intersentia, Leiden, 2001, 587.

[44] *Boot M.,* Genocide, Crimes Against Humanity, War Crimes: Nulum Crimen Sine Lege and the Subject Matter Jurisdiction of The International Criminal Court, School of Human Rights Research, Intersentia, Leiden, 2001, 587, sq. 177, 2. UN, Preparatory Commission for the International Criminal Court PCNICC/2000/1/Add.2, Distr.: General 2 November 2000, Article 7(1) paragraph f, 12. See <http://www.iccnow.org/documents/ElementsofCrimeEng.pdf>, [18.11.2012].

[45] *Boot M.,* Genocide, Crimes Against Humanity, War Crimes: Nulum Crimen Sine Lege and the Subject Matter Jurisdiction of The International Criminal Court, School of Human Rights Research, Intersentia, Leiden, 2001, 587.

[46] 1. *Boot M.,* Genocide, Crimes Against Humanity, War Crimes: Nulum Crimen Sine Lege and the Subject Matter Jurisdiction of The International Criminal Court, School of Human Rights Research, Intersentia, Leiden, 2001, 587. case 178, 2. UN, Preparatory Commission for the International Criminal Court PCNICC/2000/1/Add.2, Distr.: General 2 November 2000, Article 7(1) paragraph f, 19. quotation. 35, See <http://www.iccnow.org/documents/ElementsofCrimeEng.pdf>, [18.11.2012].

[47] IACPPT, adopted on 12 September 1985, See <http://www.iadb.org/Research/legislacionindigena/pdocs/CONVENCIONTORTURA.pdf>, [18.11.2012].

definition are worth noting: 1. Definition does not stress the “cruelty” of pain and suffering; 2. Indicates on “any other purpose”; 3. Widens the torture concept with the inclusion of actions which do not cause pain and suffering: “*Torture shall be also understood as actions .....if such methods do not cause physical or mental pain.”*

Moreover, IACPPT specifies the circle of torture subjects and together with the definition of torture provides the list in the separate article.[49]

3.5. World Medical Assembly Tokyo Declaration (Tokyo Declaration)

“Tokyo Declaration” [50] in its preamble for the purpose of declaration defines term “torture” as: “*Deliberate, systematic or wanton infliction of physical or mental suffering by one or more persons acting alone or on the orders of any authority, to force another person to yield information, to make a confession, or for any other reason.”*[51]

Definition of “torture” provided in the “Tokyo Declaration” is the shortened version compared with the UNCAT definition; for example it does not consider such elements as seriousness of suffering and is considered as *“definition having less legal nature”*[52].

4. Elements Composing Torture and Torture and other forms of Ill-Treatment in the Case (Common) Law

4.1. Characterisation of Elements Composing Torture in UNCAT

For the qualification of action as violation of article one of UNCAT, conditionally the following elements can be distinguished:

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[48] According to the Article 2 of Inter-American Torture Convention, for the purposes of convention torture is: “act intentionally performed whereby physical or mental pain or suffering is inflicted on a person for purposes of criminal investigation, as a means of intimidation, as personal punishment, as a preventive measure, as a penalty, or for any other purpose. Torture shall also be understood to be the use of methods upon a person intended to obliterate the personality of the victim or to diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish.
The concept of torture shall not include physical or mental pain or suffering that is inherent in or solely the consequence of lawful measures, provided that they do not include the performance of the acts or use of the methods referred to in this Article.”

[49] IACPPT, Article 3: "A public servant or employee who acting in that capacity orders, instigates or induces the use of torture, or who directly commits it or who, being able to prevent it, fails to do so; A person who at the instigation of a public servant or employee mentioned in subparagraph (a) orders, instigates or induces the use of torture, directly commits it or is an accomplice thereto.”

[50] In October 1975, in Tokyo the 29th Assembly of World Medical Association adopted declaration, devoted to the guiding principles of medical personnel in case of torture or other cruel, inhuman or degrading treatment or punishment of detained persons or prisoners. Mentioned declaration is known as 1975 year World Medical Assembly “Tokyo Declaration”. Above mentioned act is the act of “soft law”.

[51] “Tokyo declaration”, 1975, preamble.

[52] See <http://phrtoolkits.org/toolkits/istanbul-protocol-model-medical-curriculum/module-1-international-legal-standards-overview/torture/other-definitions/printpage/>, [18.11.2012].

1. Action inflicting cruel pain and suffering for the person;
2. Intention related to the special purposes;
3. Action carried out by the public official. [53]

4.1.1. Cruelty

The first element of torture and possibly the most distinguishing one is the sign of "cruelty" in inflicting pain and suffering.

Generally, in the international law on human rights, in order to qualify the action as torture, such action shall cause certain level of physical and psychic pain and suffering.[54] Above mentioned provision is reflected in the ICTY justice system,[55] in ECHR[56] and in the Committee on Human Rights.[57] Accordingly "cruelty" is considered as the sign differentiating the torture from other similar crimes.

However, the problematic aspect of "cruelty" element is that it is difficult to determine the level of "cruelty" in order to qualify it as torture.[58] ***Anthony Cullen*** notes that it is problematic to determine the level of "cruelty" without consideration of opinion of the injured person.[59] ***Chris Ingels*** shares the factor of injured person's view and underlines the fact that real determining factor of torture is also the result incurred by the injured person.[60] According to ***Mafred Novak*** *"the decisive and differentiating*

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53 There are various classifications of elements composing the torture definition envisaged under UNCAT in the literature. For example, instead of three components there are four or seven elements and accordingly, the different sequence of elements is provided; for example, "action", "physical pain or mental suffering" or "pain or suffering proceeding from the lawful sanction" and etc can be reviewed as separate elements. For the additional information related to the torture definition elements, See 1. <http://echr.coe.int/NR/rdonlyres/0B190136-F756-4679-93EC-EEBEAD50C3/0/DG2ENHRHAND062003.pdf [17.11.2012]; 2. <http://www.bbc.co.uk/ethics/torture/ law/definitions.shtml>, [17.11.2012]; 3. *Long D., Naumovich N.,* Practical Handbook on Torture Prevention, Inter-American Institute, 2006, 20.

54 *Cullen A.,* Defining Torture in International Law: A Critique of the Concept Employed by the European Court of Human Rights, California West International Law Journal, Vol. 34, #1, 2003, 34, cit. 37, ix. <http://ssrn.com/abstract=2217008>, [17.11.2012].

55 *Prosecutor v. Delalic* et al., ICTY Case No. IT-96-21-T, Trial Chamber Judgment, 455, 456, 468 (1998), See <http://www.icty.org/x/cases/mucic/acjug/en/cel-aj010220.pdf>, [15.12.2012].

56 For the additional information see the section of paragraph two, chapter III, which covers discussion on the case "*Ireland Vs United Kingdom".*

57 Ibid, 32, United Nations Human Rights Committee General Comment 20, U.N. CCPR 44th Sess., 1138th mtg. 5 (1992) *reprinted in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. GAOR, U.N. Doc. HRI/GEN/1/rev.5 (2001).

58 For the additional information See *H., & Danelius H.,* The United Nations Conventions Against Torture: A Handbook on the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1988), 117-18.

59 *Cullen A.,* Defining Torture in International Law: A Critique of the Concept Employed by the European Court of Human Rights, 32. ix. <http://www.lcil.cam.ac.uk/Media/Anthony_Cullen_Defining_Torture_Article.pdf>, [17.11.2012].

60 According to ***Chris Ingels:*** "Only the injured person can become the witness of pain and suffering, result incurred by the injured person; whether the torture was committed is also determining factor; Intention of

criterion of torture from the cruel, inhuman and degrading treatment is the purpose of action and powerlessness of the injured person and not the intensity of pain or inflicted suffering.”[61] It is also necessary to note that in the case *Ireland vs United Kingdom*, the ECtHR has not taken into account the opinion of the injured person in the process of qualification of action as torture.[62] Moreover, there is more radical approach, which fully excludes existence of not only “cruelty”, but also violence elements for the consideration of action as torture.[63]

We have to also mention that the limiting sign of UNCAT is the fact that the definition does not include all types of ill-treatment, causing physical and psychic pain and suffering, but covers only such actions, which by their nature are “cruel”.[64]

4.1.2. Intention Related to the Special Purposes

4.1.2.1. Intention

UNCAT definition requires deliberate infliction of cruel pain or suffering to the person. More precisely, action will be qualified as torture, if public official deliberately inflicts suffering or pain. ***Anthony Cullen*** is of the view that if the ill-treatment is caused by the incidental carelessness, such as, for example forgetting to give the food to prisoners, then this does not mean torture. Such action can be characterized as cruel, inhuman or humiliating or punishment. In order to qualify the action as torture it is necessary to have element of “intention” of inflicting pain or suffering from the perpetrator.[65]

The ECtHR transferred the burden of proving the intention to the government. For example, on the case *Selmouni vs France*, the ECtHR noted that “when the person is placed in the police’s detention room in the healthy condition but at the moment of his/her release the body injuries are identified, in this case the State is liable to explain under which circumstances were the injuries inflicted.”[66] Due to the fact that the State was not able to provide explanations on the above fact,

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perpetrator to inflict pain is irrelevant at least for the subjective understanding of the intensity…. The above enables us to make several assumptions, based on which we can make objective conclusion”. Ibid, 33.

[61] Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment of punishment, UN Doc. E/CN.4/2006/6, paragrafi 39.

[62] *Ireland v. United Kingdom*, App. No. 5310/71, 2 Eur. H.R. Rep. 25 (1980), See *Cullen A.,* Defining Torture in International Law: A Critique of the Concept Employed by the European Court of Human Rights, California West International Law Journal, Vol. 34, #1, 2003, 30, ix. <http://ssrn.com/abstract=2217008>, <http://www.lcil.cam.ac.uk/Media/Anthony_Cullen_Defining_Torture_Article.pdf>, [17.11.2012].

[63] For the above issue see chapter III, paragraph M2-2, sub-paragraph 2.2.

[64] *Garcia M.,* U. N. Convention Against Torture (CAT): Overview and Application to Interrogation Techniques, Congressional Research Service, 2009, 2.

[65] *Garcia M.,* U. N. Convention Against Torture (CAT): Overview and Application to Interrogation Techniques, Congressional Research Service, 2009, 32.

[66] *Selmouni v. France*, 29 E.H.R.R. 403, 426 (2000) See *Miller G.,* Defining Torture, New York, Benjamin N Cardozo School of Law, 2005, 13, *quotation 71,* See <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58287>, [20.11.2012].

ECtHR considered that the State committed torture, despite the absence of evidences related to the intention and confirming the identity of torture committing person.[67] Physical injury inflicted in the period of detention and testimony of injured person turned out to be sufficient for determining the element of intention for torture.[68] However, according to ACHR on case "*Paniagua Morales v. Guatemala"* it is not necessary to determine the intention of perpetrator.[69] In relation to the intention element, it has to be mentioned that the word "intention" in the UNCAT definition of torture implies action, infliction of injury and purposes.[70]

4.1.2.2 Special Purposes

The main essence of intention is represented in the achievement of special purpose, namely: "*Obtaining information or confession from the person or third person, his/her punishment for the action which was committed by the person or third person, or action for committing of which the person is suspected, or intimidating of third person or coercion or for any action based on the discrimination for any reason."*[71] There is an opinion expressed in the legal literature that the provision in the UNCAT definition *"for such purposes, as…."* indicates that the purposes are not comprehensive;[72] however definition provides sufficient indications on the purpose, which might be behind the physical or psychological damage.[73] According to ***Burger and Daniel,*** in order to consider ill-treatment as torture, the purpose shall have *"some, even distant connection with the policy or interests of the State and bodies of the State."*[74] Based on the above, in order to qualify action as torture, "purpose" must not simply be one of the purposes provided in the torture definition of UNCAT, it must have element connecting with the State, in other words, connection with the *policy or interests of the State and bodies of the State.* And State factor is based on the involvement of public official. Accordingly, if public official with the sadistic intentions inflicts pain or suffering to the person, and the State interests are excluded, then according to UNCAT action cannot be qualified as torture.

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67 Ibid, quotation 72.

68 *Miller G.,* Defining Torture, New York, Benjamin N Cardozo School of Law, 2005, 13, See <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58287>, [20.11.2012].

69 *Paniagua Morales v. Guatemala,* Judgment of March 8, 1998, Inter-Am. Ct. H.R. (Ser. C) NO.37 (1998), paragraph 134.

70 For the additional information related to the elements of torture intention, See *Miller G.,* Defining Torture, New York, Benjamin N Cardozo School of Law, 2005, 14-15, *quotation* 71, See <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58287>, [20.11.2012].

71 UNCAT, Article 1.

72 *Nowak M.,* and *MacArtur, E.,* UN Convention against Torture, A Commentary, Oxford Commentaries on International Law, Oxford University Press, 2008, 75.

73 *Garcia M.,* U. N. Convention Against Torture (CAT): Overview and Application to Interrogation Techniques, Congressional Research Service, 2009, 2.

74 *Cullen A.,* Defining Torture in International Law: A Critique of the Concept Employed by the European Court of Human Rights, California West International Law Journal, Vol. 34, #1, 2003, 34, *quotation* 31, See <http://ssrn.com/abstract=2217008>, [17.11.2012].

In relation to the purposes of torture,[75] the aspect deserving the interest is placing the UNCAT torture purposes at one level. In conceptual terms, we are of the view that purpose of information obtaining deserves special approach, as obtaining information might be motivated with the protection or saving of legal benefits (goods); the same cannot be said about other purposes of torture.[76]

4.1.3. Torture Committed by Public Official

UNCAT definition recognizes that torture must be committed "by or at the instigation of or with the acquiescence of a public official or someone acting in an official capacity". The most dreadful insult or the worst inhuman treatment is not considered as violation of torture prohibition envisaged under UNCAT, if the State is not in any way participating in the action, as torture committed by the private person is covered under the criminal law of the country. Authors of UNCAT did not consider necessary to include private person in the international convention.[77] As for the paragraph (e), article 7 of Rome Statute, it does not at all include provision about the public official.

Anthony Cullen notes that "*although Convention (*UNCAT is implied, insertion - D. Tsulaia) *is directed against the action of public official, formulation of definition is quite wide in order to cover actions of private persons" and* cites ***Chris Ingels's*** following words:

"The wording of the requisite relationship with the government is so broad in the Convention (notably the term acquiescence) that there are many ways to ensure that a wide range of actions committed by private persons are covered by the operation of the Convention, if the state in some way or other permits such activities to continue ."[78]

When the public official inflicts cruel pain or suffering to the person, requirement for the State involvement is valid for all cases except for the actions of public official for personal purposes.[79] Involvement of the State can be distant, however satisfying UNCAT definition requirement, if *by the instigation of or with the acquiescence of a public official* private person's action is achieved, implying that inaction of the State via the private person implies torture.[80]

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[75] For the additional information in relation to the "purposes'" element of torture See *Miller G.,* Defining Torture, New York, Benjamin N Cardozo School of Law, 2005, 15-17, See <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58287>, [20.11.2012].

[76] For the additional information on the above issue see paragraph 2, chapter 2.

[77] *Miller G.,* Defining Torture, New York, Benjamin N Cardozo School of Law, 2005, 15-17, See <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58287>, [20.11.2012].

[78] *Cullen A.,* Defining Torture in International Law: A Critique of the Concept Employed by the European Court of Human Rights, California West International Law Journal, Vol. 34, #1, 2003, 34, *quotation* 36; See <http://ssrn.com/abstract=2217008>, [17.11.2012].

[79] *Khouzam v. Ashcroft*, 361 F.3d 161, 171 (2004), ix. *Miller G.,* Defining Torture, New York, Benjamin N Cardozo School of Law, 2005, 18, See <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58287>, [20.11.2012].

[80] *Khouzam v. Ashcroft*, 361 F.3d 161, 171 (2004), See *Miller G.,* Defining Torture, New York, Benjamin N Cardozo School of Law, 2005, 18, See <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58287>, [20.11.2012].

Requirement for the participation of public official creates serious limitations in terms of application of torture definition. Above mentioned issues have been considered by ICTY as "*contradictory in terms of application of private person's responsibility for the international crimes in the international humanitarian and international criminal law.*"[81]

Nigel Rodley notes that the requirements for State participation are present even when *"the public official could not ensure or public official does not want to ensure efficient protection from ill-treatment, including ill- treatment from non-public servant"*[82] The above confirms the fact that the State is actually responsible for the nonfulfillment of liability.[83]

Based on the above, for the improvement of torture definition, we deem it expedient to include in the torture definition unambiguous provision on the responsibility of public official and to consider State responsibility for the violation of liability on the efficient protection from ill-treatment of the non-public person.

4.2. Torture and Other Forms of Ill-Treatment in the Case (Common) Law

4.2.1 Greek Case

For the Greek case European Commission on Human Rights (ECmHR) has defined terms of article 3 of ECHR in the following way:

"Notion of inhuman treatment covers at least such treatment, which deliberately causes infliction of cruel suffering, either physical or mental, which is not reasonable under the specific situation. The word "torture" is often used for the characterization of inhuman treatment, which has such purpose as yielding of information or confession, or punishment, and generally is grave form of inhuman treatment. It can be said, that treatment or punishment of individual is humiliating, if the person is humiliated in front of others or forces the person to act against own will or conscience."[84]

Progressing of "cruelty" – from the humiliating treatment through the inhuman treatment to the torture – establishes pain hierarchy, in which torture pain is the most evident.[85] After the *Greek* case, the ECHR has applied the hierarchy concept many times in the judgments.[86]

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[81] *Prosecutor v. Kvocka*, ICTY Case No. IT-98-30/1, Trial Chamber Judgment, 119 (2001).

[82] Office of the United Nations High Commissioner for Human Rights, *Human Rights Fact Sheet: No. 4 Combating Torture,* at 34 (May 2002) See *Miller G.,* Defining Torture, New York, Benjamin N Cardozo School of Law, 2005, 18, See <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58287>, [20.11.2012].

[83] For the additional information See 1. *Z v. The United Kingdom*, 34 E.H.R.R. 3 (ECHR 2001); 2. *E. v. United Kingdom*, 36, E.H.R.R. 31, 88 (ECHR 2002).

[84] The Greek Case, Yearbook November 18, 12 Y.E.C.H.R (1969), 186.

[85] *Miller G.,* Defining Torture, New York, Benjamin N Cardozo School of Law, 2005, 9, See <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58287>, [20.11.2012].

[86] *Miller G.,* Defining Torture, New York, Benjamin N Cardozo School of Law, 2005, 9, *quotation.* 45. See <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58287>, [20.11.2012].

Due to the fact that there is no standard for the determination of "cruelty", as underlined by the Commission in the *Greek* case,[87] all states always and for all cases make decisions based on the facts of the case.[88]

"It appears from the testimony of a number of witnesses that a certain roughness of treatment of detainees by both police and military authorities is tolerated by most detainees and even taken for granted. Such roughness may take the form of slaps or blows of the hand on the head or face. This underlies the fact that the point up to which prisoners and the public may accept physical violence as being neither cruel nor excessive, varies between different societies and even between different sections of them."[89]

With regard to the above mentioned issue, the doctrines of Orthodox Church shall be also taken into account; according to these doctrines the imposed perils are perceived as blessing from the God and the person must be even grateful to the God, and at such moments the most important is to bear the peril. For the research of issues related to torture proper attention must be drawn to the above.

Although in *Greek* case torture is considered as "the aggravating form of inhuman treatment", the court has not noted that the certain limit of pain and suffering was required for the consideration of ill-treatment as torture. The above is considered in the ECtHR judgment for the case *Ireland VS United Kingdom.*

4.2.2. Ireland VS United Kingdom[90]

Ireland vs United Kingdom case is considered as one bearing high importance in the case (common) law for the following two reasons: (1) ECtHR is of the view that "threshold level of cruelty" is necessary for the ill- treatment cases, in order to qualify action as torture, and (2) ECtHR presented definitions for the terms provided in the article 3 of ECHR.[91]

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[87] *Aydin Y.,* The European Court of Human Rights Approaches to the Prohibition of Torture, Inhuman and Degrading Treatment or Punishments, 7, *quotation* 20, The Greek Case, Yearbook November 18, 12 Y.E.C.H.R (1969), See <www.justice.gov.tr/e-journal/pdf/Prohibition_Torture.pdf>, [15.12.2012].

[88] *Aydin Y.,* The European Court of Human Rights Approaches to the Prohibition of Torture, Inhuman and Degrading Treatment or Punishments, 7. Quotation 21, *Addo M., and Grief N.,* 'Is there a policy behind the decisions and judgments relating to Article 3 of the ECHR?', (1995) E L Rev., 188, See <www.justice.gov.tr/e-journal/pdf/Prohibition_Torture.pdf>, [15.12.2012].

[89] *Aydin Y.,* The European Court of Human Rights Approaches to the Prohibition of Torture, Inhuman and Degrading Treatment or Punishments, 7. cit. 22, Commission Report in the Greek Case, p. 501, op. cit., See <www.justice.gov.tr/e-journal/pdf/Prohibition_Torture.pdf>, [15.12.2012].

[90] The essence of case is the following: so called five techniques of information yielding were used for hours against the persons suspected in terrorism: 1. Standing with hands up and legs aside; 2. Leaving without food and water; 3. Not allowing to sleep; 4. Keeping under the permanent noise; 5. Forcing person to wear dark kerchiefs., See http://sitemaker.umich.edu/drwcasebook/files/republic_of_ireland_v._united_kingdom.pdf>, [20.12.2012].

[91] *Cullen A.,* Defining Torture in International Law: A Critique of the Concept Employed by the European Court of Human Rights, California West International Law Journal, Vol. 34, #1, 2003, 35, See <http://ssrn.com/abstract=2217008>, [17.11.2012].

(1) ECtHR is of the view that the intensity of suffering infliction should be considered as the criterion for the determination of "threshold level of cruelty. Moreover cruelty level is estimated based on the specific circumstances of the case and the court takes into account the following: 1. Duration of ill-treatment; 2. Physical results of ill-treatment; 3. Mental results of ill- treatment; and 4. Gender, age and health condition of injured person; 5. Combination of actions; and 6. Purpose. However it is recognized that determination of "*threshold level of cruelty"* is relative and depends on the *"nature of the subject".*"[92]

(2) The main criterion differentiating torture and inhuman treatment is based on the intensity of suffering inflicted[93] and defines terms as:

a) "Torture" is deliberate inhuman treatment causing very serious and cruel[94] suffering and is attached to the special stigma.[95]

b) "Inhuman" treatment causes intensive physical and mental suffering;

c) Treatments are degrading since they are such as to arouse in their victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance."[96]

Position of the ECtHR was widely criticized due to the limitation of article 3 of ECHR, due to the fact that the ECtHR has separated torture from other forms of ill-treatment with the level of intensity and defined torture as deliberate inhuman treatment, "*which causes* very serious and cruel[97] suffering" *and* moreover indicated in the justification part that *"The five techniques were applied in combination, with premeditation and for hours at a stretch; they caused, if not actual bodily injury, at least intense physical and mental suffering to the persons subjected thereto and also led to acute*

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[92] *Ireland v. United Kingdom*, (No. 5310/71), Strastburg 1978, judgment, paragraph 162, See <http://sitemaker.umich.edu/drwcasebook/files/republic_of_ireland_v._united_kingdom.pdf>, [20.12.2012].

[93] *Ireland v United Kingdom* (No. 5310/71), Strastburg 1978, judgment, paragraph 167, 39, See <http://sitemaker.umich.edu/drwcasebook/files/republic_of_ireland_v._united_kingdom.pdf>, [20.12.2012].

[94] 1. It has to be considered that term "cruel" is vague and open for interpretation, See discussion - *Ireland v United Kingdom* (1978), 39-42; 2. According to one commentator, "It is actually impossible to determine the cruelty and aggravating inhuman treatment for the consideration of action as torture*."* See *Nigel Rodley*, The Treatment of Prisoners under International Law, (2d ed. 1999), 98; 3. IACtHR, *Loayza-Tamayo v. Peru.* 1997. Series C No. 33; ECtHR, *Ribitsch v. Austria,* 1995, Series A no. 336, par. 36; *Ireland v. the United Kingdom,* 1978, Series A no. 25, paragraph 167.

[95] *Ireland v United Kingdom* (No. 5310/71), Strastburg 1978, judgment, paragraph 167, See <http://sitemaker.umich.edu/drwcasebook/files/republic_of_ireland_v._united_kingdom.pdf>, [20.12.2012].

[96] ECHR, Council of Europe, Strasburg, France, 8, quotation 24.: *O'Boyle H.,* Law of the European Convention on Human Rights (1995), 80, quotation 18, See *Ireland v. UK*, 2 EHRR 25 (1978), See <http://www.errc.org/cms/upload/media/02/D9/m000002D9.pdf>, [20.12.2012].

[97] 1. It has to be considered that term "cruel" is vague and open for interpretation, See discussion - *Ireland v United Kingdom* (1978), 39-42; 2. According to one commentator, "It is actually impossible to determine the cruelty and aggravating inhuman treatment for the consideration of action as torture." See *Nigel Rodley*, The Treatment of Prisoners under International Law, (2d ed. 1999), 98. 3. IACtHR, Loayza-Tamayo v. Peru. 1997. Series C No. 33; ECtHR, Ribitsch v. Austria, 1995, Series A no. 336, par. 36; *Ireland v. the United Kingdom*, 1978, Series A no. 25, paragraph 167.

psychiatric disturbances during interrogation", such action will be considered as the category of inhuman treatment provided in the article 3 of ECHR."[98]

Critics mainly cover such issues as:

1. The ECtHR position has actually neglected article 2 of *"United Nations Declaration against Torture",* dated 9 December 1975, as well as unanimous decision of ECmHR "*article 3 was violated via the utilization of five techniques in the form of torture."*[99]

2. The subjective test was not used on the case for the assessment of ill-treatment with the consideration of injured person's opinion. Such approach confirms arbitrary nature of ECtHR decision making, notes judge ***Zekia.*** He later adds that assigning GBP 10,000 and GBP 25,000 payments as the reimbursement of incurred damage indicates *"on the high level of cruelty, intensity and duration of suffering".*[100] Other judges also present their critics related to the ECtHR decision: O'Donogu, Fitzmauris, Evrigenis and Matcher.[101]

3. It is interesting that in the case *Aksoy vs Turkey* the ECtHR decided that "forced wearing of *Palestinian hooding"* was "*Sufficiently (quite) serious and cruel with its nature to characterize it as torture".*[102]

4. Regarding the ECtHR explanatory note on the case of *Ireland vs United Kingdom* concerning the degrading treatment *`degrading treatments arouse in their victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance"* – two inter-exclusive positions provided in the case law are interesting. On the *Ilaskus* case[103] the ECtHR made decision, according to which convicted person was sentenced to death despite the absence of legal groundings. During the year, due to detainment under the prison conditions the action was qualified as torture. On the other hand, on the case *Öcalan vs Turkey*[104] it was decided that death sentence assigned as a result of non-objective court hearing is equivalent to inhuman treatment, as the pain result is caused with the fear of death sentence. Based on the above, according to ***Yavuz Aydin,*** due to the absence of standard court approaches development of fixed definition for degrading treatment is impossible, as well as for other violations considered under the article 3 of the Convention. He further notes

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[98] *Ireland v United Kingdom* (No. 5310/71), Strastburg 1978, judgment, paragraph 167, See <http://sitemaker.umich.edu/drwcasebook/files/republic_of_ireland_v._united_kingdom.pdf>, [20.12.2012].

[99] *Cullen A.,* Defining Torture in International Law: A Critique of the Concept Employed by the European Court of Human Rights, 38, *quotation* 60. See <http://www.lcil.cam.ac.uk/Media/Anthony_Cullen_Defining_Torture_Article.pdf>, [17.11.2012].

[100] *Ireland v United Kingdom* (No. 5310/71), Strastburg 1978, judgment, judge Zekin's decision, 61. See <http://sitemaker.umich.edu/drwcasebook/files/republic_of_ireland_v._united_kingdom.pdf>, [20.12.2012].

[101] For the detailed information See *Ireland v United Kingdom* (No. 5310/71), Strastburg 1978, judgment, 63-86. See <http://sitemaker.umich.edu/drwcasebook/files/republic_of_ireland_v._united_kingdom.pdf>, [20.12.2012].

[102] European Court of Human Rights, *Aksoy v. Turkey*, Communication 21987/93 18 December 1996, paragraph 64.

[103] *Aydin Y.,* The European Court of Human Rights Approaches to the Prohibition of Torture, Inhuman and Degrading Treatment or Punishments, 12, *quotation* 20, *Ilaşcu and others* v *Moldova and Russia* (App. 48787/99), Judgment of the Grand Chamber of 8 July 2004; (2005) 40 EHRR 1030, paras. 434-42 of the Judgment, See <www.justice.gov.tr/e-journal/pdf/Prohibition_Torture.pdf>, [15.12.2012].

[104] Ibid, *Öcalan v Turkey* (App. 46221/99), Judgment of the Grand Chamber of 12 May 2005.

that standard approach would be the hindering factor for the convention dynamic and democratic society.[105]

5. ***Anthony Cullen*** notes that in the case of *Ireland vs United Kingdom* the ECtHR, by evaluation of utilization of five techniques, defined all torture elements except one, namely, (1) purpose – "obtaining of confession and /or information"; (2) "systematic" utilization of five techniques; (3) "official person" – representatives of security forces. Based on the above, due to the absence of "sufficient cruelty of pain and suffering" the ECtHR did not consider utilization of five techniques as torture.[106]

ECtHR definition of torture, compared with the UNCAT torture definition, is quite limited and does not consider "purpose" and "public official" elements of UNCAT torture definition, which differentiates torture from any other violence committed by non-public person. Despite the above, the ECtHR later used UNCAT torture definition[107] for international law purposes.

5. Different Approaches to the Torture Definition and Justification of an Absolute Nature of Torture Prohibition and Possibility to Deviate from it

5.1. Different Approaches to the Torture Definition

According to ***Harry O'Boyle,*** despite the view that "*Prohibition is absolute, "ill-treatment" shall reach "minimal level of cruelty" in order to be covered under article 3 of ECHR.*"[108] It is worth to share the provision according to which, the determination of "minimal level of cruelty" is "*relative due to the nature of subject*"[109] and criteria defined by ECtHR shall be taken into consideration, namely: "*Combination of actions*[110]*, purpose*[111]*, duration of ill-treatment, its physical or mental results and in some cases gender, age and health condition of the victim*"[112]

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[105] *Aydin Y.,* The European Court of Human Rights Approaches to the Prohibition of Torture, Inhuman and Degrading Treatment or Punishments, 12, See <www.justice.gov.tr/e-journal/pdf/Prohibition_Torture.pdf>, [15.12.2012].

[106] *Cullen A.,* Defining Torture in International Law: A Critique of the Concept Employed by the European Court of Human Rights, California West International Law Journal, Vol. 34, #1, 2003, 39, See <http://ssrn.com/abstract=2217008>, [17.11.2012].

[107] 1. *Selmouni v. France* (2000) 29 EHRR 403, paragraph 67, 100; 2. *Al-Adasani v. United Kingdom* (2001) 34, 273, paragraph 29.

[108] *O'Boyle H.,* Law of the European Convention on Human Rights (1995), 56 See *Ireland v. UK*, 2 EHRR 25 (1978), See <http://www.errc.org/cms/upload/media/02/D9/m000002D9.pdf>, [20.12.2012].

[109] 1. *Ireland v. United Kingdom*, (1979-80), paragraph 162; S*elmouni v. France,* paragraph 160; *Assenov v. Bulgaria*, Judgment of 28 October 1998, paragraph 94; *Aydin v. Turkey*, 25 EHRR 251 (1996), paragraph 84; *Tyrer v. United Kingdom*, 2 EHRR 1 (1978), paragraph 30; *Costello-Roberts*, 19 EHRR 112 (1993), paragraph 26-28, ix. <www.errc.org/cms/upload/media/02/D9/m000002D9.pdf>, [15.12.2012]; 2. In the case *Moldovan and others* v *Romania, Judgment No. 2* (Apps 41138/98 and 64320/01), Judgment of 12 July 2005, the life style of the injured person was attacked; the above attack was motivated by racism based discrimination. Above mentioned circumstances were considered as aggravating factor.

[110] *I v. Bulgaria* (2005) ECHR 378, paragraph 68. See European Journal of Social Sciences, Vol. 32, Number 3 (2012), 397.

Moreover, “margin of appreciation” will be different for crisis and ordinary periods.[113] These criteria are relevant for two contexts, namely *“when it is determined whether the margin of suffering is sufficient, to consider it as inhuman and degrading treatment and when we are separating forms of less cruel treatment and torture,”*[114] however this approach is also relative and not absolute.

Yavuz Aydin notes that the court must learn the facts on all cases with attention, with consideration of requirements for the existing situation and specific facts detected in the violations.[115] *“‘The threshold of cruelty requirement and conduct of relativity show that the prohibition in ECHR is not a static one, but receives a living interpretation and must be considered in the light of present-day circumstances.”*[116] He also notes that contradictive decisions made by the court in various times are actually confirming dynamism and accordingly, as shown in the Selmouni [117] case, past court precedents and decisions of the Commission will not be very helpful for defining preliminarily what decision will be adopted for the current case. Such decisions made on such cases bring in uncertainty in relation to the court jurisprudence, but on the other hand, this circumstance is the inevitable part of decision making in the continuously changing world.[118]

Rosemary Patenden notes that the separating line between the torture and ill-treatment is “still weak”,[119] and ***Nigel Rodley*** notes that “for considering the action as torture, it is actually impossible to determine how cruel or inhuman shall be the treatment.[120]

Committee on Human Rights decided that “*It is not necessary to make the list of prohibited actions or to determine strict differences between the punishment and various forms of treatment; Differences depend on the nature, purpose and cruelty of used treatment.”*[121]

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[111] *I I v. Bulgaria* (2005) ECHR 378, paragraph 67, 69. See European Journal of Social Sciences, Vol. 32, Number 3 (2012), 397.

[112] Ibid: 1. *Ireland v. United Kingdom* (1978) 2 EHRR 35, paragraph 162; 2. *Selmouni v. France* (2000) 29 EHRR 403, paragraph 100.

[113] See 1. *Aydin Y.,* The European Court of Human Rights approaches to the prohibition of Torture, inhuman and degrading treatment or punishments, 8, *quotation* 24, See <www.justice.gov.tr/e-journal/ pdf/ Prohibition_ Torture.pdf>, [15.12.2012]; 2. *Cullen A.,* Defining Torture in International Law: A Critique of the Concept Employed by the European Court of Human Rights, 41, See <http://www.lcil.cam.ac.uk/Media/Anthony_ Cullen_Defining_Torture_Article.pdf>, [17.11.2012].

[114] European Journal of Social Sciences - Vol. 32, Number 3 (2012), 397.

[115] Ibid, 8.

[116] *Aydin Y.,* The European Court of Human Rights approaches to the prohibition of Torture, inhuman and degrading treatment or punishments, 8, quotation 25, Ovey C. and White R., *European Convention on Human Rights*, 3rd Ed., Oxford, 2002, p. 6, See <www.justice.gov.tr/e-journal/pdf/Prohibition_Torture.pdf>, [15.12.2012].

[117] *Selmouni* v. *France* (App. 25803/94), Judgment of 28 July 1999; (2000) 29 EHRR 403, paragraph 101 of the judgment.

[118] *Moldovan and others* v *Romania, Judgment No. 2* (Apps 41138/98 and 64320/01), Judgment of 12 July 2005, 522.

[119] *Hayajneh A., Qtaishat K., and Al-Laimoon A.,* The Legal Value of Evidence Obtained in English Law by Torture, European Journal of Social Sciences, Vol.32 No.3, Eurojurnals publishing, (2012), 391-406, 397, *quotation* 46, Rosemary Pattenden, *Op. Cit,* P. 21. See <http://www.europeanjournalofsocia lscie n ces.com/issues/EJSS_32_3.html>, [15.12.2012].

[120] *Rodley N.,* The Treatment of Prisoners under International Law, US, Oxford University Press, New York, (2d ed. 1999), 98.

5.2. Justification of an Absolute Nature of Torture Prohibition and Possibility to Deviate from It

The following seven aspects characterizing the absolute nature of torture were identified in the first and second chapters of the present article; namely the torture norm represents: 1. International standard of general nature; 2. International law principle; 3. Imperative norm - *jus cogens* – of international law; 4. Norm of absolute nature; 5. Torture is reviewed as specific crime; 6. Torture is reviewed as the crime against humanity, and 7. Torture is considered as war crime. In addition to the above, one can add such aspects, as 8. *aut dedere aut judicare* principle;[122] 9. International legal acts prohibit torture irrespective of victim's behaviour; 10 Prohibition of torture itself means prohibition of threatening with torture."[123]

Above listed aspects are elements of conditional list, revealing the universal nature of torture prohibition, the essence of which in legal terms is that not only there must not be any exceptions related to any deviation from the torture norm, but such deviations are prohibited.[124]

Despite the above, based on the *Amnesty International* data, the research conducted globally proved that 75% of countries with ratified UNCAT systematically commit tortures.[125] Moreover, there are cases, when the State officially issues permission on the use of torture. For example, Supreme Court of Israel Justice on 14 January 1996 issued the permission on the use of torture against the arrested Palestinians.[126]

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[121] Committee on Civil and Political Rights, General Comment No. 20 on Article 7 of the ICCPR, paragraph 4.

[122] 1. Aut Dedere Aut Judicare is the legal principle and means - "Extradition or criminal persecution". This principle, according to the international law, considers the legal obligation of states to carry out criminal persecution against persons who have committed serious international crime and other state has not requested perpetrator's extradition. The above mentioned principle is valid for torture along with other crimes. *See* <http://definitions.uslegal.com/a/aut-dedere-aut-judicare/>, [17.11.2012]; 2. United Nations 1984 Torture Convention, under the Article 5-8 defined the "universal jurisdiction" in relation to the torture. The above meaning that each participating country shall ensure validity of their jurisdiction for torture cases (when the person suspected in the commitment of crime is not extradited for taking the person to the court of other country), shall ensure criminal persecution of person(s) suspected in the commitment of crime, despite their citizenship and location of committed crime and to transfer the person to the competent bodies.

[123] In the legal literature threatening with torture is represented in the form of infliction of spiritual, psychological, mental suffering. In addition to the threatening with torture, the term "psychological torture" is often used. For the detailed information on the threatening with torture, See 1. IACtHR, *Baldeón-García v. Peru.* 2006. Series C No. 147, par. 119; *Maritza Urrutia v. Guatemala.* 2003. Series C No. 103, par. 92; *Tibi v. Ecuador*. 2004. Series C No. 114, par. 147; *Bámaca-Velásquez v. Guatemala*. 2000. Series C No. 70.; ECHR, *Soering v. United Kingdom*, 1989, Series A Vol. 161, par. 111; ICCPR, *Miguel Angel Estrella v. Uruguay* (74/1980), 29 March 1983, paragraph 8(3) and 10; 2. See <http://linguistics.ucdavis.edu/People/fzojeda/human-rights/what_is_pt.pdf>, <http://humanrights.ucdavis.edu/resources/library/documents-and-reports/ojeda.pdf>, [19.12.2012].

[124] See UDHR, Article 5, Geneva Convention – Article 3; ECHR – Article 3; ICCPR – Article 7; IACHR – Article 5; UNCAT – Article 2. ACHPR – Article 5 and etc.

[125] *Quiroga J.,* Torture, From the Encyclopedia of Psychological Trauma, Copenhagen, Denmark, John Wiley & Son, Inc., 2008, 2., See <file:///G:/Torture-definition_Quiroga_Jaranson.pdf>, [22.12.2012]

[126] See <http://www.pchrgaza.org/portal/en/index>; <http://aftermathnews.wordpress.com>, [22.12.2012].

Absolute prohibition of torture has opposition in the legal literature that attempts to theoretically justify the legal condition for deviation from such absolute prohibition in the extreme cases. Deviation from the torture norm is related, for example, with: (1) Conflict between the values in the extreme situation, namely when the dignity of victim is opposed with the dignity of kidnapper and the right for legal protection of the victim is generated;[127] (2) Positive law tries to find the way out from the torture prohibition via the interpretation method in order to achieve the acknowledgement of the above as "a true justice" by the majority of society with the consensus capability;[128] (3) Theological restriction of torture prohibition; (4) Justification of torture with the excluding circumstances of criminal law responsibility[129] and etc.

According to ***V. Brugger,*** in the situation when without torture and threatening it is impossible to obtain the information, which serves the (saving of) legal goods (benefits), the society would generally say on torture or threatening with torture the following - "generally no, but….."; such "but" has been identified and causes discussions.[130]

Based on the above, the key aspect is inexpediency of placing torture purposes at one level in the UNCAT. Accordingly, purpose of information obtaining deserves special approach, as information obtaining might be motivated with the protection and saving of legal goods (benefits); the same cannot be stated for other purposes of torture as envisaged under UNCAT. The objective of the position developed in the literature by ***V. Brugger*** for the police law is to teleologically restrict torture prohibition in certain cases, such as saving the life of hostages.[131] ***V. Brugger*** in the desperate situation, in terms of victim saving, restricts torture prohibition teleologically and indicates on the requirement for the existence of the following eight conditions: danger must be (1) evident; (2) direct; (3) significant; (4) against the non-guilty person's life or physical integrity; (5) danger must be created by the individually identifiable person; (6) such person is the only one, who can eradicate the danger

[127] *Turava M.,* Torture and Threatening with Torture for Saving the Life of Human Being – Compulsion Measure Allowed Under the Criminal Law? (National and European Approaches Based on the Magnus Gaefgen case), Collection of Articles - International Standards for the Protection of Human Rights and Georgia, *Konstantine Korkelia, (Editor),* Tb., 2011, 202 (In Georgian).

[128] *Turava M.,* Torture and Threatening with Torture for Saving the Life of Human Being – Compulsion Measure Allowed Under the Criminal Law? (National and European Approaches Based on the Magnus Gaefgen case), Collection of Articles - International Standards for the Protection of Human Rights and Georgia, *Konstantine Korkelia, (*Editor), Tb., 2011, 207 (In Georgian).

[129] *Turava M.,* Torture and Threatening with Torture for Saving the Life of Human Being – Compulsion Measure Allowed Under the Criminal Law? (National and European Approaches Based on the Magnus Gaefgen case), Collection of Articles - International Standards for the Protection of Human Rights and Georgia, *Konstantine Korkelia, (*Editor), Tb., 2011, 208 (In Georgian).

[130] *Turava M.,* Torture and Threatening with Torture for Saving the Life of Human Being – Compulsion Measure Allowed Under the Criminal Law? (National and European Approaches Based on the Magnus Gaefgen case), Collection of Articles - International Standards for the Protection of Human Rights and Georgia, *Konstantine Korkelia, (*Editor), Tb., 2011, 207 (In Georgian)..

[131] *Brugger W.,* Darf der Staat ausnahmsweise Foltern?, Journal: Der Staat, 1996, 67; W. Brugger, Vom unbedingten Verbot der Folter zum bedingten Recht auf Folter?, Journal: JZ, 2000, 165, ix. *Turava M.,* 208.

via the sharing the lifesaving information; (7) and such person has the above liability; (8) use of physical forcing (violence) must be the only means for getting the result – information." [132]

Supporters of an absolute prohibition of torture, develop the idea, according to which "*Hypothetical situation manipulates with the emotional reactions of audience and it is assumed that: there is a danger; attack is inevitable; attack will cause liquidation of large number of people; arrested person is the organizer of attack; The person has information by which the attack will be avoided; that only the torture of the attacker will ensure timely obtaining of information necessary to avoid the attack."*[133] The above position states that in reality one or more assumptions out of the above assumptions are always erroneous and that torture is essentially unreliable in terms of information obtaining, that professional investigators have many times proved that interrogation without torture could be conducted more effectively.[134]

Moreover, the literature underlines that justification of torture in the scenario of "*ticking bomb"* will cause the application of torture in other cases, that scenario contain "concealed falseness which must be discharged", in particular:

"However, even if the torturer did begin with the genuine motive of obtaining information, torture corrupts the perpetrator. This is an inherent part of the act of torture. Further, the assumption that the objective is purely to gather information is too simplistic. In real life situations other motivations and emotions, such as anger, punishment and the exercise of power, can take over."[135]

Based on the above mentioned, it is considered that due to the nature of torture, justification of torture in any form will inevitably cause the practice of deviation from the practice by the State bodies.[136]

P. Zaliger criticizes the teleological restriction of torture prohibition. He is of the view that torture prohibition norm even in the extreme situations does not allow for any exceptions, but

[132] *Turava M.,* Torture and Threatening with Torture for Saving the Life of Human Being – Compulsion Measure Allowed under the Criminal Law? (National and European approaches based on the Magnus Gaefgen case), Collection of Articles - International Standards for the Protection of Human Rights and Georgia, *Konstantine Korkelia, (Editor),* Tb., 2011, 209 (In Georgian).

[133] Preventing Torture: An Operational Guide for National Human Rights Institutions, Association for the Prevention of Torture, OHCHR, APT and APF, Sydney, Australia and Geneva, Switzerland, May 2010, 13-14, See <http://www.ohchr.org/Documents/Publications/PreventingTorture.pdf>, [17.11.2012].

[134] Preventing Torture: An Operational Guide for National Human Rights Institutions, Association for the Prevention of Torture, OHCHR, APT and APF, Sydney, Australia and Geneva, Switzerland, May 2010, 14, See <http://www.ohchr.org/Documents/Publications/PreventingTorture.pdf>, [17.11.2012].

[135] Preventing Torture: An Operational Guide for National Human Rights Institutions, Association for the Prevention of Torture, OHCHR, APT and APF, Sydney, Australia and Geneva, Switzerland, May 2010, 13-14, See <http://www.ohchr.org/Documents/Publications/PreventingTorture.pdf>, [17.11.2012].

[136] Preventing Torture: An Operational Guide for National Human Rights Institutions, Association for the Prevention of Torture, OHCHR, APT and APF, Sydney, Australia and Geneva, Switzerland, May 2010, 14, quotation 17, *Defusing the Ticking Bomb Scenario: Why we must say NO to torture, always*; Association for the Prevention of Torture; 2007, 13–16. See <http://www.ohchr.org/Documents/ Publications/Preventing Torture.pdf>, [17.11.2012].

prohibits, and in his view ***V. Brugger's*** teleological filling of "value shortcomings" are "methodically inadmissible" for the development of law *(contra legem)*.[137]

Despite the inter-excluding arguments in the literature,[138] we are of the view that in many cases and especially in cases, when we are dealing with the measures bearing the functionality to truly avoid the danger aiming at the saving the legal benefits (goods), the absolute prohibition of torture by the State is formal and ***V. Burger's*** following view fits it quite well: "application of torture is never allowed, however torture can still be used in the form of rare exception."[139]

Even when the State prohibits torture and considers teleological filling of "value shortcoming" as "methodically unacceptable", information obtained by the public official via the torture for the protection or saving of legal benefits (goods) is still used. Accordingly, fact of use of information obtained by the public official via the threatening with torture, due to the saved legal benefits in reality is not subject to critic and criminal law responsibility. The above mentioned allows us to make the following conclusion: (1) at some extent the absolute nature of torture prohibition becomes questionable; (2) the possibility of deviation from the absolute prohibition of torture is justified at some extent; and (3) the fact that absolute prohibition of torture is dictated by the preventive objectives is confirmed.

6. Conclusion

Based on the research it is clarified that definition of torture represents complex legal issue. Nature of torture prohibition, characteristics of torture definition presented in the article are compared with the synonymous notions, the linguistic and conceptual shortcomings and problems faced in the process of application of torture norm have been articulated.

Research implemented enables us to focus on several aspects, in particular:

(1) Issue related with the torture definition;

(2) Issue related with the absolute prohibition of torture.

1. Problems related with the practical application of torture norms are determined by the linguistic as well as conceptual irrelevances in the torture definitions, which are confirmed via the analysis of international legal acts and court practices.

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[137] *Turava M.,* Torture and Threatening with Torture for Saving the Life of Human Being – Compulsion Measure Allowed Under the Criminal Law? (National and European Approaches Based on the Magnus Gaefgen case), Collection of Articles - International Standards for the Protection of Human Rights and Georgia, *Konstantine Korkelia, (*Editor), Tb., 2011, 202 (In Georgian).

[138] For the additional information on the possibilities of deviation from the absolute prohibition of torture See *Turava M.,* indicated work, pp 199-228 (In Georgian).

[139] 1. *Turava M.,* Torture and Threatening with Torture for Saving the Life of Human Being – Compulsion Measure Allowed Under the Criminal Law? (National and European Approaches Based on the Magnus Gaefgen case), Collection of Articles - International Standards for the Protection of Human Rights and Georgia, *Konstantine Korkelia, (*Editor), Tb., 2011, 207 (In Georgian). 2. It is possible to present many facts from the history of mankind when the representative of state with the purpose of saving or protection of legal benefits, was using the force; as a result person could be named as the saint.

Moreover, practical application of torture norms revealed that torture cases have individual nature for different countries. There is a possibility to have different qualifications provided by the different courts on the same case. Based on the above, torture definition shall not be restrictive. We have to consider that (1) international normative acts on torture are live documents, which are open for interpretation and (2) limited interpretation of torture definition and its practical application may cause fair criticism, as it was for example in the *Ireland vs United Kingdom* case.

Accordingly, we deem it expedient to modify torture definition, so the torture norm does not artificially cause the inevitability of qualification of torture as other form of ill-treatment.

For the above purpose, we are of the view that torture definition in its composition may additionally include such mandatory elements as:

a) **Consideration of opinion of injured person.** Mentioned requirement is based on the positions of ***Anthony Cullen, Chris Ingels, Mafred Novak and others.*** Moreover, torture concept shall necessarily consider the fact that due to various reasons the injured person may reject the fact of torture he was subjected to;

b) **Consideration of result inflicted by the torture.** It was again clarified that result of ill-treatment is in direct relationship with the definition of "cruelty level" as well as intensity of ill-treatment. Non-consideration of above mentioned element may cause incorrect application of norm;

c) **Responsibility of public official.** It was clarified in the process of research that torture definition does not contain straightforward provision on responsibility, causing uncertainty in terms of application of torture norm. Moreover, responsibility of public official shall consider: (1) ***Nigel Rodlye's*** requirement for the "responsibility of the State" for the non-fulfilment of liability for the efficient protection of non-public person and (2) ***Burger's and Daniel's*** requirement, considering that for the qualification of action as torture it is not sufficient to define only one of the purposes provided in the torture definition, the torture "purpose" must have "*some, even distant connection with the policy or interests of the State or its bodies.*"

d) **Separation of "information obtaining" from other purposes.** Purpose of information obtaining could be motivated with the protection or saving of legal benefits, which qualitatively differentiates it from other specific purposes of torture. Based on the above, we are of the view that purposes shall be differentiated.

Elements a) and b), bring us logically to the need to have mandatory requirement for the **scheduling psychiatric expertise** for each fact of torture. Such practice provides the opportunity to define nature and level, as well as causal-result relationship of mental suffering inflicted as a result of threatening with torture. Moreover, such approach is necessary for the definition of "minimal cruelty threshold". And finally, scheduling the psychiatric expertise for each torture case is justified with the fact that inflicting of physical pain and psychic suffering is the aggregation of two facts, meaning that physical pain is directly connected with the psychic suffering and vice versa.

2. Absolute prohibition of torture as an exception can consider only the possibility of admission of threatening of torture in case of tragic collision excluding the guiltiness in compliance with eight requirements (conditions) developed by ***V. Brugger***.

With the consideration of the fact that absolute prohibition of torture has purely formal nature when the torture is truly serving the objective of avoiding danger, saving or protection of legal goods (benefits), we can conclude that absolute prohibition of torture is determined by the preventive objective.

For the better understanding of essence of absolute prohibition of torture and qualification of action as torture, study of the following issues gains the special importance:

a) **Conscious understanding of results of the crime by the person committing the crime.** Person, who committed the heavy category crime, prior to the commitment of crime (for example terrorist act, organized crime and etc.), was fully aware of the public and State reaction, moral and legal outcomes of the crime. Moreover, perpetrator is generally aware that in case of arrest, based on the investigation goals, he may be subjected to the various forms of physical and psychological coercion, including torture. In such condition, the perpetrator, especially if his/her mental condition reaches fanaticism (for example: kamikadze case), is consciously or unconsciously ready to be subjected to the various forms of physical and psychological coercion. We must also take into account the fact that physically and psychologically prepared perpetrator may not suffer the pain in the same way as physically and psychologically unprepared perpetrator, who "was not aware" of reaction of society and the State on the committed crime.

b) **Psychological aspects of the person committing the crime.** According to the general rule, human being at the moment of crime commitment reaches the condition referred to as mental (psychic) disorder. This condition, leaving its traces until the end of person's life, creates the psychic conflict in the human being. Being aware of graveness of committed crime, the person suffers the pain of conscience, followed with penitence and confession of crime. Knowledge of the fact that the perpetrator will at the end understand his/her guilt, get back the ability for healthy evaluation and condemn the committed crime, makes us to think that possibility of using the measures against the will of perpetrator is expedient as well as inexpedient. Above mentioned is related to the issue that absolute prohibition of torture implies the negative and positives liabilities from the State, which also implies non-use of information obtained via the torture.

c) **Psychological aspects of sentence imposing.** Imprisonment, at some extent, can be viewed as physical and psychological coercion over the human being, which creates the need for the study of sentencing and sentence execution.

d) **Knowledge about the absolute prohibition.** The knowledge about the absolute prohibition of torture is also important. It is important that perpetrator uses such knowledge in his/her favour, if physical or psychological coercion or attempt of such actions is used against him.

We shall note that at this stage legal science cannot provide comprehensive response on the problematic issues mainly related to the following: a) conscious understanding of crime results by the person committing the crime, b) psychological aspects of person committing the crime and c) psychological aspects of sentence assigning. The above is conditioned with the fact that the nuances of torture identified by us (concerning the essence, heaviness, evaluation of physical and psychological suffering, expediency/inexpediency of torture prohibition and etc.), with their essence are of non-legal nature and are related with the metaphysical (spiritual) sphere. Moreover, the problem at some extent is determined by the fact that science in general studies only the issues, events or facts, which can be subjected to empirical research and logic acceptable for the scientists. Study of issue identified in the present article crosses the boundaries of science and objectively requires consideration of religious doctrines.

Accordingly, it is reasonable, to carry out criminological research, which will study each aspect in complex, using multi-disciplinary approach and with the consideration of religious doctrines.

Maka Khodeli[*]

Problem of Admissibility of Evidences Obtained via the Torture In the Criminal Law Procedure

(According the Georgian and German Laws)

1. Introduction

The accused has right to make decision to give testimony or refuse to give such testimony. According to section 2, article 74 of Criminal Procedure Code[1] of Georgia, giving evidence is the right of suspect. He/she has right to freely decide to give or not to give the evidence.[2]Above mentioned right is based on the principle of protection from the self-discrimination (*nemo tenetur se ipsum accusare*), which is guaranteed under the article 6 of European Convention on Human Rights and has the constitutional status (section 8, article 42, The Constitution of Georgia). Privilege of protection against self-discrimination is one of the fundamental principles guaranteed by the article 15 of CPCG. Torture is among the unacceptable methods of influencing the freedom of will of accused. Prohibition of torture and torture threat has absolute nature,[3]which is based on such international legal acts, as the article 3, section 2, article 15 of European Convention on Human Rights, article 7 of International Pact of Civil and Political rights, paragraph one, article one, UN convention against the torture, dated 1984, Convention of European Commission against torture, dated 1987. There are no exclusions permitted from the prohibitions defined in the above mentioned acts, as torture and threat of torture infringes the key values guaranteed by the Constitution, human being's dignity.[4]

The subject of present research is to discuss procedural-legal aspects of acceptability of evidences obtained as a result of torture without discussion of torture in terms of material-legal aspects.

According to the section one, article 72 of CPCG evidences obtained with the essential violation of the code are unacceptable and do not have legal effect. The evidences obtained via the torture shall be considered as unacceptable, as utilization of torture in the criminal law process must be considered as essential violation of the law. However, it is interesting to find out, whether other evidences lawfully obtained based on the evidences obtained via the torture shall be considered as unacceptable; in other words does the evidence obtained via the torture have the further Impact its exclusion from the criminal law case.[5] So called "Theory of fruit of the poisoned tree" is being dealt with in this case,

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[*] Doctoral Student, TSU Faculty of Law.

[1] In the future the abbreviation CPC will be used.

[2] See *Volk K.,* Grundkurs StPO, 6. Auflage, 2008, München 41.

[3] See *Tugushi T., Burjanadze G., Mshvenieradze G., Gotsiridze G., Menadbde V.,* Human Rights and Practice of Constitutional Court of Georgia, Tb., 2013, 95 (In Georgian).

[4] Ibid.

[5] In German criminal law the above mentioned is referred to with the term - Fortwirkung von Beweisverwertungsverbot.

which was regulated by legislation in the section one, article 72 of valid CPCG of 2010. Accordingly the above mentioned issue is relevant based on the innovative establishment considered under the CPCG.

It is also interesting to review the issue of the renewable impact of exclusion of evidences from the criminal law case,[6]in other words, does the rule on the considering the evidences obtained via the torture as unacceptable influence the data obtained as a result of lawful interrogation carried out later.

As contents of section one, article 72 of CPCG is the legislative novelty for the presently valid code, it is interesting to find out, how does the German Criminal Law Code regulate the acceptability of evidences obtained as a result of torture. The views and positions of German scientists and representatives of justice related the above issue is also relevant.

Problems raised in the present article are discussed based on the example of divergent case in Germany – case on *Magnus Gäfgen*.

As for the sequence of issues, the present article will first review *Magnus Gäfgen* case.

The next section of the work discusses the acceptability of evidences obtained via the torture according to the Georgian Criminal Law process. This section briefly discusses the legal basis for the prohibition of torture. The legislative regulations on the considering the evidences as unacceptable are further analyzed and the following issue will be discussed – what would be the decision on the acceptability of evidences obtained via the torture for *Magnus Gäfgen* case according the Criminal Procedure Code of Georgia.

The research subject of the next section – acceptability of evidences obtained via the torture according to the German Criminal Law process. The article will briefly review paragraph 136a, which covers prohibited interrogation methods. The rule on exclusion of evidences obtained via torture will be analyzed. In particular, the article will discuss the future and renewal effect of exclusion of evidences obtained via the torture from the Criminal Law Case. The practice of German Federal Court will be studied and discussed in relation to the above issue.

The final section of article will summarize the analysis of the theories established in the German Criminal Law literature and relevant court practices, Moreover, with the consideration of German experiences, the article will discuss the limits for the acceptability of evidence obtained via the torture based on the section one, article 72 of CPCG.

2. Definition of Problem Based on *Magnus Gäfgen* Case

The crime committed by the young student *Magnus Gäfgen* in 2002 and the actions carried out by the police against him caused the intensive discussions on the torture and torture threat in Germany.

The contents of the case[7]: On 27 September 2002 *Magnus Gäfgen* has by deception kidnapped 11 year old son of banker, *Jakob von Metzler* and soon killed him; he has hidden the corpse near one of the lakes. *Gäfgen* then demanded one million euro in ransom from the *Metzler* family. He was observed by the police when he picked up the ransom, the police started his police watching. *Magnus*

[6] In German criminal law the above mentioned is referred to with the term-Fortwirkung von Beweisverwertungsverbot.

[7] See *Ellbogen K.,* Zur Unzulässigkeit von Folter (auch) im präventiven Bereich, "Jura", Heft 5/2005, 339.

Gäfgen was arrested on 30th September at Frankfurt airport. After his transfer to the police department the kidnapper was interrogated. The police vice-president, *Wolfgang Daschner,* considering the fact that life of 11 years' old child was in danger, issued the order to use violence against *Gäfgen*, threaten him with the subjecting him to the body violence, as the latter was not naming the location of child voluntarily; the order was executed by one of the policemen. Under the threat of torture the kidnapper named the location of child; however the police found the child dead at the indicated location. Frankfurt court in his conviction for murder to life imprisonment in July 2003, established his grave level of guilt. The court also tried the police vice-president *Daschner* and his subordinate.[8]

It is interesting to note that police has not hidden the fact of threatening with torture, in contrary police included the fact in the protocol, which caused the wide discussions in the public. Police was expecting the support and positive approach from the public for the carried out actions.[9]There were some responses supporting and favourable to the head of police, they were justifying the actions of *Daschner*.[10] In particular, the following view was expressed – torture and threatening with torture is acceptable is exceptional cases.[11] However according to the dominating view, the dignity of human being is inviolable, it is not acceptable to violate this right for any argument; this is an absolute right.[12] Relativisation of torture and threatening with torture, making exceptions creates huge threat for the essence of legal state. It is difficult to determine the preconditions for the limitation of this absolute right and to place it in the framework of legal regulation.[13]

The European Court on Human Rights made decisions on *Gäfgen* case in 2008 and 2010 years; these decisions contain important definitions on the allowance of torture, acceptability of evidences and principles of fair court.[14]

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8 According to the resolution issued by the Frankfurt area court, dated 20 December 2004 both persons were announced guilty, however they were assigned the suspended sentence.

9 See *Schaefer C.*, Freibrief, "Neue Juristische Wochenschrift" (NJW), 2003, 947.

10 *Hilgendorf,* in this case morally justifies the torture, See *Hilgendorf E.*, Folter im Rechtsstaat? "Juristenzeitung" (JZ), 2004, 337, 338, According to the position of *Herzber,* police employees have not committed the crime and verdit of not guilty had to be assigned, See *Herzberg R.*, Folter und Menschenwürde, "Juristenzeitung" (JZ), 2005, 321, Also interesting: *Follmar P., Heinz W., Schulz B.*, Zur aktuellen Folterdebatte in Deutschland, 2003, <http://www.institut-fuer-menschenrechte.de>, [7.07.2014].

11 Compare with: *Miehe O.*, Nochmals: Die Debatte über Ausnahmen vom Folteverbot, "Neue Juristische Wochenschrift" (NJW), 2003, 1219, *Brugger W.*, Vom unbedingten Verbot der Folter zum bedingten Recht auf Folter? "Juristenzeitung" (JZ), 2000, 165 ff.

12 See *Roxin C.*, Kann staatliche Folter in Ausnahmefällen Zulässig oder wenigstens straflos sein? Festschrift für Albin Eser zum 70. Geburtstag, München, 2005, 465, *Gomes Navajas J.*, Darf der Staatfoltern?, Festschrift für Claus Roxin zum 80. Geburtstag, Berlin, 2011, 635, 638, *Ellbogen K.*, "Juristische Ausbildung" (Jura), Heft 5/2005, 343, *Jerouschek G., Kölbel R.,* Folter von Staatswegen? "Juristenzeitung" (JZ), 12/2003, 613-620, *Turava M.,* Doctrine on Crime, Tb., 2011, 495, *Turava M.,* Torture and Threatening with Torture for Saving the Life of Human Being – Compulsion Measure Allowed under the Criminal Law? (National and European approaches based on the *Magnus Gäfgen* case), International Standards for the Protection of Human Rights and Georgia, *Konstantine Korkelia, (Editor),* Tb., 2011, 194 (In Georgian).

13 See *Eisenberg U.*, Beweisrecht der StPO, Spezialkommentar, 8. Auflage, München, 2013, 220, Fn.186, Compare with: *Greco L.*, Die Regeln hinter der Ausnahme Gedanken zur Folter in sog. Ticking time bomb-Konstellationen, "Goltdammer's Archiv für Strafrecht" (GA), 2007, 628-643.

14 See Decision of European Court of Human Rights, *Gäfgen vs Germany (Gäfgen v. Germany),* 22978/05, 30 June 2008, Decision of European Court of Human Rights, Large Chamber, *Gäfgen vs Germany (Gäfgen v.*

3. Issue of Acceptability of Evidences Obtained via the Torture according the Georgian Criminal Law Process

3.1. Legal Basis for the Prohibition of Torture

According to the section one, article 17 of Georgian Constitution person's honour and dignity are inviolable.[15] According to the section two of the same article, torture, inhumane, brutal or degrading treatment or punishment of the Human Being is impermissible.[16] The mentioned actions are related to the prohibition of infringement of honour and dignity. Norms protecting honour and dignity do not consider limitation of the above right by any form. These two fundamental law benefits are not violated even under the emergency and war conditions.[17] Protection from torture is the absolute right of human being. According to the section 3 of European Convention of European Rights,[18] which is the part of legislative system "No one shall be subjected to torture or to inhuman or degrading treatment or punishment".[19]

Based on the international legal norms on the prohibition of torture, as mentioned in the introduction, the articles 144^1 (torture), 144^2 (threaten with torture) and 144^3 (humiliating or inhuman treatment) of Criminal Law Code of Georgia were developed.[20]

Article 4 of Criminal Law Code of Georgia, concerning the inviolability of person's dignity defines:

1. Judge, prosecutor, investigator and other parties to the criminal law process are responsible to protect the dignity and privacy of parties to the process at all stages of criminal law process.
2. It is not permissible to influence the freedom of human being's will using the torture, violence, severe treatment, deception, medical intervention, hypnosis, and similar measures, which affect the memory and mental condition of the person. It is also impermissible to threaten or promise the concessions, which are not considered under the law.

Germany), 22978/05, 01 June 2010, *Jähnke B.*, Unverfügbares im rechtsstaatlichen Strafprozess und die Rolle des Europäischen Gerichtshofs für Menschenrechte, Criminal law science in the process of integrated European development, *Merab Turava,* Tb., 2013, Page 486 and following pages (In Georgian).

15 See *Gotsiridze E.,* Unviability of Honor and Dignity, Prohibition of Torture or other Inhuman Treatment, comments to the Constitution of Georgia, chapter two, Citizenship of Georgia. Basic Rights and Freedomgs of Human Being, Tb., 2013, 107 and following pages (In Georgian).

16 Ibid, 115 and following pages (In Georgian).

17 See *Tugushi T., Burjanadze G., Mshvenieradze G., Gotsiridze G., Menadbde V.,* Human Rights and Practice of Constitutional Court of Georgia, Tb., 2013, 95, Compare with Article 15 – European Convention on Human Rights (In Georgian).

18 Georgia signed European Convention on Human Rights on 27 April 1999, the Parliament of Georgia ratified it on 20 May, 1999.

19 See Prohibition of Torture, implementation of the Article 3 of European Convention on Human Rights, Guide, Tb., 2005, 51 <http://www.supremecourt.ge/files/upload-file/pdf/Article3.pdf>, [7.07.2014] (In Georgian).

20 See *Turava M.,* Torture and Threat Ending with Torture for Saving the Life of Human Being – Compulsion Measure allowed by the Criminal Law? National and European Approaches Based on the *Magnus Gäfgen* Case, International Standards for the Protection of Human Rights and Georgia, *Konstantine K., (Ed.),* Tb., 2011, 199(In Georgian).

3. Compulsion in the criminal law case can be used only in cases envisaged under the law and in accordance with the defined rules.

As for the interrogation of accused during the interrogation, it is conducted in line with the rules defined under the 20 February 1998 CPCG, according to which the accused shall be interrogated at the place of the pre-trial investigation (section 3, article 311). Torture of the person during the pre-trial interrogation and evidences obtained as a result of such interrogation is subject of acute critics in the criminal law science. However, according to the section one, article 322, final and transitional provisions of CPCG, pre-trial interrogation based on this rule is carried out up to 31 December 2015. After this date the rule of interrogation of person at the court becomes effective.

3.2. Exclusion of Evidences Obtained as a Result of Torture (Section one, Article 72 of CPCG)

Evidences obtained with the violation of above mentioned law requirements are not acceptable. According to the section 7, article 42 of the Constitution of Georgia, the evidence obtained with the violation of law is not legally effective.[21]

CPCG of 20 February 1998 was specifically defining the conditions under which the evidences would be considered as inadmissible. In particular, according to the section one, article 111 of CPCG:

Evidence is recognized as inadmissible if it has been obtained:

a) By an official or body who is not competent to collect evidence in the matter;

b) From a source not provided by law;

c) in contravention of the statute-provided procedure, as well as with the application of violence, threat, deception, blackmail, in disregard of a personality, or with the application of other illegal methods;

d) From a person who has violated the law or who cannot indicate from which source, where, when and how the submitted by him evidence has been revealed.

Article 72 of valid CPCG has introduced quite different, new regulation of the inadmissible evidences. According to the section one of the mentioned article, “the evidences obtained with the material violation of procedure code and other evidences obtained legitimately based on these evidences, if such evidences worsen the legal condition of the accused, are inadmissible and have no legal effect.”

What does material violation of law mean? 1998 year CPCG was defining the essential violations of procedure law. Namely, according to the article 563 “Material are deemed to be such violations of the provisions of this Code which have restricted the rights of the participants in the proceeding, interfered with the comprehensive, complete and impartial hearing of a matter, affected the making of a lawful, well-grounded and just judgment”. According to the valid CPCG it is discretion of the judge to decide what to consider as the material violation of the discussed code.

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[21] See *Turava M.,* Right for the Fair Court, comments to the Constitution of Georgia, chapter two, Citizenship of Georgia, Basic Human Rights and Freedoms, Tb., 2013, 552 and following pages (In Georgian).

Article 72 of CPCG defined, how to deal with the evidences ("the fruit of poisoned tree") obtained based on the evidences ("poisoned tree") obtained via the material violation of the procedure code. Hence, unlike the 1998 Code, the valid introduced the paragraph defining the legal nature of so called "fruit of the poisoned tree".

The theory of "fruit of poisoned tree" was established in USA form the beginning of 20th century. The objective of the theory is to avoid legal result from the initial illegal action and not to admit the evidences obtained legitimately from the above action for the criminal law case.

Ia Chkheidze criticized formulation of article 72 of CPCG in her thesis work.[22]According to her, such change cannot be considered as the progressive.[23] Author is of the view that 1998 CPCG via the definition of conditions for the admissibility of evidences in the article 111, the legislation was ensuring the "objectivity of information"; the relevant norms of 2010 year procedure code does not strictly regulate the process of assertion.[24] *Chkheidze* considers it necessary strict regulation of such area of legal relationship as admissibility of evidences.[25] She is of the view that "any evidence, which is obtained, based on the illegal evidences, such evidences must be excluded from the criminal law case"[26]and "rule of admissibility of evidences shall not consider any exceptions".[27]

As mentioned above, according to the section 2, article 4 of CPCG, torture belongs to the inadmissible methods of influence over the freedom of the will. Evidences obtained from the accused via such methods, according to the section one, article 72 of CPCG are inadmissible and have no legal effect. *Merab Turava,* commenting on the article 42 of the Constitution of Georgia notes that article 3 of Convention on Human Rights is one of the key values of democratic society and evidences obtained via the violation of this article, generally are the inadmissible evidences.[28]However, it is other issue, to define whether it is possible to admit other evidences obtained legitimately based on the inadmissible evidences obtained on the criminal law case via the torture?

Considering the circumstances of mentioned *Gäfgen* case, the investigation has obtained new evidences as a result of forced admission on the case. In particular, corpse and the traces of the car tires. Does the Georgian procedure code consider admissible the direct evidences obtained via the torture, in this case the corpse? CPC of Georgia answers this question. As the investigation found the corpse of 11 years' old *Jacob von Metzler*via the torture of *Gäfgen* and the above evidence worsens the legal condition of accused, according to the section one, article 72 of CPCG, the corpse as well as the testimony shall be considered as inadmissible evidence.

It is interesting, how the German court dealt with the evidences obtained on the *Magnus Gäfgen* case. It is also important to review the approach of German legislation and court practice on the admissibility of evidences obtained via the torture.

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22 See *Chkheidze I.,* Problem of Admissibility of Evidences in Criminal Law Procedure, Tb., 2010, 79-81 (In Georgian).

23 Ibid, 79.

24 Ibid.

25 Ibid, 80.

26 Ibid.

27 Ibid, 81.

28 See *Turava M.,* Right For the Fair court, Comments to the Constitution of Georgia, chapter two, Citizenship of Georgia, Basic Human rights and Freedoms, Tb., 2013, 554(In Georgian).

4. Issue of Admissibility of Evidences Obtained via the Torture in German Criminal Law Procedures

4.1. Essence and Purpose of Paragraph 136a of CPC

Prohibition of torture is considered in the following normative acts of Germany: paragraph one, article one, paragraph two, article 2 and paragraph one, article 104 of the Constitution, paragraph 136a of CPC, paragraphs 340 and 343 of Criminal Law Code, relevant norms in the police law with reference to paragraph 136a of CPC.

Paragraph 136a of German Federal Republic CPC, considering the procedural-legal regulation of torture prohibition, is devoted to the prohibited methods of interrogation. This paragraph was included in the code by law of 12 September 1950,[29] formulation of which was developed Ministry of Justice of Germany with the significant influence from Swedish Criminal Procedure Law example.[30]

Initially adding of paragraph 136a to the CPC was assessed as non-productive measure, as on the day of paragraph becoming effective in the CPC of Germany the freedom of testimony giving and acknowledgement of accused as the subject of trial were both effective, which themselves implied prohibition of inadmissible methods of interrogation; in other words it was a valid procedural principle.[31] Despite the above, the issue of annulation of new paragraph did not become subject of discussions.[32]

Professor *Rogall* indicates that decision of legislator on the inclusion of paragraph 136a into the CPC deserves the respect.[33] Above mentioned paragraph is the result of negative experience of recent past; in particular, massive heavy violations of fundamental rights of Human Being by the Germany's National-Socialistic regime is being discussed.[34] Based on the above, the purpose of paragraph 136a is consideration of fundamental principal acknowledged by the Constitution in the Criminal Procedure law.[35] The above mentioned paragraph is the manifestation of Constitutionally guaranteed such rights and freedoms, as for example: inviolability of person's dignity, prohibition of torture, privilege of protection against self-discrimination (*nemo tenetur se ipsum accusare*)and principle of fail court.[36]

Paragraph 136a is comprised of 3 sub-paragraphs:

According to the first paragraph it is inadmissible to restrict the free decisions and implementation of free will by the accused via the inadmissible methods of interrogation. Such methods include: torture, severe treatment, deception, hypnosis. Compulsion may only be used in cases envisaged under the criminal

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29 See BGB 1. I, 455.

30 See *Rogall K.*, Systematischer Kommentar zur Strafprozessordnung mit GVG und EMRK, 4. Auflage, Band II, Köln, 2010, §136a, Rn. 1.

31 Ibid, Rn. 2.

32 Ibid.

33 Ibid.

34 Ibid.

35 Ibid.

36 See *Eisenberg U.*, Beweisrecht der StPO, Spezialkommentar, 8. Auflage, München, 2013, 220, Rn. 625, *Rogall K.*, Systematischer Kommentar zur Strafprozessordnung mit GVG und EMRK, 4. Auflage, Band II, Köln, 2010, §136a, Rn. 3, *Meyer-Goßner L.*, Strafprozessordnung, 55. Auflage, München, 2012, §136a, Rn. 1.

procedure law and in line with the set rules. It is prohibited to threaten with any of the impermissible methods and promise such concessions, which are not considered by the law.

According to the second paragraph it is not allowed to use the measures which could have negative impact over the memory of accused or his consciousness.[37]

The first sentence of the third paragraph of mentioned 136a paragraph indicates that prohibitions stated in the first and second paragraphs are effective even in case of consent of the accused.

And finally, the second sentence, third sub-paragraph of paragraph 136a defines legal outcomes of utilization of prohibited methods of interrogation. Namely, testimony obtained via the prohibited methods of interrogation shall not be admitted to the criminal law case, even if the accused agrees with the admissibility of the provided evidences.

4.2. Rule on Exclusion of Evidences Obtained as a Result of Torture in Lice with Sub-paragraph 3, Paragraph 136a of CPC

In the process of making decision on the permissibility of evidences in criminal law case, it is important to consider how the mentioned evidences support identification of truth on the criminal case. *Rule of exclusion of evidence*[38] considers state-legal restriction of liability to identify the truth [39] for the police, prosecutor's office and the court,[40] as it is not permissible to define the truth regarding the case for any price.[41]

Evidences' exclusion rule, on its own, means that the court does not have right to base its decision making on the evidences obtained with the violation of law.[42]

According to the general view dominating in the literature, rule on exclusion of evidences, provided in paragraph 136a of CPC represents the specific manifestation of protection of human dignity envisaged under the article one of German Constitution.[43]The State shall ensure that the accused is the subject and not the object of the criminal law trial/case. Identification of truth on the criminal law case shall be achieved within the criminal law procedures which are regulated at state-legal level.[44] Obligation to identify the truth on the criminal case by all means is not a principle of criminal law process.[45]

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[37] This formulation of the norm provides the reason to state that paragraph 136a does not consider comprehensive list of prohibited list of interrogation methods. In this regard, See *Neuhaus R.*, Zur Notwendigkeit der qualifizierten Beschuldigtenbelehrung, "Neue Zeitschrift für Strafrecht" (NStZ), 1997, 313, *Meyer-Goßner L.,* Strafprozessordnung, 55. Auflage, München, 2012, §136a, Rn 6.

[38] In German criminal law the above mentioned is referred to with the term: Beweisverwertungsverbot.

[39] See Articles 160, 163 and second paragraph of Article 244 of German CPC.

[40] See *Kühne H. - H.*, Strafprozessrecht,8. Auflage, Heidelberg, 2010, 532, Rn. 880.1.

[41] In this regard see the following court decisions: BVerfG NJW 1984, 428, BVerfG NJW 2005, 2382, BGHSt 14, 358, 365.

[42] Compare with *Kühne H .- H.*, Strafprozessrecht, 8. Auflage, Heidelberg, 2010, 546 ff.

[43] See *Neuhaus R.*, Zur Fernwirkung von Beweisverwertungsverboten, "Neue Juristische Wochenschrift" (NJW), 1990, 1221.

[44] In this regard see the following court decisions: BVerfG, NJW 1984, 428, BVerfG NJW 2005, 2382, BGHSt 14, 358, 365.

[45] See BGHSt 14, 358, 365.

In the process of discussion of evidence exclusion rule it is key to have positive effect over the condition, interests of injured person.[46]

According to the dominating position, the outcome of evidence exclusion is the verdict of not guilty, if there are no other evidences for the conviction of accused.[47]

Beling was referring to the above during the early years.[48]

It is interesting to discuss whether to exclude evidences for all errors, all violated norm during the criminal law trial?

Till today problem of evidence exclusion rule is one of the complicated and disputable issues in the criminal law proceedings. Doctrine related to the above issue has been established only in recent years. *Beling* is considered as founder of doctrine on the obtaining and admissibility of evidences in the German criminal law process.[49] The above made the admissibility of evidences as independent criminal law case problem, a subject of discussion.[50] This issue became even more relevant in the criminal law science at the 46th meeting devoted to the German legal advisers held in 1966.[51] There are various theories developed in the criminal law literature, such as, so called "theory of rights' circle"[52], "theory of norm protection purpose"[53], "doctrine on individual assessment of specific case"[54]; however until today the problem of admissibility of evidences has not been solved and the issue is still subject of disputes.[55]

If *Beling's* position is shared, then the admissibility of evidences obtained via the violation of laws shall always be excluded.[56] Development of rule on exclusion of evidences was caused by the utilization of prohibited interrogation methods.[57] The legislator makes more effective the prohibition of the above

46 See *Eisenberg U.*, Beweisrecht der StPO, Spezialkommentar, 8. Auflage, München, 2013, Rn. 371.

47 See *Beling E.*, Die Beweisverbote als Grenzen der Wahrheitserforschung im Strafprozeß, Darmstadt, 1968, 32.

48 *Klaus Rogall* refers to *Beling* as the founder of evidence inadmissibility concept. See *Rogall K.*, Hypothetische Ermittlungsverläufe im Strafprozeß, "Neue Zeitschrift für Strafrecht" (NStZ), 1988, Heft 9, 386.

49 See *Beling E.,* Die Beweisverbote als Grenzen der Wahrheitserforschung im Strafprozeß, Darmstadt, 1968, 30.

50 See *Roxin C., Schünemann B.*, Strafverfahrensrecht, 27. Auflage, München, 2012, §24, Rn. 22.

51 See *Jäger C*, Beweiserhebungs- und Beweisverwertungsverbote als prozessuale Regelungsinstrumente im strafverfolgenden Rechtsstaat, "Goltdammer's Archiv für Strafrecht" (GA), 2008, 473.

52 See *Roxin C., Schünemann B.*, Strafverfahrensrecht, 27. Auflage, München, 2012, §24, Rn. 24, *Eisenberg U.*, Beweisrecht der StPO, Spezialkommentar, 8. Auflage, München, 2013, Rn. 364, 365.

53 See *Roxin C., Schünemann B.*, Strafverfahrensrecht, 27. Auflage, München, 2012, §24, Rn. 25, *Eisenberg U.*, Beweisrecht der StPO, Spezialkommentar, 8. Auflage, München, 2013, Rn.366.

54 See *Rogall K.*, Gegenwärtiger Stand und Entwicklungstendenzen der Lehre von den strafprozessualen Beweisverboten, "Zeitschrift für die gesamte Strafrechtswissenschaft" (ZStW), 91 (1979), 1-44, *Rogall K.*, „Abwägungen" im Recht der Beweisverbote, Festschrift für Ernst-Walter Hanack zum 70. Geburtstag, Berlin, 1999, 293-309, *Roxin C., Schünemann B.*, Strafverfahrensrecht, München, 2012, §24, Rn. 30, *Jäger C*, Beweiserhebungs- und Beweisverwertungsverbote als prozessuale Regelungsinstrumente im straf-verfolgenden Rechtsstaat, "Goltdammer's Archiv für Strafrecht" (GA), 2008, 473-499, *Eisenberg U.*, Beweisrecht der StPO, Spezialkommentar, 8. Auflage, München, 2013, Rn. 367.

55 See *Eisenberg U.*, Beweisrecht der StPO, Spezialkommentar, 8. Auflage, München, 2013, Rn. 370.

56 See *Beling E.*, Die Beweisverbote als Grenzen der Wahrheitserforschung im Strafprozeß, Darmstadt, 1968, 30.

57 See *Rogall K.*, Systematischer Kommentar zur Strafprozessordnung mit GVG und EMRK, 4. Auflage, Band II, Köln, 2010, §136a, Rn.101.

methods, envisaged under the first and second sub-paragraphs, as well as first sentence of third sub-paragraph of paragraph 136a, by not allowing the use of resulted outcome (testimony obtained via the utilization of prohibited interrogation methods) in the trial,[58] whether the above testimony is wrong or not, contains extenuating or aggravating circumstances.[59]

So called "Mühlenteich theory" established different approach related to the exclusion of evidences obtained via the prohibited methods for the criminal law case.[60] This theory is also distinguished with the positive attitude to the accused, so called "benevolence to the accused".[61] According to this theory evidence obtained via the utilization of prohibited methods may not become subject of exclusion of evidences if the evidences contain information beneficial for the accused; based on the contents of the second sentence, sub-paragraph 3 of paragraph 136a the evidences shall be excluded if such evidences contain the aggravating circumstances for the accused.[62] The main idea of "Mühlenteich theory" was established in the following way: consideration of evidences as inadmissible shall not be followed with the aggravation of legal condition of the accused.[63]

The formulation included in the paragraph 136a, related to the following: the evidence obtained with the prohibited methods of interrogation cannot be included in the trial, even if the accused agrees to it.[64] Accordingly, even the consent of the accused does not legitimate the use of prohibited interrogation methods.[65]

The third senate of German federal court made a decision[66] related to the admissibility of testimony in the event of consent of accused, when mentioned testimony is subject to the exclusion rule. The senate left open the issue whether it is possible to have cases, in contrary to the literal definition of the law; the evidences obtained via the violation of law are admitted based on the fundamental constitutional legal principles. The court is of the view that it cannot identify the truth under the liability to determine truth for the case envisaged under the paragraph 244 of CPC via the use of prohibited methods envisaged under the paragraph 136a.[67]

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58 See *Roxin C., Schünemann B.*, Strafverfahrensrecht, 27. Auflage, München, 2012, §25, Rn. 16.

59 See *Meyer-GoßnerL.,*Strafprozessordnung, 55. Auflage, München, 2012, §136a, Rn. 27, *Eisenberg U.*, Beweisrecht der StPO, Spezialkommentar, 8. Auflage, München, 2013, 248, Rn. 704, *Gleß S. in Löwe-Rosenberg*, Die Strafprozeßordnung und das Gerichtsverfassungsgesetz, 26. Auflage, Berlin, 2007, §136a, Rn. 71, *Rogall K.*, Systematischer Kommentar zur Strafprozessordnung mit GVG und EMRK, 4. Auflage, Band II, Köln, 2010, §136a, Rn. 99.

60 Title Mühlenteich was given to the theory due to the place of meeting of its authors. The authors of the doctrine are: *Claus Roxin, Gerhard Schäfer and Gunter Widmaier, they had meeting in 1996 year.* As a result of active discussions conducted at the meeting so called "Mühlenteich theory" was created. This theory refers to the importance of evidence exclusion rule and its impact over the criminal law. See *Roxin C., Schäfer G., Widmaier G.*, Mühlenteichtheorie, "Strafverteidiger" (StV), 11/2006, 655.

61 See *Roxin C., Schäfer G., Widmaier G.*, Mühlenteichtheorie, "Strafverteidiger" (StV), 11/2006, 656.

62 Ibid, 655-661.

63 Ibid, 660.

64 See *Roxin C., Schünemann B.*, Strafverfahrensrecht, 27. Auflage, München, 2012, §25, Rn. 17.

65 See *Rogall K.*, Systematischer Kommentar zur Strafprozessordnung mit GVG und EMRK, 4. Auflage, Band II, Köln, 2010, §136a, Rn. 97, 105.

66 See BGH StV 2009, 113.

67 Ibid.

Some approaches developed as a result of this decision of German federal court were criticized by *Claus Roxin*.[68] He is of the view that Federal Court assigns relevance to only the grammatical (literal) definition of the law, which deserves critic.[69] According to *Roxin* the law text does not restrict the opportunity for the court to acknowledge the evidences proving non-guiltiness of accused.[70] According to the second sentence, sub-paragraph three, paragraph 136a testimony obtained via the prohibited interrogation methods then this testimony cannot be used even if the accused agrees with their use. This wording in the law, notes Roxin, relates to the evidences containing aggravating circumstances, as in the event of extenuating evidences there is no issue of the consent from the accused.[71] Let's assume, that the accused person makes decision to take the guilt or he/she is the victim, based on which he/she does not agree with the use of evidences containing aggravating circumstances. The court for this case still has to, within the requirements of the circumstances determined for the case, to prove the non-guiltiness of the accused or assign the light punishment. The court based on the principle of responsibility of accused, which has firm effect, shall always consider any extenuating circumstances on the case.[72] The cases considered under paragraph 136a the issue shall not be resolved differently.[73] It not admissible to punish the person without the guilt or over the level of his guiltiness. Guilty responsibility principle protects dignity of human being, which is guaranteed by the paragraph one, article one of the German Constitution and at the same time composing part of the requirement of legal state as considered by paragraph 3, article 20 of the German Constitution.[74]

Justice bodies do not have right to use means and measures prohibited by the law even for the determination of truth. However, for certain cases, if such measures are carried out and even against their purpose, as a result the evidences extenuating the circumstances for the accused are obtained, then based on the fairness and legal state the use of these evidences for the benefit of accused shall not be excluded.[75] Use of such material against the accused will cause the incorrect trial of non-guilty person or person having less level of guiltiness. This will have heavier outcomes for the justice, to have legal system taking care only about "not to make hands dirty" with the use of evidences obtained via the violation of laws.[76] Hence, according to the "Mühlenteich theory" incorrect punishment of innocent person or person having less heavy guiltiness, as the extenuating evidences obtained via the violation of laws are not admitted to the case, will be methodical as well as material violation of legal state.[77]

According to "Mühlenteich theory" second sentence, sub-paragraph three, paragraph 136a does not only consider the testimony of accused. If the witness is interrogated with the methods prohibited by the law and the testimony contains significant extenuating circumstances (for example, if the

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[68] See *Roxin C.*, Anmerkung zu BGH, Beschl. v. 5.8.2008 – 3 StR 45/08 (LG Lüneberg), "Strafverteidiger" (StV),2009, 113 ff.
[69] Ibid, 114.
[70] Ibid.
[71] Ibid.
[72] Ibid.
[73] Ibid.
[74] See *Roxin C., Schäfer G., Widmaier G.*, Mühlenteichtheorie, "Strafverteidiger" (StV), 11/2006, 656.
[75] Ibid.
[76] Ibid.
[77] Ibid.

interrogation makes it clear that the accused played secondary role in the commitment of the crime), then such testimony shall not be neglected, if based on other evidences the accused is faced with the danger of verdict of guilty.[78]

To summarize the essence of "Mühlenteich theory" – indeed, the paragraph 136a generally excludes the use of testimony obtained via the violation of law in the criminal law process; however this prohibition does not contravene with the use of evidences with the purpose of extenuating circumstances.[79] Hence, according to "Mühlenteich theory" the record of second sentence, sub-paragraph 3, paragraph 136a "testimony obtained via the prohibited interrogation methods cannot be used even when the accused agrees to use them", has to be placed within the framework of state-legal principles and constitution.[80]

Regarding the above, *Gerhard Schäfer* is of the view that incorrect interpretation of sub-paragraph three, paragraph 136a may place the accused under the paradox situation on behalf of the protection of his dignity, not allowing the use of evidences containing the extenuating circumstances to the trial.[81]

The German Federal court also discussed the above issue. Namely, the first senate of court indicated in the decision made in 2005, that if the evidences obtained via the violation of law contain the data which are beneficial for the accused, proving his/her non-guiltiness, it is difficult to imagine that the court does not take the above into consideration.[82]

According to *Roxin* the prohibition contained in the second sentence, sub-paragraph 3, paragraph 136a does not cover the issue of admissibility of materials containing the extenuating circumstances.[83] The legislator wishes to exclude the probability of dependence of use of evidences obtained via the prohibited interrogation methods on the will of accused.[84] The above is based on the idea that use of prohibited interrogation methods may have impact on the obtaining consent from the accused on the use of evidences obtained via such methods. For example, if the person provided admissive testimony as a result of compulsion and torture, he would often agree on the use of such evidences, as he could still be under the pressure, as he is afraid of repeated violence.[85]

The German Federal court senate in its decision[86]in some extent allows use of evidences proving the innocence and obtained via the violation of laws. In particular, such evidences are

[78] Ibid.
[79] Ibid, 659.
[80] Ibid, 656.
[81] Ibid.
[82] See BGHSt 50, 206.
[83] See *Roxin C.*, Anmerkung zu BGH, Beschl. v. 5.8.2008 – 3 StR 45/08 (LG Lüneberg), "Strafverteidiger" (StV),2009, 114.
[84] In relation to this issue, when the exclusion of evidences may depend on the authority of the accused person for the free decision making, related to the admissibility of evidences in favour of accused person. See *Hamm R.*, Verwertung rechtswidriger Ermittlungen – nur zugunsten des Beschuldigten, "Strafverteidiger Forum" (StraFo), 1998, 361 ff., *Nack A.,* Verwertung rechtswidriger Ermittlungen nur zugunsten des Beschuldigten, "Strafverteidiger Forum" (StraFo), 1998, 366 ff., *Amelung K.*, „Verwertbarkeit rechtswidrig gewonnener Beweismittel zugunsten des Angeklagten und deren Grenzen", "Strafverteidiger Forum" (StraFo), 1999, 181 ff.
[85] See *Roxin C.*, Anmerkung zu BGH, Beschl. v. 5.8.2008 – 3 StR 45/08 (LG Lüneberg), "Strafverteidiger" (StV),2009, 114.
[86] See BGH StV 2009, 113.

admitted under two pre-conditions. First, if the accused is straightforwardly indicating that he/she rejects the right for the individual protection granted by the second sentence, sub-paragraph 3, paragraph 136a. Second, the accused must show that it is impossible to implement his/her effective defense without the use of confidential, assertive materials in the case.[87] Senate decided, in case of weighing the legal benefits, the right of effective protection of accused must be given priority in relation to the main principles of state justice as guaranteed by the second sentence, sub-paragraph three, paragraph 136a.[88]

According to *Roxin,* weighing the legal benefits in this case cannot be talked about, as the "right for the effective defense" mentioned by the court is not opposed with any violation of any principles of legal state.[89] According to the author, such violation was in place in the event of use of interrogation methods prohibited under the paragraph 136a; such violation has already taken place, and it is impossible to eradicate the mentioned.[90] *Roxin* is of the view that use of extenuating circumstances revealed as a result of use of prohibited interrogation methods does not represent the violation of state-legal principles. On the contrary, use of such circumstances is based on the recruitments of state-legal principles, as the court does not have right to consciously make decision which is unfavorable for the accused and is wrong.[91]

According to *Roxin,* if the admissive testimony is obtained with the violation of paragraph 136a, which also contains the extenuating circumstances, such evidence shall not be used, if conviction of the accused is possible only based on admissibility of the above testimony, because as a result the accused shall be anyway released from the responsibility; But if the conviction of the accused is possible using the other evidences, the evidences obtained with the violation of law and containing extenuating circumstances shall be admitted to the process in favour of the accused.[92] He is of the view that the heaviness of violation of legal state principle shall not determine the conscious making of erroneous decision and thinks that the judge shall always consider the extenuating circumstances in favour of the accused.[93]

As for the issue, when is the evident aggravating or extenuating, *Rogall* is of the view that often it is difficult to detect especially at the initial stage of assessment.[94] In his comments to the decision of the German Federal Court, dated 05 August 2008[95], in this regard defines, that although it is true to separate extenuating and aggravating circumstances, the court shall be guided with the whole context of carried out interrogation.[96]

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87 Ibid.
88 Ibid.
89 See *Roxin C.*, Anmerkung zu BGH, Beschl. v. 5.8.2008 – 3 StR 45/08 (LG Lüneberg), "Strafverteidiger" (StV),2009, 115.
90 Ibid.
91 Ibid.
92 Ibid.
93 Ibid.
94 Ibid.
95 BGH StV 2009, 113.
96 See *Roxin C.*, Anmerkung zu BGH, Beschl. v. 5.8.2008 – 3 StR 45/08 (LG Lüneberg), "Strafverteidiger" (StV), 2009, 115, *Roxin C., Schäfer G., Widmaier G.*, Mühlenteichtheorie, "Strafverteidiger" (StV), 11/2006, 658.

Majority of authors is of the view, that all mistakes made in the process of obtaining the evidences do not automatically cause their exclusion from the process.[97] The theory of individual assessment of specific case dominates in the modern German justice.[98]

Based on the contents of the theme, the question must be separately given- is possible to admit the evidences obtained via the torture to the criminal trial Part of the authors is of the view that admissibility of evidences obtained via these methods shall not be subject of the individual assessment of specific case; as in this case it is not possible to make any exceptions from the evidence exclusion rule.[99] The above shall not take place even when the use of evidences obtained via the torture in in the interests of the accused.[100] Heaviness of law violations made in the process of evidence obtaining determines the admissibility of obtained evidences. The heavier the law violations, the higher are the probability that admission of obtained evidences for the criminal case will significantly damage the whole process.[101] Torture, as the method for evidence obtaining, itself is the heavy infringement of rights of accused person; its utilization makes the whole criminal process unfair.[102] Therefore, the composition of paragraph 136a excludes the admissibility of primary evidences obtained with the torture for the criminal case.[103]

To summarize the above discussed exclusion of evidences, we'll have the following situation: in certain cases the evidences obtained via the measures carried out with the violation of law may contain assertive materials which are beneficial, favorable for the accused. Therefore, based on the principles of fairness and legal state one should not exclude their use for the benefits of the accused person. Discussed "Mühlenteich theory" supports this position. However, in case of torture, the evidences obtained with the use of this prohibited method, shall be unconditionally considered as the inadmissible evidence again based on the principles of fairness and legal state.

4.3. Further Impact of Exclusion of Evidences Obtained with the Torture

It is interesting, whether the rule on the exclusion of evidences can be extended over the new (derivative) evidences obtained based on the information obtained via the torture. For example, when the investigator has achieved the admissive statement via the torture of accused, based on which the corpse hidden by the accused person was found. The issue shall be stated in a following way: does the rule on exclusion of evidences envisaged under the sub-paragraph 3, paragraph 136a, covers only the confession statement as the directly obtained evidence, or it is extended over the corpse and traces of crime on the corpse.

[97] See *Rogall K.*, Hypothetische Ermittlungsverläufe im Strafprozeß, "Neue Zeitschrift für Strafrecht" (NStZ), 1988, Heft 9, 386.

[98] See *Roxin C., Schünemann B.*, Strafverfahrensrecht, 27. Auflage, München, 2012, §24, Rn. 23 ff.

[99] See *Ambos K.*, Die transnationale Verwertung von Folterbeweisen, "Strafverteidiger" (StV),3/2009, 158.

[100] See *Meyer-Goßner L.,* Strafprozessordnung, 55. Auflage, München, 2012, §136a, Rn. 27, *Eisenberg U.*, Beweisrecht der StPO, Spezialkommentar, 8. Auflage, München, 2013, Rn. 704, *GleßS in Löwe-Rosenberg*, Die Strafprozeßordnung und das Gerichtsverfassungsgesetz, 26. Auflage, Berlin, 2007, §136a, Rn. 71.

[101] See *Ambos K.*, Die transnationale Verwertung von Folterbeweisen, "Strafverteidiger" (StV),3/2009, 152-153.

[102] Ibid, 157.

[103] See *Eisenberg U.*, Beweisrecht der StPO, Spezialkommentar, 8. Auflage, München, 2013, Rn. 713.

In the process of discussion of the above issue, namely the *further impact of rule on the exclusion of evidences (Fernwirkung von Beweisverwertungsverbot)* the definition of scope of effectiveness of the rule on evidence exclusion is the central problem. In the event of using the evidence exclusion rule envisaged under the second sentence, sub-paragraph 3, paragraph 136a the problem is related with the definition of norm,[104] as the law text does not provide indication required for its interpretation. The second sentence, sub-paragraph 3, paragraph 136a prohibits the admissibility of testimony itself and not the admissibility of information obtained based on such testimony. The law does not consider that the admissibility of the evidences obtained later, existence of which depends on the results of the initially obtained illegitimate evidences, is prohibited.[105] It is quite difficult to define the difference between the use of admissible and inadmissible data based on the law text. Hence the issue of the further impact of rule on evidence exclusion is not clarified from the grammatical (literal) definition of the norm included in the second sentence, sub-paragraph 3, paragraph 136a.[106]

Based on the above, the issue of admissibility of derivative evidences obtained based on the evidences received via the violation of law is of estimation type.[107] Therefore, the main principles related to the rule on the evidence exclusion developed in the literature as well as the court practice, in particular related to the scope of its effectiveness, is necessary and highly welcomed.[108]

4.3.1. Arguments of Ones Opposing the Exclusion of Derivative Evidences

The further impact of rule on the evidence exclusion, so called exclusion of derivative evidences from the criminal case, was principally rejected in the court practice as well as literature.[109] According to *Klaus Volk's* statement, it is not acceptable to use confession statement achieved via the torture, however the other evidences, which were obtained by the investigation based on the above testimony, is not "infected" due to the violation of paragraph 136a.[110] Accordingly, it is possible to admit them to the process.[111]

As for the approach of the German Federal court to the mentioned issue, the Federal Court justified the rejection of evidence exclusion rule with the following two arguments: first – it is not acceptable to have the "whole criminal law case paralyzed" due to the one mistake made in the process; and second – "such restriction of the result of made mistake is necessary for the effective fight against the crime".[112]

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[104] See *Rogall K.*, Systematischer Kommentar zur Strafprozessordnung mit GVG und EMRK, 4.Auflage, Band II, Köln, 2010, §136a, Rn.109.
[105] Ibid.
[106] Ibid.
[107] Ibid.
[108] Ibid.
[109] See BGHSt 27, 358, 32, 71, 34, 362, 364, *Meyer-GoßnerL.,* Strafprozessordnung, 55. Auflage, München, 2012, §136a, Rn. 31.
[110] See *Volk K.,* Grundkurs StPO, 6. Auflage, München, 2008, 47.
[111] Ibid.
[112] See BGHSt 34, 364 ff., additionally See BGHSt 32, 71. This phenomenon known to the legal professionals, when confirmation or exclusion of some event is not possible, according to *Grünwald,* cannot resolve the issue related to the admissibility of evidences. According to his view, evidence obtained with the violation

4.3.2. Arguments Supporting the Exclusion of Derivative Evidences – so Called "the Fruit of Poisoned Tree"

The principal rejection of further impact of rule on the evidence exclusion, in other words admission of derivative evidences for the criminal case was partially criticized. *Ralph Neuhaus* opposes the rejection of further impact of rule on the evidence exclusion and states that there is no empirical basis established by the German Federal court for the above mentioned arguments.[113] He is of the view that by the admission of information obtained based on the illegal evidences the criminal law process at some extent acknowledges the principles of inquisitive processes taking place during the medieval centuries.[114] The author sees the risk that it will become priority and necessary for the criminal prosecution bodies to manage and extort all information held by the accused.[115]

Even if the essence of paragraph 136a is that the illegitimate evidences shall not be admitted for the criminal law process, why shall not the evidence exclusion rule over the data obtained later based on the above evidences be extended? In relation to the above, *Neuhaus* indicates that by the admission of derivative evidences the interrogation carried out with the violation of law will still have the "result".[116] There will be the case, where the accused is interrogated as long as possible, using deception or physical force, until the accused provides the investigation with the new data, and the court will not prevent their use in the criminal trial process.[117] The above mentioned, based on the author's assumption, will provoke the intensive utilization of prohibited methods during the interrogation process.[118]

According to *Rogall,* admissibility of other evidences obtained on the basis of evidences received via the violation of law implies the use of primary (direct) evidences, as the new derivative evidence is the result of the evidences obtained via the law violation.[119]

According to the "fruit of the poisonous tree" doctrine developed in Anglo-American criminal law (*fruit of the poisonous tree-doctrine*)the derivative evidences shall be also considered as inadmissible. Otherwise, the prohibition of obtaining the evidences via the unacceptable methods loses the meaning.[120]

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of law shall not be admitted to the Criminal Law Process even if such evidences could be obtained without violation of law. See *Grünwald G.,* Anmerkung zu BGH, Urt. v. 28.4.1987 – 5 StR 666/86 (LG Hannover), "Strafverteidiger" (StV), 1987, 472.

113 See *Neuhaus R.*, Zur Fernwirkung von Beweisverwertungsverboten, "Neue Juristische Wochenschrift" (NJW), 1990, Heft 19, 1221.

114 Ibid.

115 Ibid.

116 Ibid, 1222.

117 Ibid.

118 Ibid.

119 See *Rogall K.*, Systematischer Kommentar zur Strafprozessordnung mit GVG und EMRK, 4. Auflage, Band II, Köln, 2010, §136a, Rn. 109.

120 See *Jäger C.*, Beweiserhebungs- und Beweisverwertungsverbote als prozessuale Regelungsinstrumente im strafverfolgenden Rechtsstaat, "Goltdammer's Archiv für Strafrecht" (GA), 2008, 494.

4.3.2.1 Limitation of Legal Scope of Fruit of the Poisonous Tree Doctrine

The assertive process in the criminal law shall implement under the framework of legal regulation. Already mentioned "fruit of the poisonous three" doctrine supports strict formalization of assertive process. The theories developed recently in the procedural-legal literature created the basis for the establishment of exceptions from the strict formalization of assertive process. In order to define whether the derivative evidence shall be estimated as the "fruit of the poisonous tree", the formula of causal relationship between the law violation and primary evidences is mainly used.[121] This approach existing in the modern criminal law, to determine normative relationship between the mistake made, derivative evidence and verdict, has been established in USA criminal law process.[122] Three main exceptions were developed in the USA court practice, which restrict the legal scope of effect of "fruit of the poisonous tree"; these exceptions are:[123]

- Independent source exception;
- Exception for the purging the illegally obtained evidences (*purged taint exception*);
- Exception for the inevitable discovery of evidences (*inevitable discovery exception*).

There are discussions on the mentioned exceptions in German legal literature and accordingly, they are often used for the resolution of issues.

Based on the "independent source" of evidence exception, derivative evidence shall not be excluded from the criminal case, which despite the prohibited means of obtaining can be obtained from the independent source.[124] The above includes the cases, when for example, for the obtaining of evidences several investigation actions are being implemented, and for one of such actions the law was heavily violated, for example, via the using the prohibited investigation methods, torture. As a result, investigation got information on the whereabouts of material evidences. However, independent from the law-violating investigation actions, other investigators have obtained the same evidences via the search carried out in compliance with the law.

German professor *Jäger,* proceeding from the protection of norms related to the evidence obtaining considers it possible to restrict the further impact of evidence exclusion in the German criminal law for the cases, when the derivative evidences are obtained based on the absolutely independent sources.[125]

There are following indications in the German legal literature – approach of the German criminal law towards the above issue shall be understood in the following way: in the process of determining the admissibility of evidences defined generally and specifically in the second sentence,

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[121] See *Rogall K.*, Systematischer Kommentar zur Strafprozessordnung mit GVG und EMRK, 4. Auflage, Band II, Köln, 2010, §136a, Rn. 115.

[122] Ibid, Rn. 116.

[123] Ibid. *Chkheidze I.,* Problem of Admissibility of Evidences in Criminal Law Procedure, Tb., 2010, 73 (In Georgian).

[124] See *Rogall K.*, Systematischer Kommentar zur Strafprozessordnung mit GVG und EMRK, 4. Auflage, Band II, Köln, 2010, §136a, Rn. 116, 117.

[125] See *Jäger C.*, Beweiserhebungs- und Beweisverwertungsverbote als prozessuale Regelungsinstrumente im strafverfolgenden Rechtsstaat, "Goltdammer's Archiv für Strafrecht" (GA), 2008, 494.

sub-paragraph 3, paragraph 136a it is undoubted that derivative evidences are not excluded from the criminal cases, if they are based on the independent sources (*eigenständigen Erkenntnisvorgang*).[126]

As for so called "purged" exception for the evidences obtained illegally, according to this exception, the illegally obtained derivative evidence can be admitted to the criminal process, if it could not be obtained by the investigation bodies without illegal actions, however the direct connection between the infringement of fundamental right of the accused guaranteed by the Constitution and evidence obtaining cannot be detected.[127] Some circumstance is found in the relationship between the above two aspects, it could be actions of accused, which on its own determine that the evidence is not perceived as the one obtained based on the illegal actions.[128]

Rogall considers it reasonable to use so called evidence purged exception for the illegally obtained evidences in the German criminal law.[129] According to *Rogall*, it is possible to overcome the mistake made during the process, defect by the prosecution body itself. The above considers so called "treatment" of mistakes made during the process.[130] Often, the mistake made may lose meaning without any actions implemented by the prosecution bodies. On the one hand, the above considers, any voluntary actions implemented by the accused or the third party, and on the other hand, cases when long time has passed between the mistake and obtained derivative evidences.[131]

And finally, in the event of exceptional cases for evidences referred to as "inevitable discovery", the evidences obtained via the law violation may be admitted to the criminal case, if the prosecution bodies could with high probability anyway obtain such evidences (*mit größter Wahrscheinlichkeit*).[132] *Christian Jäger* notes that derivative evidences may be used, if the same result of investigation with high probability would be achieved via the legal investigation actions (*mit an Sicherheit grenzender Wahrscheinlichkeit*).[133]

According to *Jäger,* evidence exclusion rule essentially covers derivative evidences, as they must be thankful to the violation of ways for obtaining for their useful nature.[134] Derivative evidences obtained as a result of mistake made in the process shall ensure noticeable increase of possibility to investigate the case.[135] The above does not take place when the obtaining of derivative evidences was expected based on the general life experience (for example discovery of corpse, when it was left in the forest without burying and hence, it would be easy to discover such corpse).[136]

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126 See *Rogall K.*, Systematischer Kommentar zur Strafprozessordnung mit GVG und EMRK, 4. Auflage, Band II, Köln, 2010, §136a, Rn. 117.
127 Ibid, Rn. 116.
128 Ibid.
129 Ibid, Rn. 118.
130 Ibid.
131 Ibid.
132 Ibid, Rn. 116.
133 See *Jäger C.*, Beweiserhebungs- und Beweisverwertungsverbote als prozessuale Regelungsinstrumente im strafverfolgenden Rechtsstaat, "Goltdammer's Archiv für Strafrecht" (GA), 2008, 494.
134 Ibid.
135 Ibid.
136 Ibid.

In the investigation process, existence of such hypothesis, allowing for the probability has the effect of (only) argument, which might be used for the admission of evidences to the case.[137] However, this argument in certain cases could not be or would not be used or such argument might be annulled by other argument.[138]

4.3.2.2 So Called Hypothetical Investigation Process

In the process of making decision on the admissibility of evidences the issue on so called hypothetical conduct of investigation process (*hypothetische Ermittlungsverläufe*)remains open, the above approach has been developed in the German legal literature.

What is the essence of conducting the investigation process with the hypothetical approach? Such process brings us to such circumstances in the criminal process, when law violation is in place and it is necessary to overcome such violation, referred to in the German literature as "treatment" of procedural error.[139] Such "treatment" may be achieved, on the one hand by the rejection of evidence admissibility or by re-obtaining the same evidences without violation of law.[140] However, often it is impossible to get the evidences one more time. Therefore, the requirement for finding other, new outcome was created for the purpose of so called "immunization" of process against the results of law violation.[141] Hypothetical conduct of investigation process is an important part of so called "im-munization attempt".[142] Via the creation of hypothesis, the limitation of results of the made errors are attempted.[143] The question is raised: can the errors be compensated via the "pure semantic de-cision"?[144] More so, when the semantic solution does not have integrated / common criteria.[145]

Hypothetical conduct of investigation process is not the third way for the overcoming the errors made during the process, which can be used alongside the exclusion of evidence admissibility or so called treatment of procedural error.[146] It precedes the above mentioned two opportunities to overcome the error.[147]However the question whether the hypothetical conduct of investigation process can be used for all cases and without exception shall be answered.

[137] See *Rogall K.*, Systematischer Kommentar zur Strafprozessordnung mit GVG und EMRK, 4.Auflage, Band II, Köln, 2010, §136a, Rn. 120.
[138] Ibid.
[139] See *Rogall K.,* Hypothetische Ermittlungsverläufe im Strafprozeß, "Neue Zeitschrift für Strafrecht" (NStZ), 1988, Heft 9, 386.
[140] Ibid, 387.
[141] Ibid.
[142] Ibid.
[143] Ibid.
[144] Ibid.
[145] Regarding the critics of hypothetic conduct of investigation process See *Rogall K.,* Hypothetische Ermittlungsverläufe im Strafprozeß, "Neue Zeitschrift für Strafrecht" (NStZ), 1988, Heft 9, 390.
[146] Ibid, 391.
[147] Ibid.

The hypothetical conduct of investigation process can be allowed only for making decision on the exclusion of derivative evidences obtained with the violation of law from the criminal case.[148] Unlike the direct evidences obtained with the violation of rules, derivative evidences are characterized with the fact that they existed prior to the violation of rules in the process of obtaining the direct evidences.[149] The confession of the accused obtained with the torture would be possible only with such violation of method of getting, without such violence the evidences would not exist.[150] As for the derivative evidences, such as corpse found in the forest, unlike the primary evidences existed prior to the violation of evidence obtaining methods.[151] Therefore, access to the above derivative evidences is simplified with the violation of rules related to the evidence obtaining. According to *Jäger,* this is essential difference between the primary and derivative evidences, justifying different approach and, based on the above, this difference may simplify making hypothesis when the problem is faced of further impact of evidence exclusion rule.[152]

One of the important requirements for the hypothetical conduct of investigation process is specific definition of hypothesis.[153] The above mentioned is required for the defense of the accused. It is not sufficient to assume, whether this or other result will be achieved via the process. Key is to evaluate the investigation process and expected results based on the specific case circumstances.[154] Therefore, it is better to consider the hypotheses, which were reviewed in the process of investigation.[155] Hence, obtaining of derivative evidences must not be possible, they must be expected with a higher probability (*höchstwahrscheinlich*).[156]

Klaus Rogall attempted to evaluate the hypothetical conduct of investigation via the review of four examples.[157] Only the fourth example is interesting in terms of admissibility of evidences obtained via the torture. In particular, the person accused in the murder of young girl named the location of corpse after his torture by the police. The following question shall be answered: are the evidences obtained as a result of corpse identification admissible? As already started search would anyway result in the finding of the corpse in few hours after the interrogation of accused person with the torture.[158]

According to *Rogall,* in the event of further impact of evidence exclusion rule, in other words, when the derivative evidences must be excluded from the criminal case, the need for hypothetical conduct of investigation is higher compared with other situations.[159] In the process of clarifying the

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148 See *Jäger C.*, Beweiserhebungs- und Beweisverwertungsverbote als prozessuale Regelungsinstrumente im strafverfolgenden Rechtsstaat, "Goltdammer's Archiv für Strafrecht" (GA), 2008, 494.

149 Ibid, 495.

150 Ibid.

151 Ibid.

152 Ibid.

153 See *Rogall K.*, Systematischer Kommentar zur Strafprozessordnung mit GVG und EMRK, 4.Auflage, Band II, Köln, 2010, §136a, Rn. 121.

154 See *Rogall K.,* Hypothetische Ermittlungsverläufe im Strafprozeß, "Neue Zeitschrift für Strafrecht" (NStZ), 1988, Heft 9, 392.

155 Ibid, *Rogall K.*, Systematischer Kommentar zur Strafprozessordnung mit GVG und EMRK, 4.Auflage, Band II, Köln, 2010, §136a, Rn.121.

156 See *Rogall K.,* Hypothetische Ermittlungsverläufe im Strafprozeß, "Neue Zeitschrift für Strafrecht" (NStZ), 1988, Heft 9, 392.

157 Ibid, 385.

158 Ibid, 386.

159 Ibid, 392.

further impact of evidence exclusion rule, there is a danger that the mistake made in the process of investigation, causing the exclusion of obtained evidences, may result in the termination of criminal process, paralyses the whole process.[160] According to *Rogall,* the established method for the solution of above problem established by the German Federal court, represented in the rejection of further impact of evidence exclusion rule, is not correct.[161] He is of the view that desired outcome is achieved only via the assessment of specific cases.[162] In his view, the hypothetical conduct of investigation process shall be used for these very cases as the reliable supportive mean.[163]

Despite the fact that in case of further impact of evidence exclusion rule consideration of hypothetical conduct of investigation is effective and necessary. The right for the fair court requires some exceptions.[164] Consideration of hypothetical conduct in the investigation process is related to the difficulties. It cannot be allowed without restrictions.[165] The heavier the violation of human rights, the stricter must be decision on the admissibility of evidences. In case of dealing with the infringement of fundamental rights guaranteed by the Constitution, then consideration of hypothetical conduct of investigation process must not be allowed.[166] Based on the above, in case of torture the hypothetical conduct of investigation process shall not be considered.[167]

4.3.2.3 Issue on the Use of Data Discovered by Chance

The issue related to the admission of data discovered by chance and based on the violation of law in the process of investigation (*Zufallserkenntnisse*).[168] In the above mentioned case, the situation is being dealt with, when the obtained evidence based on the sentence 2, sub-paragraph 3, paragraph 136a has not been admitted and has been excluded from the criminal case. Is it possible to use the data, circumstances obtained from the mentioned evidences for the commencement of criminal prosecution for other crime against the same accused person or even for other crime against the other accused person? The above is referred to as the "preliminary effect" of the evidence exclusion rule in the German legal literature. (*„Frühwirkung" von Verwertungsverboten*).[169]

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160 Above mentioned practice of German Federal court refers to this risk. See BGHSt 34, 364, Also See BGHSt 32, 71.

161 See *Rogall K.,* Hypothetische Ermittlungsverläufe im Strafprozeß, "Neue Zeitschrift für Strafrecht" (NStZ), 1988, Heft 9, 392.

162 Ibid.

163 Ibid.

164 See *Rogall K.*, Systematischer Kommentar zur Strafprozessordnung mit GVG und EMRK, 4. Auflage, Band II, Köln, 2010, §136a, Rn. 121..

165 Ibid.

166 Ibid, Rn. 123.

167 See *Rogall K.,* Hypothetische Ermittlungsverläufe im Strafprozeß, "Neue Zeitschrift für Strafrecht" (NStZ), 1988, Heft 9, 392, *Rogall K.*, Systematischer Kommentar zur Strafprozessordnung mit GVG und EMRK, 4.Auflage, Band II, Köln, 2010, §136a, Rn.125.

168 See BGH NStZ 2006, 402, OLG Hamburg NJW 1973, 157

169 See *Rogall K.*, Systematischer Kommentar zur Strafprozessordnung mit GVG und EMRK, 4. Auflage, Band II, Köln, 2010, §136a, Rn.114.

In relation to the above issue, *Klaus Rogall* indicates to the decision of 67th meeting devoted to the day of German legal professionals.[170] According to the above decision, evidence which is subject to the exclusion rule, but contains sufficient relevant details, could be used as the basis of commencement of new investigation.[171]

German Federal court, in its earlier decisions[172] declined the further impact of the evidence exclusion rule over the data discovered by chance in the process of investigation.[173] The court in justification used the argument of inadmissibility of "paralysation" of criminal law process and added, that the above mentioned hinders the effective implementation of criminal prosecution.[174]

Christian Jäger provides the following example for the data discovered by chance in the process of investigation: accused person was tortured at the police, to get his testimony- where has he hidden the corpse? Based on the information obtained as a result of torture police was conducting search at the indicated place, when the co-executor of the crime decided to once more visit the place of crime. In this case the co-executor of the crime was arrested at the place.[175] In this case obtaining of evidences depends on the circumstances which are not controlled by the criminal prosecution body.[176] The connection between the direct evidence obtained with the violation of law and derivative evidences proceeding from the primary ones is broken. The "fruit of the poisonous tree" is not being dealt with; The "fruit of the neighboring tree" is being faced.[177] And the roots of both threes are connected to each other.[178]

4.3.3 Intermediate Approach

The intermediate approach was established in the criminal law literature with regard to further impact of evidence exclusion rule, which has on the one hand declined admissibility of evidences obtained with the prohibited methods in general terms in the criminal case and on the other hand, declined exclusion of evidences and their non-admission to the criminal case in a general way. Intermediate approach supports the solution of issue with the individual assessment specific case (*Einzelfallabwägung*).[179] According to this doctrine evidence exclusion rule represents the instrument for the protection of individual right of the person. This rule is used when the individual interests surpass interests of criminal persecution.[180] In the event of violation of criminal procedure norm the

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170 Ibid.

171 Ibid.

172 See BGHSt 34, 364ff., BGH StV 1995, 283 (286), BGH NStZ 1998, 426 (427).

173 See BGH NStZ 2006, 402.

174 See BGH NStZ 2006, 402.

175 See *Jäger C.*, Beweiserhebungs- und Beweisverwertungsverbote als prozessuale Regelungsinstrumente im strafverfolgenden Rechtsstaat, "Goltdammer's Archiv für Strafrecht" (GA), 2008, 496.

176 Ibid.

177 Ibid.

178 Ibid.

179 See *Rogall K.,* „Abwägungen" im Recht der Beweisverbote, Festschrift für Ernst-Walter Hanack zum 70. Geburtstag, 1999, 293 ff., *Jäger C*, Beweiserhebungs- und Beweisverwertungsverbote als prozessuale Regelungsinstrumente im strafverfolgenden Rechtsstaat, "Goltdammer's Archiv für Strafrecht" (GA), 2008, 494, *Eisenberg U.*, Beweisrecht der StPO, Spezialkommentar, 8. Auflage, München, 2013, Rn. 408.

180 See *Rogall K.,* Hypothetische Ermittlungsverläufe im Strafprozeß, "Neue Zeitschrift für Strafrecht" (NStZ), 1988, Heft 9, 391.

issue of exclusion of the evidences from the case is of estimation nature.[181] The above decision shall be made based on the criminal persecution interests of the state towards the specific case; heaviness of norm violation, significance of violated interest and need for its protection.[182] There many approaches established to the above issue in the literature. Some of the authors in the collision of interests give priority to the state, public interest, so called system protection (*Systemschutz*).[183]

The German Federal court in its decisions related to the evidence exclusion rule, indicates to the estimation, normative nature of the issue and focuses on two main criteria: heaviness of law violation in the process and importance of the legally protected area for the damaged person.[184] The court notes that if on the one hand it is impermissible to determine the truth on the case for any price, on the other hand evidence exclusion rule hinders, complicates the possibility to reach the truth on the criminal case. And the latter, on its own is legally obligatory for the state.[185]

Some authors are of the view that in the process of applying above discussed principles and theories, priority must be given to the further impact of the evidence exclusion rule, in other words the derivative evidences obtained based on the evidences got with the violation of law shall be excluded from the criminal case, when dealing with the heavy infringement of rights considered under sub-paragraphs one and two, paragraph 136a,[186] and namely – the torture. As indicated by *Otto,* the above is in compliance with the historical will of the law.[187] Information obtained using the torture shall not be admitted to the criminal case.

Frankfurt area court for *Daschner* case (related to the threatening with torture) has not excluded principally the further impact of evidence exclusion rule.[188] By this way it has supported the above discussed intermediate approach.[189] Frankfurt area court in its decision defined, that considering the evidences obtained on the basis of the testimony of accused (in this case the discovered corpse of child and results of corpse exhumation) as inadmissible would not be proportionate.[190] The court has received the above mentioned result on the basis of ration of on the one hand the heaviness of

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181 Ibid.

182 Ibid.

183 See *Popp A.*, Verfahrenstheoretische Grundlagen der Fehlerkorrektur im Strafverfahren, Berlin, 2005, 373, *Rogall K.*, Beweiserhebungs- und Beweisverwertungsverbote im Spanungsfeld zwischen den Garantien des Rechtsstaates und der effektiven Bekämpfung von Kriminalität und Terrorismus, "Juristenzeitung" (JZ), 17/2008, 820, 825.

184 See *Rogall K.*, Systematischer Kommentar zur Strafprozessordnung mit GVG und EMRK, 4. Auflage, Band II, Köln, 2010, §136a, Rn. 112.

185 See BGHSt 38, 219 ff., BGHSt 38, 373 ff., BGHSt 44, 243 (249), BGHSt 51, 285, 289 ff., BGHSt 53, 112, 116

186 See *Rogall, K.*, Gegenwärtiger Stand und Entwicklungstendenzen der Lehre von den strafprozessualen Beweisverboten, "Zeitschrift für die gesamte Strafrechtswissenschaft" (ZStW), 1979, 1, *Jäger C.*, Beweiserhebungs- und Beweisverwertungsverbote als prozessuale Regelungsinstrumente im strafverfolgenden Rechtsstaat, "Goltdammer's Archiv für Strafrecht" (GA), 2008, 493 ff.

187 See *Otto H.*, Grenzen und Tragweite der Beweisverbote im Strafverfahren,"Goltdammer's Archiv für Strafrecht" (GA), 1970, 294.

188 See LG Frankfurt" Strafverteidiger" (StV), 2003, 327.

189 Ibid, *Weigend T.*, Anmerkung zu LG Frankfurt/M., Beschl. V. 9.4.2003 – 5/22 Ks 3490 Js 230118/02, "Strafverteidiger" (StV), 8/2003, 436.

190 See LG Frankfurt "Strafverteidiger" (StV), 2003, 327.

infringement of rights of accused and on the other hand, heaviness of implemented action.[191] According to *Roxin* application of this method is arguable and is of the view that when infringement of Human dignity is dealt with, the weighing of legal benefits shall be excluded.[192] According to *Roxin,* it would be correct if the court would agree in a general form with the exclusion of derivative evidences obtained on the basis of evidences obtained with the violation of law, in other words, derivative evidences obtained based on the illegally obtained evidences.[193] *Lüderssen* also agrees with *Roxin* and indicates that he does not want to hide that support absolute nature of further impact of the evidence exclusion rule (*absoluten Fernwirkung*).[194]

Claus Roxin is of the view that if the evidences obtained with the application of methods prohibited by the law are excluded, but the corpse discovered as a result of such interrogation is used for the proving the guiltiness of accused person, then violation of paragraph 136a is in place, as actually by this way the inadmissible evidences (testimony) is indirectly used in the criminal proceedings.[195]

It is interesting that Strasburg European Court for the Human Rights in relation to the decision made on the Gäfgen case reviewed the further impact of evidence exclusion rule. The court has not excluded the admissibility of derivative evidences on the case for the verification of testimony provided by the accused person.[196] The court decided that admissibility of derivative evidences obtained with the torture generally infringes the right on the fair court guaranteed by the article 6 of European Convention on Human Rights, if the verdict of guilty or punishment is in causal relationship with the above evidences.[197] However application of derivative evidences obtained based on the primary evidences received with the violation of law is not always the necessary condition for the verdict of guilty; for example, when the court for the verification of confession testimony which is the basis for the verdict of guilty along the other evidences uses the derivative evidences obtained with the violation of article 3 of European Convention on Human Rights.[198]

To summaries the above discussed material related to the further impact of evidence exclusion rule, the following situation should come up: although in the process of implementation of assertive criminal law process the legal regulation boundaries shall be strictly adhered, the evidence obtained with the violation of law; however in some cases, when the admissibility of some derivative evidences are considered, might be disproportionate. Making exceptions from the strict formulation of assertive

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[191] Ibid.

[192] See *Roxin C.*, Kann staatliche Folter in Ausnahmefällen zulässig oder wenigstens straflos sein? Festschriftfür Albin Eser zum 70. Geburtstag, München, 2005, 471.

[193] Ibid.

[194] See *Lüderssen K.*, Die Folter bleibt tabu – Kein Paradigmen wechsel ist geboten, Festschrift für Hans-Joachim Rudolphi zum 70. Geburtstag, Neuwied, 2004, 709.

[195] See *Roxin C.*, Kann staatliche Folter in Ausnahmefällen zulässig oder wenigstens straflos sein? Festschrift für Albin Eser zum 70. Geburtstag, München, 2005, 471.

[196] See Decision of European Court on Human Rights, Large Chamber on the case *Gäfgen* vs Germany *(Gäfgen v. Germany*), 22978/05, 1 June 2010, *Jähnke B.*, Unverfügbares im rechtsstaatlichen Strafprozess und die Rolle des Europäischen Gerichtshofs für Menschenrechte, Criminal law science in the process of integrated European development, *Merab Turava (edited),* Tb., 2013, 487 (In Georgian).

[197] See Decision of European Court on Human Rights, Large Chamber on the case *Gäfgen* vs Germany (*Gäfgen v. Germany*), 22978/05, 1 June 2010,

[198] Ibid.

process, as clarified from the discussed, became possible in the modern criminal processes. However the issue of admissibility of derivative evidences, despite the established theories and exceptions, is still subject of disputes. It is possible to achieve rational solution of the problem via the individual assessment of each specific case. But in the event of torture, the derivative evidences obtained as a result of torture shall be considered as inadmissible. To formulate it in a different way, the confession testimony obtained via the torture – "poisoned tree", as well as the evidences discovered based on the information obtained via the torture – "fruit of the poisonous tree" shall excluded from the criminal case.

4.4 Renewable Impact of Rule on the Exclusion of Evidences Obtained via the Torture

The Frankfurt area court in the decision dated 09 April 2003 regarding the *Gäfgen* case discussed the evidence exclusion rule due to the absence of relevant qualified interpretation provided to the accused person.[199] According to the above decision, as the method of torture was applied in the process of first interrogation, the data obtained via the later legally conducted interrogations shall be subject to the exclusion rule, if the accused person was not provided with the clear explanations, that data obtained from the previous interrogation are excluded from the criminal case (so called "qualified explanations").[200]

Frankfurt area court in its decision indicates to the records made by the accused *Gäfgen,* according to which the latter states that the torture was uses against him on 01 October 2002. Threatening with torture was not used during the next interrogations. He gave the testimony on the crime to the investigation as thought that he needed the above.[201]

It is interesting to know whether the evidence exclusion rule has impact over the data obtained via the interrogations conducted later,[202] in other words does the exclusion of evidences obtained with the violation of paragraph 136a has the renewable nature? (*Fortwirkung von Beweisverwertungsverbot).*

Generally there is a rule valid in German literature and court practice, according to which if the accused person under the influence of prohibited method gives the later testimonies, and then such testimony must also be subject to the evidence exclusion rule, if illegal method still has impact on the getting information as a result of later testimony.[203] The renewable impact of this rule is not given

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199 See LG Frankfurt/M., Beschl. V. 9.4.2003, "Strafverteidiger" (StV), 6/2003, 325-327.

200 This term is related with the name of famous German Professor – *Bernd Schunemann*, See *Schünemann B.*, Die Belehrungspflichten der §§243 IV, 136 n.F.StPO und der BGH, "Monatsschrift für Deutsches Recht" (MDR), 2/1969, 101-102.

201 See LG Frankfurt/M., Beschl. V. 9.4.2003, "Strafverteidiger" (StV), 6/2003, 326.

202 See *Rogall K.*, Systematischer Kommentar zur Strafprozessordnung mit GVG und EMRK, 4. Auflage, Band II, Köln, 2010, §136a, Rn. 103, *Roxin C., Schünemann B.*, Strafverfahrensrecht, 27. Auflage, München, 2012, §24, Rn. 61, *Eisenberg U.*, Beweisrecht der StPO, Spezialkommentar, 8. Auflage, München, 2013, Rn. 711, *Gleß S. in Löwe-Rosenberg*, Die Strafprozeßordnung und das Gerichtsverfassungsgesetz, 26.Auflage, Berlin, 2007, §136a, Rn. 74, *Meyer-Goßner L.,* Strafprozessordnung, 55. Auflage, München, 2012, §136a, Rn. 30.

203 See LG Frankfurt/M., Beschl. V. 9.4.2003, "Strafverteidiger" (StV), 6/2003, 326, For example, according to *Klaus Rogall,* this phenomena – renewable nature of evidence exclusion rule means that evidence exclusion rule covers all other evidences, which were impacted by the prohibited interrogation method. See *Rogall K.,* SK-StPO, 2010, §136a, 1381, Fn. 604.

itself, it must be confirmed.[204] Renewal effect of evidence exclusion rule is easily confirmed if, for example, in short time after the interrogation using the prohibited methods, the second interrogation of the accused person is conducted.[205] For the determination of renewable nature of this rule the heaviness of infringement of will freedom of the accused person must be taken into consideration.[206]

For example, it shall assumed that prohibited methods of interrogation still effect the accused person, when at the interrogation conducted later he/she does not give testimony independently, he/she only confirms or/and repeats the data from the previous testimony.[207] Frankfurt area court in its decision indicates that it is possible to "cure" the errors made during the first interrogation, if the accused person is aware that he is free during the next interrogations and does not depend on the testimonies provided during the previous interrogations.[208] *Thomas Weigend* criticizes the possibility to "cure" the errors made during the interrogation conducted with the violation of law.[209] The author indicates that the above mentioned law violation already exists and it is impossible to "cure "it; therefore the result of interrogation still remains as inadmissible for the criminal process. It is important, that the next interrogations are conducted within the requirement of the law.[210]

The mistake made during the criminal law process will only take place if the accused person de facto possesses the freedom to make decision in the process of second interrogation conducted with the violation of law.[211] For providing the accused person with such freedom, and not to assign to the evidences the renewable form, in other words have the influence of primary evidences over the results of later interrogation,[212] it is necessary to advice accused person that results of interrogation conducted with the prohibited methods will be excluded from the criminal case.[213]

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204 See *Rogall K.*, Systematischer Kommentar zur Strafprozessordnung mit GVG und EMRK, 4.Auflage, Band II, Köln, 2010, §136a, Rn. 103, *Eisenberg U.*, Beweisrecht der StPO, Spezialkommentar, 8. Auflage, München, 2013, Rn. 711.

205 *Neuhaus* has different position on this issue. According to this position, the time elapsed between the first and the second interrogations should not determine the renewable effect of evidence exclusion rule. Elapse of time may even reinforce the erroneous perception of accused person that it is not possible to annul the result of previous interrogation. More so, when the accused person is not provided with the relevant legal advice. Hence, according to *Neuhaus* these criteria – time period elapsed between the previous and later interrogations, generally is not useful for defining the renewable effect of interrogation conducted with the violation of law. See *Neuhaus R.*, Zur Notwendigkeit der qualifizierten Beschuldigtenbelehrung, "Neue Zeitschrift für Strafrecht" (NStZ) 1997, 314.

206 See *Rogall K.*, Systematischer Kommentar zur Strafprozessordnung mit GVG und EMRK, 4.Auflage, Band II, Köln, 2010, §136a, Rn. 103.

207 See LG Frankfurt/M., Beschl. V. 9.4.2003, "Strafverteidiger" (StV), 6/2003, 326, *Rogall K.*, Systematischer Kommentar zur Strafprozessordnung mit GVG und EMRK, 4.Auflage, Band II, Köln, 2010, §136a, Rn.103.

208 See LG Frankfurt/M., Beschl. V. 9.4.2003, "Strafverteidiger" (StV), 6/2003, 326.

209 See *Weigend T.*, Anmerkung zu LG Frankfurt/M., Beschl. V. 9.4.2003 – 5/22 Ks 3490 Js 230118/ 02, "Strafverteidiger" (StV), 8/2003, 438.

210 Ibid.

211 See *Rogall K.*, Systematischer Kommentar zur Strafprozessordnung mit GVG und EMRK, 4. Auflage, Band II, Köln, 2010, §136a, Rn. 104.

212 See *Roxin C., Schünemann B.*, Strafverfahrensrecht, 27. Auflage, München, 2012, §24, Rn. 61.

213 See *Rogall K.*, Systematischer Kommentar zur Strafprozessordnung mit GVG und EMRK, 4. Auflage, Band II, Köln, 2010, §136a, Rn. 104, *Roxin C., Schünemann B.*, Strafverfahrensrecht, 27. Auflage, München, 2012, §24, Rn. 61.

Frankfurt Area court clearly indicates that result of later interrogation shall be admitted to the criminal law case, if the accused person was provided with the "qualified" advice in relation to the data of earlier interrogation.[214] It must be clear for the accused person that he provides the testimony in the way that is not related with the data of earlier testimony. Accused person makes decision to give the testimony or use the right to remain silent absolutely independently from the circumstances and from the start.[215] Such approach of the court is referred to as very progressive and welcomed by *Thomas Weigend*.[216] There were no requirements for the provision of "qualified" advice to the accused person implemented by the law enforcement bodies in the decisions made before 2003. For example, in the decision of German Federal Court, 1988 it is indicated that evidence exclusion rule covers only the results of the interrogation, during which any of the methods prohibited under the paragraph 136a were used.[217] Result of the testimony provided by the accused person later, which is free from the use of methods prohibited by the law, shall be "fully admitted" to the case.[218]

In case of *Gäfgen,* the court decided that accused person has not been provided with the "qualified advice" on the exclusion of results of previous testimony, and that such advice has not been included in the minutes.[219] However, there is a position that it is not mandatory to make record in the minutes, and it is sufficient if it is clearly defined based on other circumstances that accused person understands his/her right to give the testimony or exercise the right to remain silent.[220] The words of accused *Gäfgen*" I provided the investigation with information, as it was required for me,"[221] allows for various interpretations and does not straightforwardly confirm the awareness of accused person about the possibility to make free choice.[222]

Frankfurt area court decided that in this case rule for renewal of evidence exclusion is effective, as the accused person was not provided with the qualified explanations on the fact that the testimony given under torture would be excluded from the case and its effect was be annulled.[223] However, in many cases, the explanations provided to the accused person on the annulation of previous interrogation data, their exclusion from the criminal case, which is also reflected in the minutes, is unimaginable for the accused person himself. He/she does not allow for such possibility.[224]

Weigend notes that in the event of renewable impact of the evidence exclusion rule, first of all it is important that the decision of the accused person to re-confess to the investigation is not free and not that the accused person with the high probability is under the impact of physical or psychological

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214 See LG Frankfurt/M., Beschl. V. 9.4.2003, "Strafverteidiger" (StV), 6/2003, 326.
215 Ibid.
216 See *Weigend T.*, Anmerkung zu LG Frankfurt/M., Beschl. V. 9.4.2003 – 5/22 Ks 3490 Js 230118/02, "Strafverteidiger" (StV), 8/2003, 438.
217 See BGH StV 1988, 369 = BGH NStZ 1988, 419.
218 Ibid.
219 SeeLG Frankfurt/M., Beschl. V. 9.4.2003, "Strafverteidiger" (StV), 6/2003, 326.
220 Ibid.
221 Ibid.
222 Ibid.
223 Ibid, 327.
224 See *Weigend T.*, Anmerkung zu LG Frankfurt/M., Beschl. V. 9.4.2003 – 5/22 Ks 3490 Js 230118/02, "Strafverteidiger" (StV), 8/2003, 438.

abuse.[225] In this case accused person thinks that his silence will not have result and purpose. Accused person, who thinks that with the first testimony given everything is finished for him/her, perceives the explanations on his right to remain silent as the formal part of the procedure.[226] What benefit will the silence bring to him now? Therefore, the investigation must always consider mentioned circumstances, and take into account the fact that the accused person, generally, has wrong understanding that the testimony given under the prohibited methods of interrogation will be used at least indirectly against him/her.[227] In relation to the above issues, *Weigend* positively assesses the requirement provided in the Frankfurt area court in 2003 – first of all the state must be assigned to provide the accused with the possibility to make decisions independently, and second- provision of "qualified explanations" on his/her rights to the accused person prior to the questioning and reflecting the above in the minutes is not sufficient.[228] More importantly, law enforcement body shall verify that the accused person has understood the opportunity to make choice – give or not to give testimony to the investigation.[229]

In 2008 fourth senate of the German Federal court made important decision with regard to the evidence exclusion rule, when the accused person is not provided with the "qualified explanations" prior to the start of questioning.[230] According to the above resolution several important issues have been stressed:

1. Prior to the start of questioning accused person shall be provided with the explanations that the data obtained via the first interrogation will not be admitted to the criminal case hearing (so called "qualified explanation");
2. If such explanation is not provided, application of data obtained via such interrogation could be subject to further assessment;
3. Despite the comparison of violations taking place during the process and interests related to the reaching the truth, in the process of determining the issue of the evidence exclusion, it is important to determine whether the accused person perceives him/her still connected with the results of previous interrogation.[231]

With this resolution, the German Federal court, in like its earlier practice,[232] underlined the fact, that it is obligatory to provide the accused person with comprehensive explanations regarding the fact that results of previous questioning will not be admitted to the case and only the explanations provided according to the paragraph 136a of CPC are not sufficient.[233] Mandatory nature of such explanation is related to the one of the most important privileges of the accused person in the criminal law –

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225 Ibid.
226 Ibid.
227 Ibid.
228 Ibid, 439.
229 Ibid.
230 See BGH NJW 2009, 1427, NStZ 2009, 281.
231 Ibid.
232 See BGHSt 47, 172 (175), BGHSt 22, 129 (134),according to the latter so called: "qualified advice" is not mandatory and violation of paragraph 136a did not necessarily cause exclusion of evidences.
233 See *Kasiske P.*, Entscheidungsanmerkung, Beweisverwertungsverbot bei Unterbleiben einer „qualifizierten" Belehrung, "Zeitschrift für Internationale Strafrechtsdogmatik" (ZIS), 6/2009, 319, <www.zis-online.com>, [8.07.2014].

protection from self-incrimination (*nemo tenetur se ipsum accusare*).[234] As the accused person is not aware about exclusion of results of the previous interrogation from the case, at the next questioning the accused person's right to remain silence might be hindered.[235] He/she seems to be liable to give testimonies against him/her.[236]

As for the legal outcome, according to the position expressed in the legal literature, in the absence of "qualified explanation" obtained data may be subject to general rule on the exclusion of evidences.[237] In this case German Federal court abstains from such position and assesses the issues based on each specific case.[238] However, the above is quite arguable. According to *Roxin,* making decision on the issue based on weighing specific cases can be acceptable, when the case is associated with the insignificant violation of criminal procedures.[239] But when the violation of such an important right of the accused person, as right to remain silent is in place, which is the fundament for the fair court, admissibility of evidences to the criminal case must be excluded.[240] In the event of violation of such a central principle of criminal law procedures the decision on the exclusion of evidences shall not be made via the assessment of each specific case separately. [241] The fact that the person conducting the interrogation could forget to provide explanations to the accused person or was not aware of the mentioned liability should not change the outcome.[242]

What happens when the accused person was not provided with the explanations prior to the questioning; however it was discovered that accused person was aware about his/her right to remain silent. For such cases German Federal court practice considers the testimony of accused person as admissible evidence.[243]

For *Gäfgen* case Frankfurt area court in its decision noted, that indication to the professional qualification of the accused person could not substitute the liability of investigation to provide qualified explanation.[244]

To summarize the material on the renewal effect of the evidence exclusion rule, the following can be state: proceeding from the interests of investigation, the attempt of law enforcement body to

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234 Ibid, 323.

235 Ibid, 321.

236 Ibid.

237 See *Neuhaus R.*, Zur Notwendigkeit der qualifizierten Beschuldigtenbelehrung, "Neue Zeitschrift für Strafrecht" (NStZ), 1997, 312, *Roxin C.*, Beschuldigtenstatus und qualifizierte Belehrung, "Juristische Rundschau" (JR), 2008, 16, 18.

238 See BGH NJW 2009, 1427.

239 See *Roxin C.,* Für ein Beweisverwertungsverbot bei unterlassener qualifizierter Belehrung, HRRS, 5/2009, 187, <www.hrr-strafrecht.de>, [8.07.2014].

240 Ibid.

241 See *Kasiske P.*, Entscheidungsanmerkung, Beweisverwertungsverbot bei Unterbleiben einer „qualifizierten" Belehrung, "Zeitschrift für Internationale Strafrechtsdogmatik" (ZIS), 6/2009, 323, <www.zis-online.com>, [8.07.2014].

242 See *Roxin C.,* Für ein Beweisverwertungsverbot bei unterlassener qualifizierter Belehrung, HRRS, 5/2009, 187, <www.hrr-strafrecht.de>, [8.07.2014].

243 See BGHSt 38, 214, BGHSt 47, 172, *Kasiske P.*, Entscheidungsanmerkung, Beweisverwertungsverbot bei Unterbleiben einer „qualifizierten" Belehrung, "Zeitschrift für Internationale Strafrechtsdogmatik" (ZIS), 6/2009, 322-323, <www.zis-online.com>, [8.07.2014].

244 See LG Frankfurt/M., Beschl. V. 9.4.2003, "Strafverteidiger" (StV), 6/2003, 327.

overcome made mistake and to ensure the lawful conduct of investigation activities is acceptable. Following the interrogation of accused person via the torture, if the accused person is interrogated second time within the requirements of the law, there is a possibility that evidence exclusion rule is not extended over evidences obtained through such interrogation. For the admissibility of mentioned testimony it is necessary to have determine the freedom of will from the accused person. Otherwise, one of the most important principles of criminal law procedure, namely, privilege for the protection of accused person from self-incrimination, will be violated.

5. Summary

As a result of research implemented for the article it has become evident that inadmissibility of evidences for the criminal case must be valid only for the strictly defined cases. If according to *Belling* admissibility of evidences obtained with the violation of law shall be excluded for all cases,[245] large part of modern German scientists is of the view that in the process of discussing the issue on the exclusion of evidences from the criminal case the interests of accused person must determining factor. In particular, evidence obtained with the violation of law may not be subject to the evidence exclusion rule, if it contains information beneficial for the accused person.[246]

In Georgian criminal procedure law the main criteria for the consideration of evidences as inadmissible is the legal condition of accused person, his/her interests. The main idea of "Mühlenteich theory" reviewed in the present article is that consideration of evidences as inadmissible should not result in the aggravation of legal condition of the accused person, is relevant to the composition of article 72 of CPCG. According to the first section of above mentioned article "evidences obtained with the material violation of the code, and other evidences obtained legally on the basis of above mentioned evidences are unacceptable and do not have legal effect if they worsen legal condition of the accused person."

Based on the analysis carried out within the present article related to the issue of admissibility of evidences obtained with the violation of law, it became clear that according to the vast majority of German scientists all mistakes made during the obtaining of evidences, does not itself cause their exclusion form the civil case. The issue shall be resolved based on the interest of the state related to the specific criminal persecution for the specific case, heaviness of norm violation, importance of violated interest and need for the protection of such interests. German Federal court underlines two main criteria: heaviness of violation taking place in the process and importance of legally protected area.[247]

Admissibility of evidences obtained via the torture is not subject to the individual assessment of specific case. In this case it is not allows to make any exceptions from the evidence exclusion rule. The above is not permitted even when the consideration of obtained evidences as admissible is in the interest of accused person. According to the position widely spread in the German criminal law

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[245] See *Beling E.*, Die Beweisverbote als Grenzen der Wahrheitserforschung im Strafprozeß, Darmstadt, 1968, 30..

[246] In relation to the above mentioned see 4.2.

[247] In relation to the above mentioned see, chapter 4.3.3.

literature, torture, as the method for obtaining the evidences, is such a rough violation of accused person' rights, that its application will make unfair the whole criminal law process.[248] As for the approach of Georgian criminal procedure law, torture shall be necessarily considered as the material violation of procedures provided in article 72 of CPCG and evidences obtained based on the above is subject to exclusion.

In relation to the issue of admissibility of evidences obtained legally based on the law violation, it shall be noted that unlike Georgian CPC, the above is not defined under the German CPC. The above issue is of evaluative nature. However, in the event of torture, the concessive testimony achieved via the torture – "poisonous tree" as well as the other evidences obtained on the basis of information collected via the torture – "fruit of the poisonous tree" shall be excluded from criminal case. As noted by *Claus Roxin* when dealt with the infringement of human dignity, the weighing of legal benefits shall be excluded.[249]

Assertive process, proceeding from its importance, shall be subject to the strictly defined legal regulation. However the formulation of so called "fruit of the poisonous tree" doctrine provided in the article 72 of Georgian CPC may in practice cause some problems. The above problem will be in place when the considering the derivative evidences obtained based on the evidences obtained with the violation of law, as inadmissible in some cases might be unjustifiable in terms of revealing the truth on the criminal law case (it is not considered here the derivative evidences obtained based on the evidences obtained via torture).

The experience of German court practice and approach established in the German science related to the evidence exclusion rule is quite interesting. For example, Frankfurt area court deemed is disproportionate the consideration of evidences obtained based on the evidences received via the torture as inadmissible for the *Gäfgen*case. However large part of German scientists indicate that exclusion of primary evidences obtained via torture shall be extended over other evidences obtained based on the above evidences in absolute form. By this they support the absolute nature of further impact of evidence exclusion rule in the event of torture.[250]

The section one, article 72 of Georgian CPC, in the process of making decision on the admissibility of evidences obtained with the material violation of the above code as well as other evidences legally obtained based on the above evidences sets the condition, that they will be considered as inadmissible if worsen the legal condition of the accused person. In this regard it is interesting, how the issue on the admissibility of primary and derivative evidences will be resolved in cases, when for example, the accused person takes on the crime committed by his/her child. For the identification of truth on the case, he is subject to torture; as a result accused person admits the truth and names to the investigation the location of evidences (video recording of murder).Shall the court consider admissible the interrogation protocol prepared with the torture of accused person, violating the section one, article 72 of CPCG and the video film legally extracted from the residential house of accused person with the argument that above evidences improve the legal condition of accused

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248 In relation to the above mentioned see, chapter 4.2.

249 See *Roxin C.*, Kann staatliche Folter in Ausnahmefällen zulässig oder wenigstens straflos sein? Festschrift für Albin Eser zum 70. Geburtstag, München, 2005, 471.

250 In relation to the above mentioned see, chapter 4.3.3.

person? It is difficult to imagine that the investigation, for the purpose of identifying the truth for the given criminal case, declines the use of evidences obtained with the violation of law and other evidences legally obtained based on the above primary evidences. However, in case of torture, based on the principle of legal state, for the protection of absolute right guaranteed by the Constitution, primary evidences obtained using such methods as well as derivative evidences shall be considered as inadmissible without any exceptions.

The German court practice on the further impact of evidence exclusion rule discussed in the present article is quite interesting. Does the rule on considering inadmissible the evidences obtained via the torture have an effect over the data obtained via the interrogation conducted in compliance with the law? The Frankfurt area court, in relation to the *Gäfgen* case decided that in this case evidence exclusion rule has renewable impact, as the accused person was not provided with the qualified explanations on the fact that the primary testimony given under the threat of torture is excluded from the case and it does not have legal effect. In relation to the above issue, the position of majority of German scientists deserves support; in their view, qualified explanation provided to the accused person on his/her rights and legal condition is not sufficient. It is the most important, that law enforcement body ensures that in the next interrogation the accused person is provided with the opportunity to make decision independently, to give or not to give the testimony.[251]

6. Conclusion

As a result of review of issue related to the admissibility of evidences obtained via torture, based on the *Magnus Gäfgen* case example, the position dominating in the German science has been articulated – evidences obtained via the torture, as well as other evidences legally obtained based on the above evidences shall be considered as inadmissible. Rule on the exclusion of primary evidences from the criminal case shall in absolute manner extend over the derivative evidences. Hence, in case of torture, exclusion of primary evidences from the criminal law case has further impact.

The composition of the section one, article 72 of CPCG must also be defined in the following way – evidences obtained as a result of torture as well as other evidences lawfully obtained based on the above shall be unconditionally considered as inadmissible.

As a result of conducted analysis it was clarified that if following the interrogation of accused person via torture, his repeated interrogation is conducted in compliance with the law requirements, there is a possibility that exclusion of testimony obtained as a result of first interrogation does not have renewable impact over the testimony provided as a result of second interrogation. For the admissibility of mentioned lawfully conducted interrogation results. The free expression of accused person's will shall be confirmed. Otherwise, the violation of one of the most important principles of Criminal Law Procedure, namely protection of accused person from self-incrimination will be in place.

It is important how the Georgian justice solves the above issues articulated in the article in the process of practical application of article 72 of CPCG.

[251] In relation to the above mentioned see, Chapter 4.4.

The implemented research confirmed the importance of prohibition of torture, method for evidence obtaining and inadmissibility of evidences obtained based on the above method in the legal state. In this regard, the changes made to the interrogation rules envisaged under the article 332 of Georgian CPC i the most welcome, the above changes shall become effective from 2016 year. This legislative innovation provides the conduct of interrogation at the court in order to maximally protect human dignity, not to make the accused person the object of criminal process.

Karlo Nikoleishvili*

Compliance of Parole Board Activities with Standard of Fair Trial

(Analysis of Concrete Issues)

1. Introduction

Prison overcrowding and prison population growth represent a major problem to prison administrations and criminal justice system as a whole, both in terms of human rights and of the efficient management of penal institutions.[1] The above problem encourages states to develop an effective policy for the release of convicts.

In 1847 French A. Bonneville de Marsangy coined the concept of conditional release that implied the release of a convict after certain period of imprisonment with a promise of satisfactory future behavior.[2]Considering all the aforementioned, the existence of parole institutions is of vital importance for criminal justice system. Although inappropriate enforcement of the abovementioned rights of convicts might lead to serious consequences. Thus, it is significant that the parole system is built on fair principles.

The recent amendments in the Georgian legislation raised many questions on adequate functioning of parole institutions, especially on decision making mechanisms. The question is whether the transfer of decision making competence on conditional release from the court to local councils infringes the constitutional and international principles of fair trial?

According to Article 84 Paragraph 5 of the Constitution of Georgia only a court may quash, change, or suspend a court decision. However, the abovementioned statement does not automatically emphasize non-constitutionality of the Georgian parole system. The legislation of European countries also differs – in different states variously created and structured bodies make decision on parole issues. Not only the court but the prison administration, special tribunal, public prosecutor etc. can also be a competent body.[3] For example in England, Wales[4] and Scotland[5] the decisions are rendered by parole boards. Convicted prisoners with a sentence of up to three years in Belgium are eligible for provisional

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

1 Council of Europe, Committee of Ministers, Recommendation No R. (99) 22 Concerning Prison Overcrowding and Prison Population Inflation, preamble.

2 *Pradel J.,* Comparative Criminal Law, translated by *E. Sumbatashvili*, ed. *T. Ninidze*, Tb., 1999, 467 (In Georgian).

3 *Panfield N.*, *van ZylSmit D., Dunkel F.,* Release from Prison, European Police and Practice, Willan Publishing, USA, 2010, 425. Sited: *Mikanadze G.,* Prisoners' Right for Conditional Release – European Experience and Georgian Reality, in book: Human Rights Protection: Achievements and Challenges, ed. *Korkelia K.*, Tb., 2012, 130 (In Georgian).

4 *Padfield N.*, Recalling Conditionally Released Prisoners in England and Wales, EJP, Vol. 4, No.1, 2012, 34-45.

5 *Weaver B.*, *Tata C.*, *Munro M.*, *Barry M.*, The Failure of Recall to Prison: Early Release, Front-Door and Back-Door Sentencing and the Revolving Prison Door in Scotland, EJP, Vol. 4, No. 1, 2012, 85-98.

release on the basis of an administrative decision under the responsibility of the Minister of Justice, while prisoners serving a sentence of more than three years are eligible for conditional release based on the decision of the Sentence Implementation Courts.[6] In Slovenia, decision is taken by a specially created commission consisting of 3 members: Supreme Court Judge, Supreme State Prosecutor and a civil servant from the Prison Administration Unit of the Ministry of Justice.[7]

The scope and judicial functions of an authority is important and not its name. Case law reveals that the European Court on Human Rights[8] does not consider a title of a body implementing the justice important.[9] The Constitutional Court of Georgia, in one of the decisions has stressed that the nature of legal category is determined by the contents and not by the title; in this particular case the function assigned to the authority. A judge and a person exercising judicial power are functionally equal - both of them execute justice.[10]

Local Council for Early Conditional Release (Parole Board) under the Ministry of Corrections of Georgia[11] is authorized to change the decision made by the court regarding the term of imprisonment following the comprehensive review of the case. Thus, the provided explanation reads that the above-mentioned authority based on its scope of activities exercises a juridical power. Hence, judicial guarantees must be provided and the scope of activities of local councils should be in line with fair standards.

Considering all the above-mentioned the parole model regulated by the Georgian legislation raises great research interest. The fact that the issue is practically not researched reinforces the interest towards it.

The key research question of the article is – are the structure and scope of activity of the parole board in compliance with fair trail standards? Thus to give appropriate answer to this question, analysis, synthesis and interdisciplinary methods will be utilized. To answer the key research question it is important to examine constitutional and international principles of fair trial, to analyze national conditional release mechanism and afterwards establishing, comparing and synthesizing of the research results.

2. Right of a Convict to Participate in the Hearing

Standard of fair trial incorporates the participation of a convict in the hearing. No one shall become bare object of the court process, everyone must have the opportunity to express his/her

6 *Ridder S., Beyens K., Snacken S.,* Does Reintegration Need REHAB? Early Release Procedures Without a Legal Permit of Residence in Belgium, EJP, Vol. 4, No. 3, 2012, 31.

7 *SugmanSubbs K.*, *Ambroz M.*, Recalling Conditionally Released Prisoners in Slovenia, EJP, Vol. 4, No. 1, 2012, 103.

8 Hereinafter the European Court.

9 E.g., *Demicoli v. Malta*, [1991] ECHR, App. no 1305/87, 40.

10 Citizens of Georgia – *Irakli Lekveishvili, Koba Gotsiridze, Koba Kobakhidze and the Public Defender of Georgia v. Georgian Parliament and the President of Georgia,* February 26, 2003, Georgian Constitutional Court, Paragraph 1 (In Georgian).

11 Hereinafter the local council or council (Parole Board).

position and influence the decision making process.[12]Right of a person to fix his/her position, shall be ensured not generally, but for each and every specific factual circumstances. The party has right to evaluate each fact to be reviewed by the court. On the other hand, body exercising the justice is prohibited to base its decision on facts for which the parties have not expressed their positions.[13]

2.1. Awareness of Information by a Convict to be Discussed by Parole Board

The right of fair trial entails the practical implementation of equality and adversarial principles. None of the parties shall be granted the privilege; each of them should possess information on arguments of counter-party.[14]

The European Court on Human Rights determined the violation of Article 6 of the Convention - the right to fair trial - in cases, where national courts based their decisions on the evidences the defendant was not aware of or when one of the parties had been deprived of access on case materials.[15]

In the case *Brandstetter v. Austria*the European Court stated that the adversarial trial grants the party an equal opportunity to have knowledge and assess any evidence or factual information submitted by the other party. In the above case the fact that no copy of the submissions of the Senior Public Prosecutor was sent to the applicant led to the violation of the Convention.[16]

In the case *Bulut v. Austria* the European Court once again reiterated that under the principle of equality of arms, fair trial grants each party a reasonable opportunity to present his case under conditions that do not place him at a disadvantage vis-à-vis his opponent.[17]

In the case *Garcia Alva v. Germany* the applicant was, upon his arrest, informed in general terms of the grounds for suspicion and of the evidence against him, as well as of the grounds for his detention. The Public Prosecutor's Office dismissed counsel's request for consultation of the investigation files on the ground that consultation of these documents would endanger the purpose of the investigations. Due to the provision of information incompletely, the applicant was not able to appeal the decision. As the party could not express his/her position the requirements of the European Convention were violated.[18]

In the case *Foucher v. France* the applicant argued that case materials were not made accessible for him and he was deprived of possibility to make copies of the documents. The European Court stated that granting access a person to his/her case materials is a necessary precondition for an appeal. In order to prepare effective defense the case materials had to be made accessible for the applicant.[19]

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12 *Kublashvili K.,* Fundamental Rights, Tb., 2003, 336 (In Georgian). *Izoria L., Korkelia K., Kublashvili K., Khubua G.,* Commentaries on the Constitution of Georgia, Fundamental Human Rights and Freedoms, Tb., 2005, 366 (In Georgian).

13 Ibid.

14 *Izoria L., Korkelia K., Kublashvili K., Khubua G.,* Commentaries on the Constitution of Georgia, Fundamental Human Rights and Freedoms, Tb., 2005, 366 (In Georgian).

15 Ibid, 366-367.

16 *Brandstetter v. Austria*, [1991] ECHR, App. no 11170/84, 67.

17 *Bulut v. Austria*, [1996] ECHR, App. no 17358/90, 47.

18 *Garcia Alva v. Germany*, [2001] ECHR, App. no 23541/94, 39-40.

19 *Foucher v. France*, [1997] ECHR, App. no 22209/93, 36.

In the case *Weeks v. the United Kingdom* the European Court on Human Rights has drawn its attention to the fact that the Board to act fairly does not entail an entitlement to full disclosure of the adverse material which the Board has in its possession. The provision of adequate information to the convict was considered by the court as the necessary factor for the proper defense of him/her and it ruled the presence of significant procedural deficiency.[20]

The Article 8[1] of Typical Provision of the Local Council of the Ministry of Corrections approved by the Minister of Corrections and Legal Assistance of Georgia with the order №151 issued on October 28, 2010[21]indicates that the basis for the case review is the petition submitted by the penitentiary establishment accompanied by the reference letter. However, none of the legislative and subordinate normative acts determine the liability of the Board to make the materials available for a convict. In practice, it is possible to send the reference letter to the Board without informing the party. Thus, a convict is deprived of the possibility to fix his/her position, view on the circumstances provided in the reference letter.

2.2. Right to Oral Hearing

The European Court on Human Rights in the judgments against the United Kingdom indicated that the Parole Boards did not satisfy the standard envisaged under the Article 5, Paragraph 4 of the European Convention. In particular, the Court defined the following: when it is necessary to evaluate the personality and mental development, maturity of a convict as well as the level of dangerousness, it is necessary to ensure the organization of oral hearing and adversarial procedure. A convict shall be provided with the opportunity to participate in an oral hearing, to call and questioning witnesses, present evidences.[22]

Following the judgments of the European Court the changes were introduced into the legislation of the United Kingdom and the organization of oral hearing became mandatory. An oral hearing was conducted by one of the members of the Board in the form of interview. The above amendment caused significant increase in number of oral hearings.[23] On the one hand, the practical analysis made it clear that oral hearing conducted by the Parole Board had essentially improved the quality of documents comprising dossier of the convict. The members of the Board also indicated that oral hearings were important for their activities and decision making process. On the other hand, increase of number of oral hearings had substantially increased budgetary expenses.[24] Chamber of Lords has also stressed the need for oral hearings. However, it turned out to be impossible to organize interviews with convicts in every single.[25] Accordingly, to reduce number of cases with oral hearing it became necessary to develop a relevant method.

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20 *Weeks v. The United Kingdom*, [1987] ECHR, App. no 9787/82, 66.

21 Hereinafter Provision of Local Council or Provision.

22 *Hussain v. The United Kingdom*, [1996] ECHR, App. no 21928/93, 60. *Singh v. The United Kingdom*, [1996] ECHR, App. no 23389/94, 68. *Curley v. The United Kingdom*, [2000] ECHR, App. no 32340/96, 32-33. E.H.R.L.R., Parole – Release and Recall Decisions for Children Convicted of Murder, 1996, 3, 334. E.H.R.L.R., Parole – Release Decisions for Prisoners Detained at Her Majesty's Pleasure, 2000, 4, 435.

23 *Padfield N.*, The Role and Functions of the Parole Board, *Crim. L. R.,* 2006, May, 382.

24 *Padfield N.*, The Parole Board in Transition, *Crim.L.R*., 2006, Jan., 4.

25 *Naylor B., Schmidt J.*, Do Prisoners Have a Right to Fairness Before the Parole Board, Sydney Law Review,

According to Article 6, Paragraph 4 of the Typical Provision of the Local Council, the Board makes decision without oral hearing on the rejection of petition, admission to the oral hearing of the case or in case of decision of conditional early release. According to Article 12, Paragraph 4, sub-paragraph “b” the Board reviews cases based on oral hearing to get additional information from a convict in order to make decision on conditional early release.

The Ombudsman of Georgia as early as in his 2010 year report to the Parliament indicated that it would be better to consider such subjective issues, as the personality of the convict or/and his/her attitude towards the family, only at the oral hearing with the participation of a convict. Indeed, clear definition of criteria and introduction of risk assessment system was the step forward; however, without oral hearing the assessment would acquire the formal nature and would not reflect a real condition of a convict.[26]

In 2011 year Parliamentary report the Ombudsman has again reiterated that the main decisions of the Council are made without oral hearing. The Council at this process assesses the criteria and based on the general analysis discusses whether the purposes of the punishment is attained. As the main conclusion is made without oral hearing based on the results of criteria assessment, it can be boldly stated that involvement of convict in the second stage has only formal character. The above does not ensure real, adequate participation of an interested person in the decision making process.[27]

The Annex №18 to the “Rules on the Maintenance of Registries and Personal Files of a Convict” approved by the Minister of Corrections and Legal Assistance of Georgia with the order №82 issued on May 10, 2011 defines the form of the reference(letter). When for the majority of convicts the individual planning of the punishment is not in place[28]and penitentiary system does not provide sufficient number of qualified psychologists and social workers, the quality of documents to be discussed by Parole Board is doubtful. Consequently, in most cases it is impossible for Parole Board to make fair decisions without oral hearing.

It is evident that acting legislation does not satisfy international requirements and it is necessary to carry out relevant measures. Indeed, three Parole Boards functioning in Georgia would not be able to conduct oral hearings for all cases based on the available human as well as financial resources. The mobilization of additional resources is necessary. The acting legislation of Georgia on the organization of oral hearing has quite a formal nature and raises doubts in the objective observers. At least, it is necessary to prepare detailed procedural norms for the conduct of oral hearings by Parole Board clearly defining the cases when oral hearing has to be organized and what criteria to be applied by the Board.

Vol 32:437, 2010, 455.

[26] Annual Report of the Public Defender of Georgia, The Situation of Human Rights and Freedoms in Georgia, 2010, 62 (In Georgian).

[27] Annual Report of the Public Defender of Georgia, The Situation of Human Rights and Freedoms in Georgia, 2011, 354 (In Georgian).

[28] Individual planning of the punishment is officially operating only in the №11 Rehabilitative Establishment for Juveniles. See “Instruction on the Individual Planning of the Punishment” approved by the Minister of the Corrections and Legal Assistance of Georgia with the order №19 issued on February 2, 2012 (In Georgian).

3. Justification of Decision

The Constitution of Georgia does not specifically define the liability for the justification of court decision. As for the Criminal Procedure Code of Georgia Article 271, paragraph 1 states that a judgment should include a descriptive-motivation part; and Article 273 specifies that a judgment should point to the evidence on which the court conclusion is based and a motive under which one evidence is admitted and considered and other evidence is not admitted or considered. The court is also liable to justify the type and size of a punishment. According to Article 249 of Civil Procedure Code of Georgia, decision includes the motivational part, which should provide legal assessment and laws, by which the court was guided.

None of the international documents on human rights directly indicates on the obligation of national court to justify the decision.[29]However, Article 6 of the European Convention on Human Rights is, inter alia, to place the "tribunal" under a duty to conduct a proper examination of the submissions, arguments and evidence adduced by the parties, without prejudice to its assessment of whether they are relevant to its decision.[30]It has to be noted that requirement for fairness extends not only over the court hearing stage, but also over the whole litigation process. Article 6 of the European Convention is not limited to the specific part of the proceeding; it serves the interests of the justice as a whole incorporating the obligation of a court to justify its decisions.[31]The European convention sets the requirement for the National courts to make motivated decisions on civil as well as criminal law cases.[32] The obligation for justification covers all types and categories of decisions. For example, in the case of *Brickmont* the commission established the violation of Convention requirements as the court without any reason had not satisfied the petition of the applicant on hearing the testimony of the witness.[33]

Court decision must necessarily include description of facts, analysis of evidences, evaluation of procedural issues and legal motivation.[34]National courts are liable to respond to all important issues raised by the parties during the proceeding.[35]However, in the case *Van de Hurk vs. The Netherlands* the European Court decided that this shall not be interpreted as "requiring a detailed answer to every argument."[36] The judicial body shall review in detail the aspects essential for the case and respond to all questions which may

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[29] *Trechsel S. (*with the assistance of *S.J. Summers*), Human Rights in Criminal Proceedings, translated by *V. Gogelia, E. Lomtatidze, E. Kartsivadze, T. Ivanishvili, M. Narindoshvili*, Georgian Constitutional Court, Tb., 2009, 129 (In Georgian).

[30] *Kraska v. Switzerland*, [1993] ECHR, App. no 13942/88, 30.

[31] *Trechsel S.* (with the assistance of *S.J. Summers*), Human Rights in Criminal Proceedings, translated by *V. Gogelia, E. Lomtatidze, E. Kartsivadze, T. Ivanishvili, M. Narindoshvili*, Georgian Constitutional Court, Tb., 2009, 129 (In Georgian).

[32] *Bokhashvili B.,* Case Law of the European Court of Human Rights, Georgian Young Lawyers Association, Tb., 2004, 244 (In Georgian).

[33] *Brickmont v Belgium*, § 151-3. Sited: *Trechsel S. (*with the assistance *of S.J. Summers*), Human Rights in Criminal Proceedings, translated by *V. Gogelia, E. Lomtatidze, E. Kartsivadze, T. Ivanishvili, M. Narindoshvili*, Georgian Constitutional Court, Tb., 2009, 129 (In Georgian).

[34] *Higgins and others v. France*, [1998] ECHR, App. no 20124/92, 40-43.

[35] *Bokhashvili B.,* Case Law of the European Court of Human Rights, Georgian Young Lawyers Association, Tb., 2004, 244 (In Georgian).

[36] *Van de Hurk v. The Netherlands*, [1994] ECHR, App. no 16034/90, 61.

be deemed as bearing decisive, fundamental importance in relation to the final outcome.[37] In case *Hiro Balani v. Spain* the applicant submitted to the national court the issue which required specific, express reply. The Supreme Court left the above mentioned question without answer, unclear; it has neither dismissed nor neglected the issue. Taking into account the above the European Court established the violation of Article 6 of the Convention.[38]

It is important to understand which standard of justification shall be met by the decisions made by the national courts. Cases of the European Court on Human Rights provide general, however important definition: The extent to which this duty to give reasons applies may vary according to the nature of the decision. It is moreover necessary to take into account, inter alia, the diversity of the submissions that a litigant may bring before the courts and the differences existing in the Contracting States with regard to statutory provisions, customary rules, legal opinion and the presentation and drafting of judgments. That is why the question whether a court has failed to fulfill the obligation to state reasons, deriving from Article 6 of the Convention, can only be determined in the light of the circumstances of the case.[39]

In conclusion it must be noted that international and national legislations envisage the obligation of the justification of a court decision. The end of fair justice must be a motivated decision.

3.1. Necessity of Justification of Decision

3.1.1. Necessity of Justification of Decision Based on Nature of Legal Science

Based on the most general division differentiation is made between humanitarian and natural sciences. The key method used by the natural science is experience, and hence observation and experiment.[40] Law more belongs to humanitarian sciences and deciding on the correctness of one or other assertions is impossible based on the above mentioned methods used by the natural sciences. In the law the hypothesis is checked only based on the comprehensive and logical reasoning. Accordingly, based on the nature of law science, without specific reasons, arguments and assessments the decision cannot claim on its accuracy as well as on possessing the legal nature.[41]

3.1.2. Necessity of Justification of Decision to Avoid Arbitrary Behavior

Indication of decision bases, relevant reasons demonstrates that the court listened to and analyzed arguments presented by parties. On the contrary, groundless rejection of petitions, proposals

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[37] *Bokhashvili B.,* Case Law of the European Court of Human Rights, Georgian Young Lawyers Association, Tb., 2004, 244-245 (In Georgian).

[38] *Hiro Balani v. Spain,* [1994] ECHR, App. no 18064/91, 28.

[39] *Ruiz Torija v. Spain*, [1994] ECHR, App. no 18390/91, 29.

[40] *Khubua G.,* Theory of law, Tb., 2004, 26 (In Georgian).

[41] *Trechsel S. (*with the assistance of S.J. *Summers*), Human Rights in Criminal Proceedings, translated by *V. Gogelia, E. Lomtatidze, E. Kartsivadze, T. Ivanishvili, M. Narindoshvili*, Georgian Constitutional Court, Tb., 2009, 130 (In Georgian).

or other issues indicates that the court has not listened to the parties and made willful decision.[42] Without relevant motivation it will be impossible to differentiate rightful decision from arbitrary one.[43] Right to the motivated decision is close with the right to rightful decision.[44] Unjustified decision may not be willful one, however it generates such impression.[45]

And the impression of the society and objective observer has special significance. They should not lose the positive perception of the court system - judicial body as the mean for restoration of justice.

3.1.3. Necessity of Justification of Decision for Ensuring Right of Appeal

An addressee of decision shall have opportunity to appeal a decision. For the effective implementation of this right the party must be familiar with the bases of the decision made by judicial body. Accordingly, necessity of justification is conditioned with the need for ensuring the effective appeal.[46]

In the case *Hadjianastassiou v. Greece* the European Court on Human Rights stated that the national courts must indicate with sufficient clarity the grounds on which they based their decision. It is this, inter alia, which makes it possible for the accused to exercise usefully the rights of appeal available to him.[47]

3.2. Decision of Parole Board as Individual Administrative Act and Its Justification

According to Article 20, Paragraph 1 of Typical Provision of the Local Council of the Ministry of Corrections, the Board's decision is an individual administrative act, and it is covered under the acting General Administrative Code of Georgia. Conditional early release of convict represents the discretionary right of the Board, which is implemented based on the assessment of various criteria. According to Article 53 of the General Administrative Code of Georgia "an individual administrative act issued in writing must include written substantiation". As for the discussed case the administrative body acts within the discretionary authority, therefore the justification, in addition to the normative bases, shall indicate to all the factual circumstances which were important for the decision making process.[48]Article 12 of Typical Provision of the Local Council establishes the criteria based on assessment of which the Parole Board shall make decision: nature of a committed crime, conduct of a convict during serving the term of a sentence, facts of committing crimes by a convict in the past, family conditions and personality of a convict.

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42 Ibid, 132.
43 Ibid, 130.
44 Ibid, 132.
45 Renucci (2002) 143. Sited: Ibid, 130.
46 Ibid, 129.
47 *Hadjianastassiou v. Greece*, [1992] ECHR, App. no 12945/87, 33.
48 Law of Georgia "General Administrative Code of Georgia", 25/06/1999, №2181, Legislative Herald of Georgia №32(39), 15/07/1999, Article 53, Paragraph 2 and 3 (In Georgian).

It is important to mention that prior to the amendments of 27 February 2013, the Parole Board made decisions using the special formula. In particular, each criterion was assessed using the points (0, 1 or 2) and the points were then multiplied by the relevant ratio. For the admission of a case to the oral hearing the sum of assessment points should not exceed 6.5.[49]In the given case the Board was liable to analyze each criterion separately and make final decision based on the above analysis. However, via the last changes to the Provision of Local Council the formulary system of assessment was annulled, however the criteria remained unchanged. Hence, the Board may make decision without drawing attention to all criteria.

It is necessary to stress the fact that nature of the offence is a criterion, which was analyzed by the court in the process of making initial decision and considered in the process of assigning the sentence. Gravity of the offence is also related to the time for the review of the issue on parole.[50] Accordingly, assigning special importance to the above at the stage of decision making causes some confusion. Analysis of crime nature should be less relevant for the evaluation of correction and re-socialization of convict.

The issue related to the crimes committed by a convict in the past, his/her past convictions and conduct of a convict during serving the term of sentence represent factual circumstances and do not need additional assessment.[51]These criteria are directly mentioned in the convict's reference.

The criteria - personality of a convict and his/her family conditions are of particular importance. The personality of a convict may determine the level of his/her re-socialization and readiness to return to society; while the family conditions serve as guarantee for the continuation of rehabilitation process.

State authority is responsible and bears the burden of proof that the convict does not satisfy above mentioned criteria.[52]Each decision shall provide determining reasons and an addressee shall be provided with the above information in a written form.[53]

Based on the analysis of above criteria, Local Council reviewing the conditional early release within the implementation of discretionary power shall issue justified individual administrative act.

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49 Typical Provision of the Local Council of the Ministry of Corrections approved by the Minister of the Corrections and Legal Assistance of Georgia with the order №151 issued on October 28, 2010, Article 12, Paragraph 4 and 5 (In Georgian).

50 According to the Article 40 of Imprisonment Code, conditional release shall be granted if a convict factually served half term of the sentence for lesser gravity crime, two thirds of the term of the sentence for the grave crime, three forth of the term of the sentence for the especially grave crime. Different conditions are defined for the juvenile convicts: one third of the term of the sentence for lesser gravity crime, half of the term of the sentence for grave crime, two thirds of the term of the sentence for the especially grave crimes.

51 Conduct of a convict during serving the term of a sentence is related with the incentives and disciplinary sanctions, which are recorded in the relevant act, order or resolution of the director of establishment.

52 Council of Europe, Committee of Ministers, Recommendation Rec (2003) 22 on Conditional Release (Parole), Article 20.

53 Ibid, Article 32, sub-paragraph“d“.

3.2.1. Justification as Criteria of Formal Legality of Individual Administrative Act

In order to analyze formal legality of an individual administrative act it is necessary to review the documents. As mentioned in the previous sub-chapter, an act issued in a written form must contain substantiation, providing the legal and factual preconditions.[54]

Justification of an individual administrative act serves various factors. First of all, it represents a mean of self-control, as in the process of motivation formation the body making decision accurately thinks through and reinforces its position. Secondly, it is easier for an addressee of an act to analyze the lawfulness of an act and outcomes of its possible appeal. And finally, it facilitates the body reviewing the claim or supervising body to verify the legality and expediency of the above act.[55]

3.2.2. Justification of Discretionary Power

In line with Article 2, Paragraph 1, Sub-paragraph "k" of the General Administrative Code of Georgia, discretionary power means the authority, which granting freedom to a decision making body to choose the most acceptable decision out of possible decisions, to protect public or private interests. In this case legislation determines several legal outcomes; making choice among them is the competence of an administrative body. Discretionary power might imply the ability of decision making body to implement or not to implement some measure or use only one measure out of several acceptable ones.[56]However, the implementation of discretionary power should be justified.

Parole Board has discretionary power to release or not a convict. Administrative body must make decision with consideration of whether the purpose determined by the law is attained; in the given case – re-socialization of a convict, restoration of justice and prevention of a new crime. It is necessary to keep the balance between public and private interests. Damage inflicted to a private person shall not exceed benefits provided to public and vice versa. Consequently, when Board makes decision, on the one hand, it should not endanger public safety and security, take into consideration the risk of committing a new crime and on the other hand, should not impede the re-socialization-rehabilitation process of a convict.

3.3. Practice of Parole Board

For the analysis of compliance of Parole Board activities with the principles of a fair trial, in the light of decision justification, it is important to directly study individual administrative acts. Prior to

[54] *Turava P., Tskepladze N.,* General Administrative Law, Textbook, Tb., 2010, 58 (In Georgian); *Adeishvili Z., Vardiashvili K., Izoria L., Kalandadze N., Kopaleishvili M., Skhirtladze N., Turava P., Kitoshvili D.,* General Administrative Law, Textbook, GTZ, Tb., 2005, 140 (In Georgian).

[55] *Turava P., Tskepladze N.,* General Administrative Law, Textbook, Tb., 2010, 58. *Adeishvili Z., Vardiashvili K., Izoria L., Kalandadze N., Kopaleishvili M., Skhirtladze N., Turava P., Kitoshvili D.,* General Administrative Law, Textbook, GTZ, Tb., 2005, 140 (In Georgian).

[56] *Turava P., Kharshiladze I.,* Administrative Proceedings, Tb., 2006, 52 (In Georgian); *Turava P., Tskepladze N.,* General Administrative Law, Textbook, Tb., 2010, 36 (In Georgian).

the amendments dated 27 February 2013, the decisions made based on the formulary evaluation differ from the decisions from the later period. It is expedient to review them separately.

3.3.1. Practice of Parole Board Prior to Amendments to Provision of Local Council Introduced on 27 February 2013

The motivational section of the decision №2/11-1640, dated 29 July 2011, issued by the East Georgia Parole Board only states that the Board has discussed the case using the formula for the evaluation of criteria as envisaged under Article 12 of the Provision and finally came up with the point 7.5.[57]It is clear that the decision is fully unjustified and it does not provide any information on the facts, arguments and assessments. Motivation for the decision is not indicated in the meeting minutes. Only each criterion is assessed with the points without any arguments. Such approach does not comply with the national as well as international standards.

Decisions from the later period demonstrate higher level of non-justifications. For example, motivational section of decision №02/12-5006, dated 28 December 2012, issued by the East Georgia Parole Board indicates that the Board has discussed the case "using the formula for the evaluation of criteria as envisaged under Article 12 of the statute and came up with the estimated point, which was over 6.5."[58]Only the meeting minutes clarifies that the points actually equaled to 7.5. Clearly, it was absolutely unclear for the addressee of the individual administrative act, how the Board had evaluated his/her readiness for the release. The decision makes impression of willfulness.

The decisions of East and West Georgia Boards are similar in composition and demonstrate the tendencies discussed in the above examples. The decisions made by Juvenile Parole Board are slightly different. For example, the motivation section of the decision №32/04-10, dated 27 November 2010 indicates that the Board based on the information provided assessed the conduct of the convict at a medium level – with the point 1, as during the period of serving the sentence he has not been either disciplinary sanctioned or encouraged; facts of committing the crimes in the past - 0 points, due to the absence of past convictions; as he was convicted for the stealing, which was carried out in a concealed manner and was distinguished with the low level of public risk, the nature of the crime was assessed with the point one; family conditions – one point and personality of the convict – two points.[59]It is evident that unlike the motivation sections of decisions issued by the East and West Georgia Parole Boards, the above decision is more justified and reinforced. However, in this case too, the lack of arguments is noticeable and the sections related to the family conditions and personality of the convict make an impression of willful decision. It has to be also mentioned that the information provided in the descriptive part also does not allow for the reasoned evaluation of personality of the convict and his family conditions. In this concrete case it would be expedient to organize oral hearing and obtain additional information. However, the Board has not used oral hearing in the decision making process.

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[57] Decision without the oral hearing №2/11-1640, East Georgia Parole Board, 29 July, 2011 (In Georgian).

[58] Decision without the oral hearing №02/12-5006, East Georgia Parole Board, 28 December, 2012 (In Georgian).

[59] Decision without the oral hearing №32/04-10, Juvenile Parole Board, 27 November, 2010 (In Georgian).

The descriptive sections of decisions of Juvenile Parole Board are characterized with relatively comprehensive form for the later periods. For example, the contents of the decision №04/12-047, dated 28 April, 2012 made by the Juvenile Parole Board provides detailed information on the involvement of the convict in the individual planning process, relationship with the administration and other convicts, inclination to the criminal sub-culture, family background, involvement in educational and rehabilitation programs, psycho-emotional condition, attitude towards the committed crime, motivation for the change of life style and other circumstances.[60] Despite the above, in terms of argumentation, the motivation section of the decision has not essentially changed.

In conclusion, it must be noted that prior to amendments introduced in the Provision, dated 27 February 2013, the decisions issued by the East and West Parole Board were essentially unjustified; and the acts issued by the Juvenile Parole Board were characterized by lack of arguments. However, as a positive feature of the formulary evaluation system, it has to be mentioned that decision had been made based on the necessary evaluation of all criteria.

3.3.2. Practice of Parole Board Following Amendments to Provision of Local Council Made on 27 February 2013

Unlike the period of evaluation of criteria based on the formulary approach, in the period following the changes to the Provision made on 27 February 2013, decisions made by the different Boards do not differ essentially. The motivation section of the decision №01/13-011, dated 28 February 2013 issued by Juvenile Parole Board reads that administrative body has drawn its attention to the past conviction, seriousness of the crime – violent actions carried out in a group, which was characterized with the increased public risk.[61] It is evident, that the Board made its decision based on only 2 criteria out of five criteria to be evaluated. The Board has not at all assessed such circumstances which could reflect the progress in the direction of re-socialization of the convict and risks related to the normal return to the society; namely, personality and family conditions of the convict. As for the past convictions, this is a factual circumstance and only requires identification and not the assessment; the gravity of the crime has been already evaluated by the court in the process of determining the sentence and it has to be given the least priority.

In some cases Boards made its decision based on only one criterion.[62] The decision №01/13-06, dated 28 February 2013 issued by the Juvenile Parole Board states that the convict was rejected for the conditional early release with the consideration of gravity of the crime, its group nature and especially serious damage inflicted. Provided justification is lacking any ground. The addressee of the act was convicted for the stealing, which based on the past practice of the Parole Board is characterized by low risk. As for the total damage inflicted to the victim – it equaled to GEL 1370.[63] In line with the note to

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60 Decision without the oral hearing №04/12-047, Juvenile Parole Board, 28 April, 2012 (In Georgian).

61 Decision without the oral hearing №01/13-011, Juvenile Parole Board, 28 February, 2013 (In Georgian).

62 For example, in decision №01/13-008, dated 28 February, 2013 only with the consideration of the nature of the crime the Board has rejected the convict for parole (In Georgian).

63 Decision without oral hearing №01/13-006, Juvenile Parole Board, 28 February, 2013 (In Georgian).

Article 177 of Criminal Code of Georgia, this amount represents the substantial damage; the law does not envisage the especially serious damage for such cases.[64]

As a conclusion it has to be noted that unlike the previous period, practice of the period after the changes to the Provision of Parole Board dated 27 February 2013 is characterized by less justified decisions. In most cases the decisions are made via the evaluation of several and not all criteria without significant argumentation. The evident regress compared with the formulary assessment period is present. Accordingly, the individual administrative acts issued by the Parole Board did not comply with the national as well as international standards.

4. Right to Appeal Decision at Court

Right to appeal the decision at the court serves two main objectives. First of all, this is a mechanism for the parties to finish the litigation process with the more desirable outcome. Secondly, legal overview facilitates homogenous interpretation of the law, fairness of the decision and its successive nature.[65] Right to appeal has preventive nature as well. Judges have motivation for the diligent work that itself ensures prevention of mistakes or willful behavior. In this regard, right to appeal is directly related to the right to justify the decision.[66]

The European Court on Human Rights has stressed the importance of review of decisions made by Parole Boards on the conditional early release in the case *Weeks v. the United Kingdom*. The Court has pointed out that judicial review undoubtedly represents a useful supplement to the procedure before the Parole Board: it enables the individual concerned to obtain a control through the ordinary courts on activities of Parole Board. Thus, the guarantees to improve shortcomings will be ensured. However, this body must be necessarily accessible and effective. The grounds on which judicial review lies, as summarized by Lord Diplock in his speech are "illegality", "irrationality" and "procedural impropriety". By "illegality" is meant incorrect application of the law, in particular, breach of the statutory requirements; "irrationality" covers negligence of logics and morale; and "procedural impropriety" is a failure to observe expressly laid down procedural rules, a denial of natural justice or a lack of procedural fairness.[67]

According to Article 42, Paragraph 6 of the Imprisonment Code, decision of Local Council on the rejection of parole can be appealed at the court through the administrative procedure.

Court practice does not demonstrate homogenous approach; such approaches fall into two directions. One part of judges considers that Parole Board, within its discretionary power shall make decision based on all criteria envisaged under the law; such decision must be dictated by the internal faith of the Board members; moreover, decision must be based on the qualified assessment of subjective and objective circumstances of disputable issue. The court underlines that the issue on the adherence to the procedures determined under the legislation by the Board are subject to review, control and not the essence of

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64 The damage of GEL 10,000 is considered as substantial damage.

65 *Trechsel S.* (with the assistance of *S.J. Summers*), Human Rights in Criminal Proceedings, translated by *V. Gogelia, E. Lomtatidze, E. Kartsivadze, T. Ivanishvili, M. Narindoshvili*, Georgian Constitutional Court, Tb., 2009, 406 (In Georgian).

66 Ibid, 407.

67 *Weeks v. The United Kingdom*, [1987] ECHR, App. no 9787/82, 69.

evaluation of various subjective and objective circumstances related to a convict.[68]Indeed, the court is not authorized to assess the criteria and to make decision on the parole, however it has obligation to check at least the formal and material lawfulness of individual administrative act. The above implies the verification of justification of decision in general, and specifically the discretionary power. Judge is not able to assess the criteria, but can define the level of justification of the evaluation provided by the Board, which must be decisive for the review of the appeal. In the given case the attention was not focused on the above details. With the consideration of the European Court Case-law, besides ensuring the procedural guarantees, the body reviewing the case shall focus on the lawfulness and rationality of individual administrative acts. Subsequently, aforementioned approach of the national court is totally unacceptable.

The other part of the judges deems that it is necessary to verify the expediency of criteria assessment by the Board. Decision made by the administrative body within its discretionary power, which in the given case is the result of assessment of specific criteria, shall be verified in terms of its compliance with the law and justification of its expediency. In the decision making process all those important grounds shall be comprehensively examined which were indicated as necessary for the review by the Provision of Parole Board.[69]Following the discussions developed in the previous chapter, such approach of the national courts is more acceptable and complies with the international standard.

It is important to assess whether the review of Parole Board decision by the national court represents effective protection remedy. Parole Board is an administrative body and implementation of its activities is represented in the form of administrative act. Consequently, court is not capable to change the negative decision of Parole Board and release a convict. Parole Board is authorized to make decisions on conditional early release. Court can only annul the individual administrative act issued by the latter and assign Parole Board to issue a new act. Despite the existence of the right to appeal, the final decision is still in the hands of Parole Board. The court cannot be considered as an effective appeal body for the decisions made by the Parole Board.

As a conclusion it must be noted that right to appeal the decision made by Parole Board at the court is not effective remedy for protection. Court practice reveals that in the process of execution of court oversight there are many violations of procedural and legislative requirements. In order to establish common practice it is important to reflect the minimal guarantees in the legislation.

5. Standing Commission

The Standing Commission under the Ministry of Corrections of Georgia is the body supervising the Parole Board. Parole Board submits to the Standing Commission report on the implemented activities at least once every three months. The Commission is authorized to recall the cases with negative decisions and make relevant decisions, including the decision on the release of a convict.[70]

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68 Case №3/1682-10, Tbilisi City Court, Board of Administrative cases, 05 July, 2011, paragraph 5.5 (In Georgian).

69 Case №3/4388-12, Tbilisi City Court, Board of Administrative cases, 18 December, 2012 (In Georgian).

70 Law of Georgia “Imprisonment Code”, 09/03/2010, №2696, Legislative Herald of Georgia №12, 24/03.2010, Article 44, Paragraph 1 and 7.

Rules for activities of the Standing Commission are defined under the Provision approved by the Minister of Corrections and Legal Assistance of Georgia with the order №185, issued on December 27, 2010. According to the above Provision, the authority of the Commission does not essentially differ from the authority of Parole Board. The Commission is only implementing the supervisory function and not the higher administrative body. Decisions made by Parole Board are directly appealed at the court and the Standing Commission is not entitled to review the claims submitted by convicts. Confusion is even more aggravated by the fact that there are no criteria set, based on which the Standing Commission recalls the cases on which Parole Board has made negative decisions. It is a fact that it is not logical or expedient to recall all unsatisfied cases.

In terms of legal regulation there is an evident vacuum and it is demonstrated by the decisions of Standing Commission. In line with the decision №08/11/k-025, dated 30 December 2011, the Commission has recalled the case with the negative decision made by the Juvenile Parole Board. It has reviewed the materials and based on the general analysis of the provided information defined that the purpose of the punishment was attained, the convict was undergoing re-socialization and striving to return to the society as a normal member with the full perception of positive responsibility.[71]The same information is reflected in the meeting minutes of the permanent commission. The identical words are repeated in the motivational section of decision №05/13/k–016 made by the Standing Commission.[72] Decisions of the Standing Commission and meeting minutes do not indicate the reasons for recalling the cases reviewed by the Parole Board and for changing the decision. The activities of the administrative body contravene with the standards of fair trial. The above raises the questions related to the need for the existence of Standing Commission.

According to Article 7, Paragraph 8 of the Provision of Standing Commission, decision can be appealed once at the court through the administrative procedure. As the Standing Commission recalls the case materials on its initiative it is not expedient to exercise the right of appeal. Moreover, there is no relevant court practice in place. Subsequently, the inexpediency of functioning of the Standing Commission is even more evident.

Hence, in Georgia under one structure there are two bodies carrying out the same functions, out of which Standing Commission represents the supervisory body but not the higher body. The administrative legal acts issued by both bodies can be appealed at the court. In terms of compliance with the principle of fair trial they are characterized with the similar deficiencies. Simultaneous functioning of Parole Board and Standing Commission requires additional economic and human resources. Therefore, it is reasonable to abolish Standing Commission.

6. Conclusion

Based on the last amendments introduced into the national legislation, the authority for making decision on conditional release has been taken from the court and transferred to specially created Parole Boards. The transfer of authority to make decision on the conditional early release to the Parole

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71 Decision №08/11/k-025, Standing Commission, 30 December, 2011 (In Georgian).

72 Decision №05/13/k-016, Standing Commission, 11 March, 2013 (In Georgian).

Board does not violate itself the principles set at international and national levels. It is important that the body reviewing the issue complies with the standard of fair trial.

The evaluations and conclusions presented in the article made it evident that national legislation and practice do not provide the important guarantees for the fair trial. Namely, the obligation to make accessible for a convict the materials to be assessed by the Parole Board is not envisaged at a normative level; the issue related to the conduct of oral hearings is vague; there is not a mechanism for the effective appeal of the decision; there is no need for the functioning of supervisory body, Standing Commission; practice shows that the decisions are essentially unjustified and regressive development is in place.

Based on the conclusions developed in the present paper it is necessary to initiate changes in the legislation related to the activities of the Parole Boards in order to achieve compliance with the constitutional and international standards. It is important to abolish Standing Commission and create effective appeal body. Parole Boards should ensure the involvement of convicts in the decision making process and shall guarantee compliance of the issued acts with the justification standards.

Natalia Burduli*

Are Diplomatic Assurances Effective Guarantee Against Torture?

1. Introduction

After the 9/11 terrorist attacks,[1] the attention to the problem of terrorism has largely increased among the international society. States started different campaigns against terrorism that, consequently, raised many controversial issues. One of such issues is a challenge of the fundamental human rights protection and especially, protection of the rights of terrorist suspects. The paper will focus on the prohibition of torture of the terrorist suspects. The problem of abovementioned issue is mostly invoked with regard to the counter-terrorism policies.

The research question canters upon whether there are any conditions under which Diplomatic Assurances (DAs) should be considered to render acceptable return of terrorist suspects to their country of origin or to a third country, where they may face a real risk of torture. Under international human rights law, no state has the right to send a person to a country in which he/she might run a substantial risk of being subjected to torture or ill-treatment.[2]Many Western countries deeming terrorist suspects as their "security threats" try to extradite such "threats" in a manner not to compromise their duties under the international law. Therefore, states seek and accept DAs against the torture even if such assurances sometimes may not be properly guaranteed.[3]

International human rights law protectors have argued against the use of DAs, because they may end with a violation of the prohibition of torture.[4] Moreover, DAs are not only unreliable as a safeguard against torture, but they are in the fundamental tension with Committee against Torture (CAT) and other international human rights obligations. Case of *Agiza v Sweden* should also be mentioned here, where the CAT proclaimed that relying on DAs, which provided no mechanism for their enforcement, is useless and contrary the UN Convention against Torture.[5] In CAT's view, in exceptional circumstances states can trust the DAs from countries "that do not systematically violate the Convention's provisions",[6] also mentioning here "effective post-return monitoring and judicial due process guarantees."[7]

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* Doctoral Student, TSU Faculty of Law, LLM in International Human Rights Law, University of Essex, UK, Master in International Law, Faculty of Law, TSU, Chief Specialist, TSU Department of Internationalization and Scientific Research.

1 September 11, 2001, US.

2 UN General Assembly, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 3, 10 December 1984, United Nations, Treaty Series, Vol. 1465, <http://www.unhcr.org/refworld/docid/3ae6b3a94.html>, [29.04. 2014].

3 For example, the *Case of three Iranian aircraft hijackers* threatened with extradition to the Russian Federation: Report of Special Rapporteur, UN Doc E/CN.4/1995/34 (12 January 1995), para. 513.

4 Article 5 of the Universal Declaration of Human Rights (1948), the International Covenant on Civil and Political Rights (1966), Article 7 and 10(1); the European Convention on Human Rights (1950), Article 3; the American Convention on Human Rights (1978), Article 5(2); the African Charter on Human and People's Rights (1981), Article 5.

5 Amongst numerous cases, see *Mutombo v. Switzerland* (1994) UN Doc CAT/C/12/D/13/1993; also see, *Agiza v. Sweden* (2005) UN Doc CAT/C/34/D/233/2003 (Egypt).

6 Conclusions and Recommendations on Georgia, UN Doc CAT/C/GEO/CO/3 (25 July 2006), para.11; and USA, UN Doc CAT/C/USA/CO/2 (25 July 2006), para. 21.

7 Ibid.

In order to answer the research question, in section 2, main principle, addressing to the issue of Diplomatic Assurances, so called *non-refoulement,* will be discussed through the examination of different regional and international human rights treaty bodies and their practice; In section 3, different approaches of some countries, governmental and non-governmental institutes and bodies will be compared; also main arguments concerning the usage of DAs will be presented. Next, in section 4, considering the related international and national case law, applicable international law issues of DAs will be examined. Lastly, in section 5, the according conclusion will be presented.

Considering all aspects of the problematic issue, this paper will be dedicated to the protection of an idea that DAs should be banned and not used by any state, even if the guarantees are deemed sufficient enough.

2. The Principle of *Non-Refoulement*

According to the Article 3 of the UN Convention against Torture (UNCAT),[8] if a state extradites a person to a country "where there are substantial grounds for believing that he would be in danger of being subjected to torture",[9] a state can be violating its obligations under the abovementioned document. Decisions of the European Commission of Human Rights regarding the Article 3 of the European Convention[10] "inspired" the said principle.[11] The majority of cases dealt with the UNCAT concerns the Article 3.[12]In many cases the Committee decided against the state and ruled that the state must not "affect the return".[13] According to UNCAT, firstly, burden of proof is lying on the individual to provide the Committee with the proper documentation of a real risk that "there must be a factual basis for the author's position sufficient to require a response from the State party".[14] Subsequently, the burden of proof moves to the state to claim that there was no evidence showing the "real risk"[15] of torture.[16]

Human Rights Committee bears the question similarly as UNCAT and in its second general comment on Article 7 of the ICCPR,[17] declares that "states parties must not expose individuals to the

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8 UN General Assembly, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 3, 10 December 1984, United Nations, Treaty Series, vol. 1465, <http://www.unhcr.org/refworld/docid/3ae6b3a94.html>, [29.04. 2014], 85.

9 Ibid*,* Art. 3.

10 Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, ETS 5, <http://www.unhcr.org/refworld/docid/3ae6b3b04.html>, [29.04 2014].

11 *Burgers Hermann J., Danelius H.*, The UN Convention against Torture – a handbook on the Convention against Torture and Other cruel, Inhuman or Degrading Treatment or Punishment, International Studies in Human Rights, Martinus Nijhoff Publishers, Boston, 1988, 125.

12 *Nowak M., McArthur E.*, the United Nations Convention against Torture: A Commentary, 2008, 158-61.

13 *Agiza v. Sweden* (2005) UN Doc CAT/C/34/D/233/2003 (Egypt); also see *Tapia Paez v. Sweden* (1997), UN Doc CAT/C/18/D/39/1996 (Peru).

14 Committee against Torture, General Comment No. 1: Implementation of Article 3 of the Convention in the context of Article 22 (*Refoulement* and communication), UN Doc HRI/GEN/1/Rev.9, Vol. I, 2008, para. 5.

15 "…that go beyond mere theory or suspicion", ibid*,* para 6.

16 See, the Committee against Torture, *A. S. v Sweden* (2001) UN Doc CAT/C/25/D/149/1999, para 8.6.

17 The International Covenant on Civil and Political Rights (1966), Article 7 and 10(1).

danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or *refoulement*".[18] The Committee's decision on the *case of Ng v. Canada*[19] was of a greater importance. The Committee found a violation of Article 7 of the ICCPR, on the basis that the applicant was sent to be executed in gas chamber, an act, which was not consistent to Article 7 of the ICCPR.[20] After this case the Committee discussed several individual communications "involving transfer to risk of torture or other ill-treatment".[21]

The Inter-American Commission on Human Rights,[22] as well as other international systems mentioned above, also prohibits the transfer of an individual to a state, where there is a real risk of torture or other cruel, inhuman or degrading treatment.[23] In one of its cases, relating to an individual, who was to be returned to Spain without due process, the Commission sanctioned a "friendly settlement", under which the deporting country, Venezuela, admitted its liability for abuse of the Article 13(4) of the Inter-American convention to Prevent and Punish Torture.[24]

Similarly, the African Commission on Human and Peoples' Rights[25]recognized under the African Charter[26] the absolute nature of the principle of *non-refoulement,* claiming that "state should ensure no one is expelled or extradited to a country, where he or she is at risk of being subjected to torture."[27]

Other worth mentioning international mechanism, recognizing the principle of *non-refoulement*, is the Article 12 of the Third Geneva Convention,[28] also Article 49 of the Fourth Geneva Convention,[29] which even in times of armed conflicts prohibits any such transfer of an individual to a country, which represents a clear risk of a person to be subjected to torture or other ill-treatment.[30]

When a state wants to remove the individual from its territory, "fair and effective individualized procedure"[31]has to be done before its extradition in order to assess the nature of a real risk of torture or

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[18] Human Rights Committee, General Comment No. 20: Torture or Cruel, Inhuman or Degrading Treatment or Punishment, 1992, para 9.

[19] *Ng v. Canada* (1994), UN Doc CCPR/C/49/D/469/1991.

[20] Ibid.

[21] *Alzeri v. Sweden* (2006) UN Doc CCPR/C/88/D/1416/2005 (Egypt).

[22] Inter-American Committee on Human Rights (IACHR).

[23] The Inter-American Commission on Human Rights, report on Terrorism and Human Rights, OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr. (22 October 2002), paras. 392-4; Resolution No. 2/06 on Guantanamo Bay Precautionary Measures (28 July 2006).

[24] *Sebastian EchanizAlcorta and Juan Victor Galarza Mendiola v Venezuela*, Petition 562/03, Report No 37/06 (March 15, 2006) [admissibility decision] and case 12.55, Report No 110/06 (21 October 2006) [Friendly Settlement decision], para. 33.

[25] African Commission on Human and Peoples' Rights (ACHPR).

[26] The African Charter on Human and People's Rights (1981), Article 5.

[27] African Commission on Human and Peoples' Rights, Res 61 (XXXII) 02 (2002), para 15.

[28] International Committee of the Red Cross (ICRC), Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention), 12 August 1949, 75 UNTS 135, Article 12, <http://www.unhcr.org/refworld/docid/3ae6b36c8.html>, [29.04.2014].

[29] International Committee of the Red Cross (ICRC), Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), 12 August 1949, 75 UNTS 287, Article 49, <http://www.unhcr.org/refworld/docid/3ae6b36d2.html>, [29.04.2014].

[30] *Henckaert J. M., Doswald-Beck L.,* Customary International Humanitarian Law, Vol. I: Rules, 2005, 457-62.

[31] *Rodley N.*, The Treatment of Prisoners Under International Law, Oxford University Press, 1999, 225.

other ill-treatment.[32] And reliance on so called "safe countries" instead of examining each individual case particularly is deeply criticized by almost all treaty bodies.[33]

Thus, the Human Rights Council and General Assembly have integrated in their resolutions on torture that "diplomatic assurances, where used, do not release States from their obligations under international human rights, humanitarian and refugee law, in particular the principle of *non-refoulement*."[34]

Accordingly, all international human rights protecting systems recognized the greatest value of the principle of *non-refoulement*, even on grounds of terrorism or other national security threats.[35] The principle constitutes to a general international law,[36] under which any transfer to real risk of torture or cruel, inhuman or degrading treatment or punishment is prohibited and no exceptions are to be examined here.[37] Additionally, "the risk in any third state to which the author may subsequently be transferred must also be taken into account."[38]

3. State Justifications

It should be mentioned that many arguments are presented for and against DAs. Therefore, two approaches have established:[39] governmental attitude of supporting diplomatic assurances. Here should be noted the group of those who are for the usage, but proper usage of such assurances, they are in a minority, however; and the second approach of NGOs and other non-governmental bodies supporting a complete rejection of diplomatic assurances.[40]

After the 9/11 terrorist attacks dispute on the practice of DAs significantly increased.[41] In order to be more specific, examples of the governmental approaches will only be presented by the

[32] Human Rights Committee, *Maksudov and others v. Kyrgyzstan* (2008) UN Doc CCPR/C/93/D/1461, 1462, 1476 &1477/2006, para. 12.7.

[33] For example, Committee against Torture, Concluding Observations on Finland (1996), UN Doc A/51/44, paras. 131, 136; also, Human Rights Committee, Concluding Observations on Estonia (2003), UN Doc A/58/40, para 79(13).

[34] Human Rights Council, Res 8/8 (18 June 2008), para 6(d); UNGA Res 62/148 (4 march 2008), para. 12.

[35] For example, Committee against Torture, *Tapia Paez v. Sweden,* 1997, UN Doc CAT/C/18/D/39/1996 (Peru), para. 14.5 Concluding Observations on Canada, UN Doc CAT/C/CR/34/CAN (7 July 2005), para. 4(c); Human Rights Committee, *Ahani v. Canada*, (2004) UN Doc CCPR/C/80/D/1051/2002, para 10.10; Concluding Observations on Canada, UN Doc CCPR/C/79/Add 105 (7 April 1999), para. 13.

[36] *Lauterpacht E., Bethlehem D.,* The Scope and Content of the Principle of Non-Refoulement in Feller, Turk, and Nicholson (eds), Refugee Protection in International Law: UNHCR's Global Consultations on International Practice, Cambridge: Cambridge University Press, 2003, 155-64.

[37] Ibid, 162-3.

[38] Committee against Torture, General Comment no. 1 (Committee against Torture, General Comment No. 1: Implementation of Article 3 of the Convention in the context of Article 22 (Refoulement and communication), UN Doc HRI/GEN/1/Rev.9,Vol. I, 2008, para. 5.), para 2; *Korban v Sweden* (1998) UN Doc CAT/C/21/D/88/1997 (Jordan and Iraq), see at *Rodley N.*, The Treatment of Prisoners Under International Law, Oxford University Press, 1999, 225.

[39] *Skoglund, L.,* Diplomatic Assurances against Torture – An effective Strategy? – A review of Jurisprudence and the Examination of the Arguments, Nordic Journal of International Law, 77(4), 2008, 319 – 364.

[40] *Skoglund, L.,* Diplomatic Assurances against Torture – An effective Strategy? – A review of Jurisprudence and the Examination of the Arguments, Nordic Journal of International Law, 77(4), 2008, 319 – 364.

[41] International Centre for Counter-Terrorism (ICCT), The Hague, 2011, Use of Diplomatic Assurances in Terrorism-related Cases in Search of a Balance Between Security Concerns and Human Rights Obligations,

governments of the United Kingdom (UK) and the United States of America (US), as these countries were the ones who started using DAs and sending prisoners to states where these prisoners might have been at a risk of torture.

a) UK

DAs have emerged as a perfect resolution of governments' problems regarding the people deemed as threats for national security, terrorist suspects, whose deportation to a state, where they might be at risk of torture, under the principle of *non-refoulement*, is prohibited. The government of the UK is one of the strongest supporters of Diplomatic Assurances. As it was stated by Amnesty International, "[…] The UK has been Europe's most aggressive and influential proponent of these dangerous deals [diplomatic assurances], which are unreliable and unenforceable […]"[42]

In any way possible, the UK government has tried to deal with terrorist suspects.[43]Bilateral agreements, so-called "Memoranda of Understanding" (MOUs), were reached by the government. The authorities of the countries, where the extradition of terrorist suspects was planned, gave assurances. The UK government insists that a protection against ill treatment or torture is completely guaranteed by such MoUs.[44] As the former Prime Minister, Tony Blair, noted in one of his interviews,[45] the main focus of a country was on the national security that urgently needed the elimination of its national security threats. For this reason, the government was seeking and accepting guarantees provided by the receiving countries.[46]

Recently, the UK has agreed such MOUs with several countries, such as Jordan, Libya, Lebanon and Ethiopia.[47]Lately the UK deported individuals related to the terrorist activities to Pakistan, which assured that there was no ground to fear that the individual would be at any risk of torture.[48] Consequently, such kind of practice of assurances against torture can lead to the growth of deportations relying on such assurances.[49] Furthermore, only simple promise, with no additional

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<http://www.icct.nl/userfiles/file/ICCT%20Discussion%20Paper%20EM%20Diplomatic%20Assurances.pdf>, [29.04.22014]

[42] Amnesty International, The UK fails on diplomatic assurances*,* Amnesty International, 2011, line n.11, <http://www.amnesty.org.au/news/comments/24651/>, [29.04.2014].

[43] *Skoglund, L.,* Diplomatic Assurances against Torture – An effective Strategy? – A review of Jurisprudence and the Examination of the Arguments*,* Nordic Journal of International Law, 77(4), 2008, 319 – 364.

[44] Amnesty International, The UK fails on diplomatic assurances*,* Amnesty International, 2011, line n.11, <http://www.amnesty.org.au/news/comments/24651/>, [29.04.2014].

[45] *Blair T.*, The Prime Minister's Statement on Anti-Terror Measures, 2005, <guardian.co.uk> [5.08.2005, 12.28 BST], <http://www.guardian.co.uk/politics/2005/aug/05/uksecurity.terrorism1>,[29.04. 2014].

[46] Ibid.

[47] Human Rights Watch, 2005, Still at Risk: Diplomatic Assurances No Safeguard against Torture. 16 (4D). Human Rights Watch, <http://www.hrw.org/reports/2005/04/14/still-risk>, [29.04.2014].

[48] Amnesty International, The UK fails on diplomatic assurances*,* Amnesty International, 2011, line n.11, <http://www.amnesty.org.au/news/comments/24651/>, [29.04.2014].

[49] Amnesty International, United Kingdom, Human Rights: A Broken Promise.3.1., Amnesty International, 2006, <http://www.amnesty.org/en/library/asset/EUR45/004/2006/en/ce28dddd-d45b-11dd-8743-d305bea2b2c7/eur450042006en.html>, [29.04.2014].

safeguards would be enough and acceptable.[50]As it was noted in *Youssef case*,[51] whatever guarantees states desire to provide, should be accepted.[52]

The UK was engaged in a very crucial case of *Chahal v. UK*.[53]Under this case, legal precedent was recognized, the so-called *Chahal Principle*, according to which the principle of *non-refoulement* was absolute.[54]The decision is important as the court highlights the question of credibility of diplomatic assurances against torture. Even though, the assurance is given in good faith, the state cannot render a detainee to another state where torture is an "endemic" problem.[55]

b) USA

Another state wholly supporting the diplomatic assurances is the United States of America. This country uses "soft" DAs.[56] Abovementioned tendency was mainly actual during the George W. Bush Administration.[57] In one of the conferences the former US President restated the British approach to the DAs and declared that they are the only useful means not to infringe human rights obligation. The Former President was convinced of simple promise that terrorist suspects will not be tortured.[58]The US believes that as soon as a diplomatic assurance has been received, there is no need totest the consistency of the promise.[59] Nowadays, the Obama administration continues to rely on previously agreed diplomatic assurances.[60] For example, in July 2010, one Guantanamo detainee was deported to his native Algeria, despite his application on the real risk of torture or ill-treatment.[61]

To summarize, states (at least the UK and the USA) deem DAs as efficient protection measures against torture.[62] However, one may believe that reliance on such assurances is not always conducted by the idea of their effectiveness as illustrated above in the case of *Youssef v The Home office.*[63]

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[50] Human Rights Watch, 2005, Still at Risk: Diplomatic Assurances No Safeguard against Torture, 16 (4D), Human Rights Watch, <http://www.hrw.org/reports/2005/04/14/still-risk>, [29.04.2014].

[51] *H. Youssef v. The Home Office* (2004) EWHC 1884 United Kingdom: High Court (England and Wales), 89.

[52] Ibid.

[53] *Chahalv.United Kingdom* (1996) *22414/93*, European Court of Human Rights, GC.

[54] Ibid.

[55] Ibid.

[56] International Centre for Counter-Terrorism (ICCT), The Hague, 2011, Use of Diplomatic Assurances in Terrorism-related Cases in Search of a Balance Between Security Concerns and Human Rights Obligations, <http://www.icct.nl/userfiles/file/ICCT%20Discussion%20Paper%20EM%20Diplomatic%20Assurances.pdf >, [29.04.22014].

[57] Ibid.

[58] Human Rights Watch, 2005, Still at Risk: Diplomatic Assurances No Safeguard against Torture, 16 (4D), Human Rights Watch, <http://www.hrw.org/reports/2005/04/14/still-risk>, [29.04.2014].

[59] The Foreign Affairs Reform and Restructuring Act 1998.

[60] *Johnston D.,* U.S. Says Rendition to Continue, but With More Oversight, The New York Times, 2009, <http://www.nytimes.com/2009/08/25/us/politics/25rendition.html>, [29.04. 2014].

[61] Human Rights Watch, 2005, Still at Risk: Diplomatic Assurances No Safeguard against Torture, 16 (4D), Human Rights Watch, <http://www.hrw.org/reports/2005/04/14/still-risk>, [29.04.2014].

[62] *Skoglund, L.,* Diplomatic Assurances against Torture – An effective Strategy? – A review of Jurisprudence and the Examination of the Arguments*,* Nordic Journal of International Law, 77(4), 2008, 319 – 364.

[63] *H. Youssef v. The Home Office* (2004) EWHC 1884 United Kingdom: High Court (England and Wales), 89.

4. Illegalities and Ineffectiveness of DAs

a) Approaches of the NGOs and other Non-governmental Bodies

As regards to the second approach to the DAs, When considering positive and negative aspects of diplomatic assurances, the opinion of some competent international bodies and NGOs should be acknowledged as well. It is very interesting that these bodies support the full rejection of the practice of diplomatic assurances. Such organizations as the Human Rights Watch and Amnesty International have declared their positions repeatedly in their annual reports. Human Rights Watch underlines the necessity of termination of the practice of DAs,[64] as they help states "[...] to cover their complicity in torture and their role in the erosion of the international norm against torture..."[65]

NGOs are not the only ones who support the absolute rejection of the usage of diplomatic assurances. Authoritative representatives of human rights institutions, such as Louise Arbour,[66] The UN High Commissioner for Human Rights, UN Special Rapporteur on Torture, Manfred Nowak,[67] The Council of Europe High Commissioner for Human Rights, Thomas Hammarberg[68] strongly encourage states not to apply to the diplomatic assurances.[69]

It is especially significant to mention that Manfred Nowak together with Martin Scheinin,[70] the UN Special Rapporteur on Countering Terrorism, addressed the US Government not to return an individual to a state where the individual might be at a real risk of torture.[71] As experts stated, not mentioning the unreliable nature of DAs, they also are very difficult to observe and, thus, it is almost impossible to evaluate the risk facing the suspected terrorist.[72]

The Human Rights Committee in the *Alzery v. Sweden* case found that DAs contained no mechanism for monitoring of their enforcement and "the mechanisms of the visits that did take place failed to conform to key aspects of international good practice […]". Thus, committee concluded that

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[64] Human Rights Watch, 2005, Still at Risk: Diplomatic Assurances No Safeguard against Torture, 16 (4D). Human Rights Watch, <http://www.hrw.org/reports/2005/04/14/still-risk>, [29.04.2014].

[65] Ibid.3.

[66] *Arbour L.*, High Commissioner for Human Rights, at Chatham House And the British Institute of International and Comparative Law, Speech: In Our Name and on Our Behalf, 2006, <http://www.chathamhouse.org/sites/default/files/public/Research/International%20Law/ilparbour.pdf>, [29.04.2014].

[67] *Novak M., Scheinen M.,* Legal Issues in the Fight against Terrorism, Internet Journal - The Lift, 2010, <http://legalift.wordpress.com/2010/07/22/nowak-and-scheinin-urge-us-to-ensure-no-forcible-return-of-guantanamo-detainees-2/>, [29.04.2014].

[68] *Hammarberg T.*, Torture can Never, ever be Accepted, Council of Europe, 2006, <http:// www.coe.int/t/commissioner/Viewpoints/060626_en.asp>, [29.04. 2014].

[69] *Skoglund, L.,* Diplomatic Assurances against Torture – An effective Strategy? – A review of Jurisprudence and the Examination of the Arguments, Nordic Journal of International Law, 77(4), 2008, 319 – 364.

[70] International Centre for Counter-Terrorism (ICCT), The Hague, 2011, Use of Diplomatic Assurances in Terrorism-related Cases in Search of a Balance Between Security Concerns and Human Rights Obligations, <http://www.icct.nl/userfiles/file/ICCT%20Discussion%20Paper%20EM%20Diplomatic%20Assurances.-pdf>, [29.04.22014].

[71] Ibid.

[72] Ibid.

there was a violation of Article 7 of the ICCPR regardless of DAs provided. Similarly, in another case against Kyrgyzstan, the Committee again ruled the violation of Article 7 although DAs were guaranteed. The decision provided that "at the very minimum, the assurances procured should contain such a monitoring mechanism and be safeguarded by arrangements made outside the text of the assurances themselves which would provide for their effective implementation."[73]

As the foregoing review shows, there are different approaches with regard to diplomatic assurances. State governments tend to rely on them, not willing to admit that such assurances may cause human rights violations, while some international human rights institutions and bodies support either practicing diplomatic assurances that effectively guarantee the protection of an individual, or urge a total rejection of the practice.[74]

b) Case Law

With regard to the illegality and ineffectiveness of DAs, This issue cannot be considered without a proper examination of corresponding international and national case laws. On the international level, crucial judgments of the European Court of Human Rights (ECHR) will be examined. On the national level application discussed in the court of Canada will be mentioned, because it was the crucial ruling after which governments have become more confident in arguing that the rendition of a terrorist suspects in a country where this suspect can be the victim of torture, is justifiable as their threat is against national security.[75]

As it was mentioned above, in 1999, the European Court of Human Rights made a central decision on a case of *Chahal v. United Kingdom,*[76] the first case concerning diplomatic assurances, where the court found that the principle of *non-refoulement*was absolute.[77] The decision is important as the court highlights the question of credibility of diplomatic assurances against torture. Even though, the assurance is given in good faith, the state cannot render a detainee to another state where torture is an "endemic" problem[78]

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[73] *Maksudov and others v Kyrgyzstan*, (2008) UN Doc CCPR/C/93/D/1461, 1462, 1476 & 1477/2006, para. 12.5.

[74] Concluding Observations on US (2006), CCPR/C/USA/CO/3/Rev.1, para 16; on the UK, Un Doc CCPR/C/GBR/CO/6 (30 July 2008), para. 12; on France, Un Doc CCPR/C/FRA/CO/4 (31 July 2008), para. 20. Committee noted: "the more systematic the practice of torture or cruel, inhumane or degrading treatment or punishment, the less likely it will be that a real risk of such treatment can be avoided by such assurances, however stringent any agreed follow-up procedures may be."

[75] International Centre for Counter-Terrorism (ICCT), The Hague, 2011, Use of Diplomatic Assurances in Terrorism-related Cases in Search of a Balance Between Security Concerns and Human Rights Obligations, <http://www.icct.nl/userfiles/file/ICCT%20Discussion%20Paper%20EM%20Diplomatic%20Assurances.pdf>, [29.04.22014].

[76] *Chahalv.United Kingdom* (1996) *22414/93*, European Court of Human Rights, GC.

[77] Ibid.

[78] Human Rights Watch, 2005, Still at Risk: Diplomatic Assurances No Safeguard against Torture, 16 (4D), Human Rights Watch, para 104, <http://www.hrw.org/reports/2005/04/14/still-risk>, [29.04.2014].

The Grand Chamber of the ECHR in 2008 made another similarly important decision on the case of *Saadi v. Italy*.[79] As in his previous decisions,[80] the court ruled that the nature of the prohibition of torture is absolute, no matter if there is a need for states to protect their citizens from terrorism.[81] As regards diplomatic assurances, the main message of this decision was that given assurances do not automatically mean that the torture will not be committed and that existing law had not provided sufficient protection in other similar cases. The Court mentioned that only domestic laws and treaties were "not in themselves sufficient to ensure adequate protection against the risk of ill-treatment where, as in the present case, reliable sources have reported practices resorted to or tolerated by the authorities who are manifestly contrary to the principles of the Convention".[82]The Court then continues: "weight to be given to assurances from the receiving State depends, in each case, on the circumstances obtained at the material time".[83]The question, whether diplomatic assurances can sufficiently reduce an existing risk of torture was left open by the court.[84]

As regards to National law, the courts of Canada heard one of the most curious cases concerning diplomatic assurances. The *case of Suresh*[85]is distinguished with the fact that there were no adequate safeguard measures against torture, no procedural protection for the applicant when being removed from Canada to Sri Lanka. Under the Supreme Court ruling, an individual who is supposed to be extradited must have all the possibilities to confront the reliability of diplomatic assurances.[86]Even though the Court does not refuse diplomatic assurances, it does not exclusively refer to their reliance and usage either. The country, which "has engaged in illegal torture"[87] cannot be easily trusted.[88]After this ruling the so-called, "Suresh Principle" was established, which assisted states in claiming that the necessity of the rendition of a terrorist suspects relying on DAs, was emerged from only the national security protection reasons.

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[79] *Saadi v. Italy* [GC] (no 37201/06) ECHR 28 February 2008, para 148, citing *Chahal v.United Kingdom* (1996) *22414/93*, European Court of Human Rights, GC.

[80] Human Rights Watch, 2005, Still at Risk: Diplomatic Assurances No Safeguard against Torture, 16 (4D), Human Rights Watch, <http://www.hrw.org/reports/2005/04/14/still-risk>, [29.04.2014].

[81] *Hammarberg T.*, Torture can Never, ever be Accepted, Council of Europe, 2006, <http://www.coe.int/t/ Commissioner/Viewpoints/060626_en.asp>, [29.04. 2014].

[82] Ibid,para. 105.

[83] Ibid.

[84] *Hammarberg T.*, Torture can Never, ever be Accepted, Council of Europe, 2006, <http://www.coe. int/t/commissioner/Viewpoints/060626_en.asp> [29.04. 2014].

[85] *Manickavasagam Suresh* v.*The Minister of Citizenship and Immigration and the Attorney General of Canada (Suresh),* 2002, SCC 1, [2002] 1 S.C.R. 3.

[86] Ibid.

[87] *Bruin R.*,*Wouters K.*, Terrorism and the Non-derogability of Non-refoulement, International Journal of Refugee Law, 15(1), 2003, 26

[88] Concluding Observations on US (2006), CCPR/C/USA/CO/3/Rev.1, para 16; on the UK, Un Doc CCPR/C/GBR/CO/6 (30 July 2008), para. 12; on France, Un Doc CCPR/C/FRA/CO/4 (31 July 2008),para. 20. Committee noted: "the more systematic the practice of torture or cruel, inhumane or degrading treatment or punishment, the less likely it will be that a real risk of such treatment can be avoided by such assurances, however stringent any agreed follow-up procedures may be."

5. Conclusion

To conclude, the topic of diplomatic assurances has been the one broadly discussed among international law society. The legal question of when and in which conditions DAs can be used is very controversial. Few cases discussed above underline that completely different approaches are established. On the one hand, states, supported with national courts and very few scholars, have strong arguments for using DAs. Governments claim that, irrespective to the fact that, under international law, they are obliged not to send an individual to country where this individual might be at a real risk or torture, in exceptional circumstances, when the national security has to be protected, the Suresh principle can be used, therefore terrorist suspect can be extradited. While, on the other hand, for many NGOs and other non-governmental bodies the complete rejection of the DAs is vitally essential. They argue that the lack of strong enforcement instruments from receiving countries can lead to a certain violation of the prohibition of torture. Since, even carefully modified assurances cannot provide an effective basis to believe that torture measures will not be used.

It is absolutely clear that there is a need for further comprehensive examination of the issue of DAs. Undoubtedly, in order to deal with existing problem of DAs, creation of the legal framework is essential. For example, several factors should be strongly foreseen: 1. Before the extradition, DAs should be carefully observed by an independent courts or tribunals; 2. Tough enforcement system should be envisaged and legal liability for all parties should definitely be undertaken for the violation of the principle of *non-refoulment;* 3. Adequate prosecution should be held. Therefore, if all abovementioned is not properly guaranteed, there is no need in having the practice of DAs. As a result, the approach, under which the usage of DAs are permitted if they are developed enough and provide adequate protection, risks leading to the violation of the fundamental right of a person not to be tortured. Thus, it is very crucial that the application of DAs was rejected.

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Irma Khvedelidze

Tamar Kvlividze

Tsiala Gabashvili

Alexander Vaselevi

Ana Adamia

Tamuna Beradze

Mariam Kandelaki

Diana Alugishvili

Tamar Mtvarelidze

Cover Designer Mariam Ebralidze

Compositor Natia Dvali

14 Ilia Tchavtchavadze Avenue, Tbilisi 0179

Tel 995 (32) 225 14 32

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