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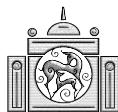

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Zurab Dzlierishvili*

Cross-undertaking as to Damages Resulting from a Provisional Remedy

The purpose of the institute of provisional remedy is the prevention of any potential obstacle to specific enforcement of a decision through the restriction of the right of a defendant to dispose of his property or through application of the other statutory provisional remedies. The institute of provisional remedy ensures the protection of the interests of a claimant, whilst the compensation of damages resulting from the application of a provisional remedy - guarantees the protection of the interests of a defendant. Cross-undertaking as to damages (provision for damages resulting from the application of a provisional remedy) serves the interests of a defendant and constitutes a guarantee that damages incurred as a result of restriction of a defendant's right will be compensated provided the provisional remedy proves to be unreasonable.

***Keywords**: Provisional Remedy, Cross-undertaking as to Damages, Article 199 of the Code of Civil Procedure of Georgia.*

1. Introduction

The efficiency of the system of justice is the fundamental precondition for the reinforcement of legal order and provision of legal security. The efficiency of justice is manifested in independent, impartial, fair and timely judicial procedure.[1]

No matter how expedient is justice,[2] no matter how fair and legitimate is a court decision, the purposes and goals of justice remain unattained if the decision is not enforced.[3]

The European Court of Human Justice stresses the importance of execution of a decision entered into force in many of its judgments and explains, that "The right to a court is not merely a theoretical right to secure recognition of an entitlement by means of a final decision but also includes the legitimate expectation that the decision will be executed."[4]

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1 *Schmitt S., Richter H.,* The Procedure of Making a Decision by a Judge in Civil Law, German Society for International Cooperation (GIZ), 2013, 3 (in Georgian).

2 *Sierra S.,* Provisional Court Protection in Administrative Disputes in Europe: The Constitutional Status of Interim Measures Deriving from the Right of Effective Court Protection, A Comparative Approach, European Law Journal, Vol. 10, No 1, January 2004, 42-60.

3 *Beck'sche Kurz-Kommentare* Zivilprozessordnung mit Gerichtsverfassungsgesetz und anderen Neben-gesetzen. Begründet von Dr. Adolf Baumbach, Professor Dr. Wolfgang Lauterbach, Dr. Jan Albers, Dr. Dr. Peter Hartmann, 75.Aufl, 2016. Vorb. §704, 2046.

4 See *Apostol v. Georgia*, application №40765/02; *Burdov v. Russia,* no. 59498/00, §34, ECHR 2002-III; *Hornsby v. Greece*, judgment of 19 March 1997, Reports of Judgments and Decisions 1997-II, p. 510, §40 Hornsby; *Mutishev and Others v. Bulgaria*, 18967/03, §129, 3 December 2009; *Antonetto v. Italy*, no. 15918/89, §28, 20 July 2000).

Thus, the purpose of the institute of provisional remedy[5] is the prevention of any potential obstruction to the specific enforcement of a decision through restriction of the right of a defendant to dispose of his property or application of the other statutory provisional remedies[6]. When applying a provisional remedy, the court protects the property of the parties and their statutory interests[7]. The right to fair trial already implies the obligation of the state to develop such a regulation, which ensures the efficient enforcement of a court decision. According to theinterpretation of the Constitutional Court of Georgia "The right to a court..., guaranteed by Part 1 of Article 42 of the Constitution of Georgia, should not be an illusory one, but rather provide for actual opportunity of due re-establishment of the rights of a person and constitute the efficient instrument for the protection of rights."[8] Provisional remedies constitute one of the procedural guarantees of efficient enjoyment of the right to fair trial and, respectively, fall within the scope, protected by Part 1 of Article 42 of the Constitution of Georgia.[9]

This research is focused not on the institute of provisional remedy in general, but rather on cross-undertaking as to damages resulting from the application of a provisional remedy, what is envisaged by Article 199 of the Code of Civil Procedure of Georgia (hereinafter the "CCPG"). Scholarly examination of this question is not only of theoretical, but also of major practical importance. The problem is analysed on the basis of both comparative law method and generalisation of judicial practice of common courts and the Constitutional Court of Georgia.

2. About Provisional Remedies in General

As per Article 2 of the CCPG every person is guaranteed to judicially protect their rights. The essence of the institute of provisional remedy is to create the legal guarantees[10] for specific enforcement of the rights and legal interests of a claimant, guaranteed by substantive law[11]. The question of application of a provisional remedy arises when it becomes necessary to ensure the efficiency of law[12].

Upon deciding on the application of a provisional remedy and restriction of the rights of one of the parties, even within statutory limits[13], the court should base itself on a reasonable assumption[14] that non-

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5 *Kramer X.,* Harmonization of Provisional and Protective Measures in Europe, pg. 1, Publishes in: M. Storme (ed.). Procedural Laws in Europe. Towards Harmonization, Maklu: Antwerpen/Apeldoorn 2003. ISBN:90-6215-881-1, 305-319.

6 *Liluashvili T.,* Civil Procedure Law, 2nd ed., Tbilisi, 2005, 299 (in Georgian).

7 *Sierra S.,* Provisional Court Protection in Administrative Disputes in Europe: The Constitutional Status of Interim Measures Deriving from the Right of Effective Court Protection. A Comparative Approach. European Law Journal. Vol. 10, No 1, January 2004, 42-60.

8 Decision of the Constitutional Court of Georgia №3/2/577, dated 24 December 2014, II-30.

9 Decision of the Constitutional Court of Georgia N2/6/746, dated 1 December 2017.

10 *Kazhashvili G.,* Role of the Perpetuation of Evidence and Claim Security in Litigation, TSU Faculty of Law, Journal of Law, №1, 2016, 76 (in Georgian).

11 *Kurdadze Sh.,* Trial of Civil Cases at the Courts of First Instance, Tbilisi, 2006, 520 (in Georgian).

12 *Sierra S.,* Provisional Court Protection in Administrative Disputes in Europe: The Constitutional Status of Interim Measures Deriving from the Right of Effective Court Protection. A Comparative Approach, European Law Journal, Vol. 10, No 1, January 2004, 42-60.

13 Practical Recommendations of the Supreme Court of Georgia for Judges of Common Courts on Points of Civil Procedure Law, Tbilisi, 2010, 157 (in Georgian).

application of the procedural measure concerned will make it objectively impossible to enforce the legal consequence of litigation - a court decision or will considerably complicate the process[15]. According to the judgments of the Constitutional Court, despite major importance of the right to fair trial, the latter is not an absolute right and "can be restricted under certain conditions, what will be justified in a democratic society by legitimate public interest"[16]. "Regulation, restricting a right, should constitute an instrument, useful and necessary for the attainment of worthy public (legitimate) goal. At the same time, the intensity of restriction of a right should be proportional, commensurate to public goal, that is to be attained. It is inadmissible for the legitimate goal to be attained at the expense of unnecessary restriction of a human right."[17]

The existence of provisional remedies in Germany as well is associated with the establishment of constitutional court practice, specifically, the interpretation of the right to efficient trial[18]. "The court only verifies how the application of a provisional remedy (freezing order) will promote the protection of future, presumable for the claimant decision against potential obstacles during the enforcement thereof"[19].

"An application for a provisional remedy requires due justification with material factual circumstances, which will convince the court of the necessity of application of a provisional remedy"[20], but before the realisation of this right the requirements, prescribed by procedure law, should be fulfilled.[21]

The content of the filed action should provide for high probability of assumption that the statement of claim has perspective and in the case of fulfilment of factual preconditions contained therein[22], interesting for the claimant legal consequence will occur, that is - the claim should legally justify the action[23].

The law does not always allow for a judge to make a decision, which will protect the interests of both parties: the claimant and the defendant [proportionality principle][24], the provisional remedy, applied to secure the claim of the claimant should be proportional (adequate) to this claim (subject matter of the

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14 Ruling of the Chamber of Civil Cases of the Supreme Court of Georgia in Case №AS-1165-1095-2015, dated 25 November, 2015 (in Georgian).

15 Ruling of the Chamber of Civil Cases of the Supreme Court of Georgia in Case №AS-956-921-2016, dated 2 November, 2016 (in Georgian).

16 Decision of the Constitutional Court of Georgia in Case №1/2/466, dated 28 June, 2010 (in Georgian).

17 Decision of the Constitutional Court of Georgia in Case №3/1/512, dated 26 June, 2012 (in Georgian).

18 *Sierra S.,* Provisional Court Protection in Administrative Disputes in Europe: The Constitutional Status of Interim Measures Deriving from the Right of Effective Court Protection. A Comparative Approach. European Law Journal. Vol. 10, No 1, January 2004, 42-60.

19 *Beck'sche Kurz-Kommentare Band1,* Zivilprozessordnung mit Gerichtsverfassungsgesetz und anderen Nebengesetzen. Begründet von Dr. Adolf Baumbach, Professor Dr. Wolfgang Lauterbach, Dr. Jan Albers, Dr. Dr. Peter Hartmann. Verlag C.H. Beck, München 2003, 2375.

20 Ruling of the Chamber of Civil Cases of the Supreme Court of Georgia in Case №AS-1135-1082-2013, dated 6 October, 2014 (in Georgian).

21 *Bolling H., Chanturia L.,* The Method of Taking Decisions in Civil Cases, Tbilisi, 2004, 37 (in Georgian).

22 Ruling of the Chamber of Civil Cases of the Supreme Court of Georgia in Case №AS-859-825-2016, dated 28 November, 2016 (in Georgian).

23 Recommendations on Problematic Issues of Civil Law Judicial Practice, Tbilisi, 2007,41 (in Georgian).

24 Proportionality principle means that the measure, applied for the attainment of the purpose of law, should be admissible, necessary and proportionate.

action) and there should be no apparent incompatibility. "Restriction of property right[25] as a provisional remedy should be justified on the basis of proportionality principle - though mutual comparison of the public goal of the institute of provisional remedy and private interests associated with property right"[26].

Although the institute of provisional remedy aims at creating favourable conditions for specific exercise of substantive right of a claimant[27], the interests of a defendant[28] should as well be protected because of party equality principle[29].

"When applying a provisional remedy the fair balance should be stricken between the right of a claimant (ensure the exercise of judicially certified future right) and the interest of a defendant (provisional remedy should not unjustifiably violate his rights as a defendant). In the event of temporary restriction of a right, it is important to strike a reasonable balance between protected wealth and restricted right"[30].

3. Guarantee for the Protection of Defendant's Interests

The application of a provisional remedy, moreover, when this measure restricts the right of a defendant to dispose of his property or monetary resources (freezing order), may inflict certain damage on the defendant[31]. Cross-undertaking as to damages incurred as a result of provisional remedy[32] serves the interests of a defendant and constitutes the guarantee, that damage inflicted due to the restriction of defendant's right will be compensated,[33] provided that provisional remedy proved to be unreasonable. "Based on the essential principle of party equality, the institute of guaranteeing the enforcement of a decision should be evaluated from the position of both a claimant and a defendant."[34]

As per Part 1 of Article 199 of the CCPG, "If the court assumes that the defendant may suffer damage as a result of application of a provisional remedy, the court may apply a provisional remedy and, at the same time, request the person who applied to the court for a provisional remedy, to guarantee the compensation of potential damages to the other party.[35] The court may also apply the security guarantee[36] on the

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25 *Zoidze B.,* Georgian Property Law, 2nd ed., Tbilisi, 2003, 26 (in Georgian).

26 Ruling of the Chamber of Civil Cases of the Supreme Court of Georgia in Case №AS-1165-1095-2015, dated 25 November, 2015 (in Georgian).

27 *Kurdadze Sh., Khunashvili N.,* Civil Procedure Law of Georgia, 2nd ed., Tbilisi, 2015, 382 (in Georgian).

28 *Liluashvili T.,* Civil Procedure Law, 2nd ed., Tbilisi, 2005, 303 (in Georgian).

29 <http://ec.europa.eu/civiljustice/interim_measures/interim_measures_ger_en.htm>.

30 Ruling of the Chamber of Civil Cases of the Supreme Court of Georgia in Case №AS-114-107-2015, dated 6 February, 2015 (in Georgian).

31 *Liluashvili T., Khrustal V.,* Commentary to the Code of Civil Procedure of Georgia, 2nd ed., Tbilisi, 2007, 355 (in Georgian).

32 *Liluashvili T.,* Civil Procedure Law, 2nd ed., Tbilisi, 2005, 304 (in Georgian).

33 *Bolling H., Chanturia L.,* The Method of Making Decisions in Civil Cases, Tbilisi, 2004, 142 (in Georgian).

34 Ruling of the Chamber of Civil Cases of the Supreme Court of Georgia Case №AS-859-825-2016, dated 28 November, 2016.

35 *Liluashvili T., Khrustal V.,* Commentary to the Code of Civil Procedure of Georgia, 2nd edition, Tbilisi, 2007, 354 (in Georgian).

basis of an application of the opposite party."[37] Hence, it is prescribed by civil procedure law that if a claimant requests a provisional remedy, the defendant may claim not the compensation of potential damage, he may suffer as a result of application of a provisional remedy, but rather the compensation guarantee.

Article 199 of the CCPG provides for two, interconnected legal mechanisms of protection of defendant's interests: a) compensation of damage by the claimant, which damage was inflicted to the defendant through a provisional remedy. The right to claim the foregoing is enjoyed by the defendant in the case of existence of factual circumstances like non-satisfaction of an action by the court of law (or, in the case of a provisional remedy for a yet-unfiled action, non-filing an action with the court of law within timelines, set by the court of law, because of what the provisional remedy was revoked) and inflicting damage to the defendant by a provisional remedy (the burden of proof of the existence and amount of which is vested with the defendant). (Similar provision is also contained in Paragraph 945 of German Procedure Law)[38].

b) Cross-undertaking as to damages, meaning that if a claimant requests a provisional remedy, the defendant may claim not the compensation of potential damage, but rather - compensation guarantee. This situation can be called counter security, which should be effected in accordance with the procedure, prescribed by Article 57 of the CCPG[39]. "When there is a necessity to apply a provisional remedy, but at the same time, it is probable, that a defendant may suffer damage, the procedure law provides for cross-undertaking as to damages in the case of application of a provisional remedy".[40]

"A provisional remedy, on the one part, is the guarantee for the protection of the rights of a claimant, and on the other - the instrument to restrict the right of a defendant. The protection of the interests of the claimant through the application of the above remedy may incur property damage to the defendant, consequently, in certain cases the necessity of creation of a mechanism for the protection of defendant's interests may arise. The application of a remedy ensuring the compensation of potential damage is a mechanism, that reasonably balances the interests concerned and serves the purposes of protection of defendant's rights".[41]

The institute of provisional remedy guarantees the protection of the interests of a claimant and compensation of damages incurred through the application of provisional remedies - protection of the interests of a defendant.[42]

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[36] *Kazhashvili G.,* Role of the Perpetuation of Evidence and Claim Security in Litigation, TSU Faculty of Law, Journal of Law, №1, 2016, 84 (in Georgian).

[37] Ruling of the Chamber of Civil Cases of the Supreme Court of Georgia in Case №AS-114-107-2015, dated 6 February, 2015 (in Georgian).

[38] *Kramer X.*, Provisional and Protective Measures: Article 24 Brussels Convention (Article 31 Brussels Regulation) 5, The Application in The Netherlands, Germany and England, Paper presented at conference on the Application of the European Private International Law Conventions in a National Context at the T.M.C. Asser Institute, The Hague, The Netherlands, May 18-20, 2000.

[39] *Liluashvili T.,* Civil Procedure Law, 2nd ed., Tbilisi, 2005, 304 (in Georgian).

[40] Ruling of the Chamber of Civil Cases of the Supreme Court of Georgia in Case №AS-499-475-2013, dated 1 July 2013 (in Georgian).

[41] Decision of the Constitutional Court of Georgia in Case N2/6/746, dated 1 December, 2017 (in Georgian).

[42] *Liluashvili T.,* Civil Procedure Law, 2nd ed., Tbilisi, 2005, 393 (in Georgian).

"Although Article 1999 of the Code of Civil Procedure provides for compensation of the damage incurred as a result of application of a provisional remedy, the court of law is required to assure itself of the reality of occurrence of such a damage. In the case concerned, the party limited itself only to mentioning, that laying freezing orders on bank accounts would have restricted LLC's access not only to disputed amount, but to all its bank accounts as well, to what the Court of Cassation cannot agree. The appealed ruling laid a freezing order on defendant's accounts only within the scope of disputed amount and consequently, it will not be obstructed in disposing of the other funds."[43]

"Foreseen cross-security is a remedy for the protection of defendant's interests, which ensures the compensation of damage, incurred through unjustified provisional measure. The court is entitled to apply a provisional remedy either on its own initiative or on the basis of an application of the opponent party. However, in either case its application is associated with the risk of occurrence of potential damage. A claim against a claimant on provision of a guarantee should be based on applicant's referral to specific circumstances and adequate justification of the necessity of provision of the guarantee."[44] The obligation to describe circumstances, which confirm the presumption of necessity to present the adequate guarantee, is vested with the applicant, what in the case concerned was not proved by the party in the case concerned commensurate with the requirements of Part 1 of Article 102 of the Code of Civil Procedure.[45] "At this stage, the complainant failed to prove the necessity of application of a security guarantee. Consequently, there do not exist the factual and legal grounds for the satisfaction of the complaint."[46]

For the enforcement of decisions, made in the name of Georgia, judiciary is supposed to apply all the available procedural and legal remedies with due consideration of the specificity of the disputed and parties thereto, on a case-by-case basis. The Court of Cassation stated, that "The Court of Appeals was correct when it charged the claimant with cross-undertaking as to damages resulting from the application of a provisional remedy and even set a period for the claimant to debit the amount on the deposit account of the courts, and after the inconclusive expiry of this period, the court has revoked provisional remedy, applied on the basis of the ruling of the court of lower instance as the claimant failed to guarantee the compensation of potential damage to the defendant (Part 2 of Article 199 of the CCPG).[47]

"The stipulation of Part 1 of Article 199 of the CCPG constitutes the protection of defendant's interests and aims at guaranteeing the interests of the defendant in the case of unreasonability of a

[43] Ruling of the Chamber of Civil Cases of the Supreme Court of Georgia in Case №AS-734-696-2013, dated 30 September, 2013 (in Georgian).

[44] Ruling of the Chamber of Civil Cases of the Supreme Court of Georgia in Case №AS-859-825-2016, dated 28 November, 2016 (in Georgian).

[45] Ruling of the Chamber of Civil Cases of the Supreme Court of Georgia in Case №AS-1290-1228-2014, dated 23 January, 2015 (in Georgian).

[46] Ruling of the Chamber of Civil Cases of the Tbilisi Court of Appeals on Case №2ბ/1319-14, dated 24 April, 2014 (in Georgian).

[47] Ruling of the Chamber of Civil Cases of the Supreme Court of Georgia in Case №759-718-2015, dated 28 July, 2015 (in Georgian).

provisional remedy, for the latter not to suffer unjustified damage. Under Part 1 of Article 199 of the CCPG a defendant is required to duly substantiate the compensation of potential damage."[48]

The Court of Cassation upheld the opinion of the complainant, that "Applied restriction is so material, that impairs the interests of the entrepreneur and may even result in the insolvency of the company. The referral of the lower instance court to Article 199 of the Code of Civil Procedure cannot be regarded as proportional to such intervention, also the purpose of Article 191 is the protection of the interests of justice and applied provisional remedy restricted the right of the person who was not liable under the statement of claim."[49]

"A defendant, who claims cross-undertaking as to damages, is required to justify the necessity of application of a security guarantee. Furthermore, the justification should be sound; reasonable presumption implies making a decision not only on the basis of a doubt, or formal analysis, but also based on evidences and logical opinion on the soundness of the claim."[50]

It should be mentioned, that similar approaches are well-established by law and judicial practice of foreign countries.[51]

4. Application of Security Guarantee for the Protection of Defendant's Interests under the Initiative of the Court of Law

It is problematic for the court to demand security guarantee from the claimant as a cross-undertaking as to damages, that may be incurred to the defendant because of a provisional remedy, on its own initiative - i.e. when a defendant does not personally demands cross-undertaking as to damages incurred as a result of application of a provisional remedy, on the basis of Part 1 of Article 199 of the CCPG. Does such commitment of the court of law contradict the adversarial principle?

The law of a rule-of-law state is based on democratic principles, inspired by high legal culture. The principles of law stem from the Constitution of the country and are manifested in all the fields of law.[52]

The adversarial principle, along with party equality principle is guaranteed by the Constitution of Georgia, what provided for state law, i.e. constitutional importance of this law. As per Part 3 of Article 85 of the Constitution of Georgia "Legal proceedings are conducted on the basis of party equality and

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48 Ruling of the Chamber of Civil Cases of the Supreme Court of Georgia in Case №AS-832-884-2011, dated 13 June, 2011 (in Georgian).

49 Ruling of the Chamber of Civil Cases of the Supreme Court of Georgia in Case №AS-1215-1140-2015, dated 2 February, 2016 (in Georgian).

50 Ruling of the Chamber of Civil Cases of the Supreme Court of Georgia in Case №AS-929-879-2015, dated 6 November, 2015 (in Georgian).

51 See <www.Justice.gov.uk/courts/procedure-rules/civil/rules/part25/pd_part25q#5.1>; *Energy Venture Partners Ltd v Malabu Oil and Gas Ltd* (2014) EWCA Civ 1295 (09 October 2014); <https:///www.gesetze-im-internet.de/zpo/>, Section 537, 709, 945.

52 *Kopaleishvili M., Skhirtladze N., Kardava E., Turava P.,* Guidebook for Administrative Procedure Law, Tbilisi, 2010, 19 (in Georgian).

adversarial principles." "The adversarial principle is based on equal potential of the parties to be equipped with relevant procedural instruments…"[53]

One of the manifestation of this principle is to take equal account of the interests of two opponent parties during various procedural actions.[54] "In civil proceedings it is the legal burden of each party to describe and prove the facts, with the help which the parties are going to prove their statements of claim or dismiss the factual circumstances named for the justification of the statements of claim."[55]

In parallels with the adversarial principle the court of law has the authority to manage the proceedings. However, the problem of proportionality of two principles - party adversarial principle and activeness of the court of law - arises.[56] Hence, these two principles should be applied in such a manner in every specific case,[57] as not to jeopardise the correct administration of justice[58].[59] "Judicial protection is efficient when it meets the requirements of expedient/timely, fair and efficient justice. Based on the fundamental right to fair trial, a court decision is to be made within a reasonable period, without unjustified delay, as unjustified delay of administration of justice undermines public confidence in it."[60]

Under Part 2 of Article 4 of the CCPG the court of law is entitled to apply remedies envisaged by the Code of Civil Procedure on its own initiative for the establishment of the facts of the case. However the court is entitled to act on its own initiative only within the scope, prescribed by the Code of Civil Procedure.[61]

The adversarial principle should not be understood as extreme passiveness of the court.[62] The dispute should be resolved in favour of reasonable balance between the adversarial and inquisitorial principles. In one of the cases the Cassation Chamber has not upheld the opinion of the complainant and explained, that "Although Article 199 of the CCPG provides for the option of the court to apply a security guarantee, the necessity of application of a security guarantee is not proved in the case concerned."[63]

"The stipulation of Article 199 of the CCPG establishes a certain legal balance between the protection of the interests of the claimant on the one part and restricted right of the defendant on the

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[53] Decision of the Constitutional Court of Georgia in Case №3/2/577, dated 24 December, 2014.

[54] *Liluashvili T., Khrustal V.,* Commentary to the Code of Civil Procedure of Georgia, 2nd edition, Tbilisi, 2007, 106 (in Georgian).

[55] Ruling of the Chamber of Civil Cases of the Supreme Court of Georgia in Case №AS-1673-1569-2012, dated 9 October 2013.

[56] *Münchener Kommentar zur Zivilprozessordnung mit Gerichtsverfassungsgesetz und Nebengesetzen Band* 3, §§ 803-1066 EGZPO, GVG, EGGVG , Internationales Zivilprozessrecht, Herausgegeben von Dr. Dr. h.c. Gerhard Lüke, Peter Wax Verlag C.H. Beck München 2001,717.

[57] *Lüke,* Zivilprozessrecht, 10., neubearbeitete Aufl,. München, 2011,5.

[58] *Rosenberg, Schwab, Gottvald*, Zivilprocessrecht, 17. Neubearbeitete Aufl., München, 2010,396.

[59] *Andrews N.,* Fundamental Principles of Civil Procedure: Order Out of Chaos, Oxford University Press, 2006, 20.

[60] Decision of the Constitutional Court of Georgia in Case №1/8/594, dated 30 September, 2016 (in Georgian).

[61] *Khoperia N.,* Correlation between the Adversarial and Party Disposition Principles in Civil Procedure Law, Tbilisi, 1998,12 (in Georgian).

[62] *Gagua I.,* Burden of Proof in Civil Procedure Law, Tbilisi, 2013, 159 (in Georgian).

[63] Ruling of the Chamber of Civil Cases of the Supreme Court of Georgia in Case №AS-1561-1561-2011, dated 26 December, 2011 (in Georgian).

other."[64] "Waiver of cross-undertaking as to damages resulting from the application of a provisional remedy does not itself deprive the defendant of the right to exercise his breached right in accordance with general rule in the case of occurrence of damage.[65] The Cassation Chamber has not upheld the opinion of the complainant, that "Application of a security guarantee depends on the presumption of probability of non-satisfaction of the action."[66]

"The Court of Cassation reiterates, that based on established judicial practice, laying freezing orders on bank accounts of an economic unit to full extent, makes it highly probable, that its economic activities will be paralyzed. Consequently, within the framework of judicial control, with due consideration of inherent to security measure equal risks for the parties, the courts which decide on the application of a provisional remedy, should consider the application of a leverage, balancing the compensation of potential damage to the other party."[67] "Complainant's opinion, that the preconditions for application of Part 1 of Article 199 of the CCPG were not justified, specifically, what damage and to what extent would have been incurred to the LLC through laying freezing orders on the assets thereof, is not legally justified and consequently, cannot be upheld."[68]

"Part 2 of Article 199 provides, that in cases, envisaged by Part 1 of this Article a person, who applied to the court for a provisional remedy, is required to secure the compensation of potential damages to the defendant within a period of 7 days. The disputed provision provides for blanket 7-days period for the compensation of potential damage. The Code of Civil Procedure does not allow for the extension of the period, set by law, consequently, if a claimant, for objective reasons, fails to secure potential damage within a period of 7 days, the provisional remedy will be revoked. Setting a timeline in a manner as not to allow for its extension or restitution aims at the protection of defendant's interests - to insure damage, resulting from the application of a provisional remedy; however, the protection of this interest should not make illusory the right of the claimant to secure the action and to guarantee the restitution of its right in the future in this way. Blanket restriction of a right, what does not provide for taking account of individual situation of the person concerned, does not minimize the binding effect, stemming from the provision" (see: Decision of the Constitutional Court of Georgia on Case №2/4/532,533, dated 8 October, 2014).

Based on disputed provision, the judge is not able to expand or shorten the timeline, imperatively prescribed by law, through adequate assessment of factual circumstances, based on individual features of the case. Consequently, in certain cases the disputed provision excludes the possibility of determining a reasonable period for cross-undertaking as to damages, what deprives a claimant of the possibility to

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64 Ruling of the Chamber of Civil Cases of the Supreme Court of Georgia in Case №AS-956-921-2016, dated 2 November, 2016 (in Georgian).

65 Ruling of the Chamber of Civil Cases of the Supreme Court of Georgia in Case №AS-1338-1263-2012, dated 15 October, 2012(in Georgian).

66 Ruling of the Chamber of Civil Cases of the Supreme Court of Georgia in Case №AS-499-475-2013, dated 1 July, 2013 (in Georgian).

67 Ruling of the Chamber of Civil Cases of the Supreme Court of Georgia in Case №AS-956-921-2016, dated 2 November, 2016 (in Georgian).

68 Ruling of the Chamber of Civil Cases of the Supreme Court of Georgia in Case №AS-759-718-2015, dated 28 July, 2015 (in Georgian).

fully apply a provisional remedy to full extent. The Constitutional Court considers that 7-days period, prescribed by the first sentence of Part 2 of Article 199 of the Code of Civil Procedure for cross-undertaking as to damages does not meet the requirements of proportionality principle and restricts the rights of a person with higher intensity than necessary when the legitimate purpose concerned can be attained through less intensive restriction of the rights of the person. Hence the constitutional claim №746 should be met in the part of the statement of claim which concerns the constitutionality of the first sentence of Part 2 of Article 199 of the Code of Civil Procedure in the light of Paragraph 1 of Article 42 of the Constitution of Georgia. Protection of a defendant against a jeopardy stemming from a provisional remedy within civil proceedings is the important legitimate purpose. Although the disputed provision contradicts the right to fair trial, guaranteed by Paragraph 1 of Article 42 of the Constitution of Georgia, its immediate invalidation will leave the issue unregulated and, at the same time, the court will not be able to define the timeline for cross-undertaking as to damages resulting from a provisional remedy. Leaving the issue without legal regulation may result in breach of material private and public interests. Consequently, the Constitutional Court considers it reasonable to defer the invalidation of disputed provision until 31 March 2018 on the basis of Paragraph 3 of Article 25 of the Organic Law of Georgia on the Constitutional Court of Georgia for the Parliament of Georgia to be given a reasonable opportunity to regulate the issue according to standards, specified by the Decision of the Constitutional Court of Georgia and strike a reasonable balance between the interests of the parties to legal proceedings."[69]

According to amendments in Art. 199 (2) of Civil Procedure Code of Georgia (dated 04.04.2018) securance of potencial damage to the defendant is possible within the period determined by the court, which should not exceed 30 days.

The account should as well be taken of the fact, that a security guarantee does not mean the automatic compensation of damage incurred through a provisional remedy, but rather only the provision for compensation of damage.[70] A claimant[71] is supposed to file[72] an action[73] with the court for cross-undertaking as to damages[74] and prove both the occurrence of such damage and its amount as well.[75]

Demanding cross-undertaking as to damages resulting from the application of a provisional remedy by the court on its own initiative does not contradict the adversarial principle in the light of stipulations of Articles 4 II and 199 I of the CCPG.

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[69] Decision of the Constitutional Court of Georgia in Case N2/6/746, dated 1 December, 2017.

[70] *Liluashvili T.,* Civil Procedure Law, 2nd ed., Tbilisi, 2005, 305 (in Georgian).

[71] *Prütting, Gehrlein,* ZPO Kommentar, 8.Aufl,. luchterhand Verlag, 2016, $945, 2378.

[72] *Kemper* in *Saenger* (Hrsg) HK ZPO, 7.Aufl., Nomos Verlag, 2017,$945, 2246.

[73] *Kurdadze Sh., Khunashvili N.,* Civil Procedure Law of Georgia, 2nd edition, Tbilisi, 2015, 395 (in Georgian).

[74] *Seiler* in *Thomas/Putzo,* Zivilprozessordnung Kommentar, 37.Aufl., C.H.Beck, München, 2016, $945, 1335.

[75] *Liluashvili T., Khrustal V.,* Commentary to the Code of Civil Procedure of Georgia, 2nd ed., Tbilisi, 2007, 335 (in Georgian).

5. Appealing a Court Ruling on Security Guarantee

Problematic is also the question of appealing a court ruling on application or refusal to apply cross-undertaking as to damages. "The Cassation Chamber reiterates, that the Court of Appeals has not evaluated: a) the soundness of the applicant's arguments in the light of Article 199 of the CCPG; b) whether or not the amount of security guarantee claimed by the applicant is based on the calculations offered in the opinion of Accountants & Business Advisers, annexed to the application. Based on the foregoing the Cassation Chamber considered that the parts of the Rulings of the Chamber of Civil Cases of the Tbilisi Court of Appeals of 16 January, 2017 and 30 March 2017 should be revoked which found inadmissible the motion/action of the JSC "T" on cross-undertaking as to damages resulting from warehousing property due to prohibition of their sale and the case was returned to the same court for re-trial thereof with a view to examination of the soundness of the applicant's claim."[76]

In the other case the Cassation Chamber explained, that "Cross-undertaking as to damages resulting from the application of a provisional remedy is subject to special regulation and it is inadmissible to apply the provisions of Article 261 of the Code of Civil Procedure for the regulation of this issue. In its turn, also worth mentioning is the fact, that none of procedural rules (Articles of the 191-199[1] of the CCPG) provide for the possibility of appealing a ruling denying cross-undertaking as to damages through private prosecution."[77] The problem is resolved in the same manner when court partially meets the claim for cross-undertaking as to damages resulting from the application of a provisional remedy.

"Regulation of issues related to appealing of a ruling on cross-undertaking as to damages does not fall within the scope of Part 2 of Article 199 of the Code of Civil Procedure. Hence disputed provision is not of such content that would have granted or restricted the right of a claimant to appeal a decision on application of a provisional remedy. Furthermore, the disputes provision does not constitute the institute of ruling on securing potential damage or/and a rule, providing for the procedure of its application either."[78]

6. Conclusion

The institute of provisional remedy ensures the protection of the interests of a claimant, whilst the compensation of damages incurred through the application of a provisional remedy - protection of the interests of a defendant.

Application of a provisional remedy may incur certain damage on the defendant. Cross-undertaking as to damages resulting from the application of a provisional remedy serves the interests of the defendant and constitutes the guarantee, that if provisional remedy turns to be unjustified, the damage incurred through the restriction of defendant's right will be compensated.

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[76] Ruling of the Chamber of Civil Cases of the Supreme Court of Georgia in Case №AS-430-402-2017, dated 19 May, 2017.

[77] Ruling of the Chamber of Civil Cases of the Supreme Court of Georgia in Case №AS-929-879-2015, dated 6 November, 2015.

[78] Decision of the Constitutional Court of Georgia in Case N2/6/746, dated 1 December, 2017.

In the case of cross-undertaking as to damages resulting from the application of a provisional remedy by the court on its own initiative, the problem should be settled in favour of reasonable balance between adversarial and inquisitorial principles. The adversarial principle should not be understood as an extreme submissiveness of the court.

Waiver of cross-undertaking as to damages does not itself deprive the defendant of the right to exercise his breached right in accordance with general rule in the case of occurrence of damage (Article 199 III CCPG).

A security guarantee does not mean the automatic compensation of damage to a defendant incurred through a provisional remedy, but rather only the provision for compensation of damage. A claimant is supposed to file an action with the court on the compensation of incurred damage and prove both the occurrence of such damage and also its amount. However, there is no common understanding whether which provision should serve as the basis of a claim in this case: Article 199 of the CCPG of Article 992 of the CCG.

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18. Ruling of the Chamber of Civil Cases of the Supreme Court of Georgia on Case №AS-929-879-2015, dated 6 November, 2015 (in Georgian).
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Nino Kilasonia*

Judicial Control of Discretionary Power Used in Administrative Rulemaking Analyses of the US and Georgia Case Law [1]

1. Introduction

Judicial review is one of the essential tools to ensure government accountability. It may have the function of a "fire alarm"-catching cases that the legislative branch of government is unwilling to control.[2]

Especially interesting is the extent of judicial review in cases where the administrative bodies use discretionary power to make administrative rules. Part of the scholars think that administrative systems, that utilize discretionary power, grant the decision-making competence to the agency and not to the court. Thus, according to the view of these scholars, the role of the court in evaluating discretionary power has to be restricted.[3]

This article analyzes standards of judicial scrutiny used by the Georgian and the US Supreme Courts to ensure effective control of discretionary power utilized in administrative rulemaking. The first chapter discusses the US Supreme Court's interpretation of the Administrative Procedure Act's (further APA) "arbitrary and capricious" standard of review. Then it explores importance of hard look and deference doctrines. The second chapter studies the Georgian Supreme Court's approach toward judicial control of discretionary power used in administrative rulemaking. The conclusion summarizes findings of the research.

2. Judicial Control of Discretionary Power Used in Administrative Rulemaking in the US

Generally, as rulemaking, is a "quasi-legislative function," it is subject to softer judicial scrutiny. However, the fact that Congress can apply "specific statutory review,"[4] sometimes puts greater responsibility on the judiciary.[5] The APA "arbitrary and capricious" standard for judicial review applies to informal rulemaking,[6] while

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2 *Reiss D.R.,* Tailored Participation: Modernizing the APA Rulemaking Procedures, NYU Journal of Legislation and Public Policy, 12, 2008-2009, 366.

3 *Koch C.H. Jr.,* Judicial Review of Administrative Discretion, The George Washington Law Review, Vol. 54, No. 4, 1986, 470.

4 Congress sometimes specifies that "substantial evidence" test has to be used for review of the notice and comment rulemaking. However, scholars indicate that "arbitrary and capricious" as well as "substantial evidence" standards are similar and they "have tended to converge in judicial review of informal rulemaking, *Burrows V.K., Garvey T.,* A Brief Overview of Rulemaking and Judicial Review, Congressional Research Service, January 4, 2011, 10, <http://www.wise-intern.org/orientation/documents/crsrulemakingcb.pdf.>.

5 *Note,* the Judicial Role in Defining Procedural Requirements for Agency Rulemaking, Harvard Law Review, Vol. 87, 1974, 801.

6 According to section 553 of the APA informal rulemaking takes place when agency issues a general notice with the substance of the proposed rule in the Federal Register; gives public opportunity to submit written comments and consequently promulgates the final rule with a "concise general statement of basis and

the "substantial evidence" test, which is a somewhat stricter standard, is used to "review formal,[7] record-producing agency actions."[8]

In this chapter the "arbitrary and capricious" test, hard look review and deference doctrine is discussed based on the analysis of the case law of the US Supreme Court.

2.1. "Arbitrary and Capricious" Test

The US courts utilize "arbitrary and capricious'' test to review administrative rulemaking. While using "arbitrary and capricious" standard of review the courts mostly concentrate on procedural violation during the rulemaking. They defer the formulation of the substance of the rule to the agency and did not intrude in policymaking choices of the agency. The landmark[9] decision establishing "arbitrary and capricious standard" of judicial review for informal rulemaking in the US is the case of *Vermont Yankee Nuclear Power Corp. v. Natural Resource Defense Council Inc.*[10] In deciding the dispute, the D.C. Circuit based its decision on the procedural violation and did not pay much attention to the substance of the rule.[11] The Supreme Court articulated that section 553 of the APA gives "the minimum requirements" for informal rulemaking. According to this section, courts are not allowed to supplement informal rulemaking[12] unless Congress decides otherwise.[13] Furthermore, the Court underlined that "agencies are free to grant additional procedural rights in the exercise of their discretion, but the revie-

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purpose." No public hearing, cross-examination or other formal procedure is required in informal rulemaking, *Strauss P.L.,* The Rulemaking Continuum, Duke Law Journal, Vol. 41, 1992, 1466.

7 Formal rulemaking is entailing procedures by which rules are made on the record after opportunity for an agency hearing, *Ibid,* 1466.

8 *McGrath M.J.,* Convergence of the Substantial Evidence and Arbitrary and Capricious Standards of Review during Informal Rulemaking, George Washington Law Review, 54, 1986, 541, Prof. Lubbers cites *Zaring* who notes that the standard applied by the courts is "reasonableness" test, *Lubbers J.S.,* A Guide To Federal Agency Rulemaking, 5th ed., American Bar Association's Section of Administrative Law, 2012, 429, citing *Zaring D.,* Reasonable Agencies, Virginia Law Review, Vol. 96, 2010, 135.

9 As *Blair Bremberg* mentions: "In 1978, the Supreme Court's landmark decision in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.* constrained to a large degree the role of courts in expanding notice value protections beyond the terms of the APA, *Bremberg B.P.*, Pre-Rulemaking Regulatory Development Activities and Sources as Variables in the Rulemaking Fairness Calculus: Taking a Soft Look at Ex-APA Side of Environmental Policy Rulemakings, Journal of Mineral and Law Policy, Vol. 6, 1990/1991, 11.

10 *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc. 1978.*

11 *Vermont Yankee* underlined that unless enabling statute mandates rulemaking procedures, courts may not impose them, *Taylor K.,* The Substantial Impact Test: Victim of the Fallout from Vermont Yankee?, George Washington Law Review, Vol. 53, 1984, 127, Another review of the decision mentions that *Vermont Yankee* overturned the D.C. Circuit's procedural hard look practice without taking into consideration "quasi-procedural or substantive hard looks, *Keller S.A.,* Depoliticizing Judicial Review of Agency Rulemaking, Washington Law Review, Vol. 84, 2009, 443-444.

12 As Professor Lubbers notes, under *Vermont Yankee* the Supreme Court hindered the elaboration of "judge-made common law of rulemaking procedure," *Lubbers J.S.,* A Guide to Federal Agency Rulemaking, 5th ed., American Bar Association's Section of Administrative Law, 2012, 8.

13 *Duffy J.F.,* Administrative Common Law in Judicial Review, Texas Law Review, Vol.77, 1998, 183.

wing courts are generally not free to impose them."[14]

Thus, in *Vermont Yankee,* the Supreme Court concluded that courts have no power to invent additional procedural requirements for informal rulemaking.[15] Judicial activism to supplement the APA notice-and-comment rulemaking is disfavored. The Supreme Court noticed that courts have to use the "arbitrary and capricious" standard of review,[16] which provides the agency with more freedom in decision-making.

Generally, while considering if a rulemaking is "arbitrary and capricious," courts have to analyze agency's basis for the decision."[17] When courts utilize "arbitrary and capricious" standard, they pay attention to three facets of the test: "1) whether the rulemaking record supports the factual conclusions upon which the rule is based 2) the "rationality" or "reasonableness" of the policy conclusions underlying the rule and 3) the extent to which the agency has adequately articulated the basis for its conclusions."[18]

Leland underlines with regard to "arbitrary and capricious" review that: "a challenge that a final agency action is "arbitrary and capricious" may depend entirely upon the content of the administrative record. If an agency proves that it has examined the relevant data and articulates a "satisfactory explanation for its decision including a rational connection between the facts found and the choice made," courts will not invalidate the agency's decision.[19]

Thus, when the US courts utilize "arbitrary and capricious" standard, they leave choice of the substance of the decision to the agency. This is a deferential approach to agency rulemaking, as the "courts can void an agency action that is procedurally flawed, even if it seems substantially reasonable."[20]

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[14] *Lubbers J.S.,* A Guide to Federal Agency Rulemaking, 5th ed., American Bar Association's Section of Administrative Law, 2012, 8, Moreover, as Professor Pierce adds: "Absent constitutional constraints or compelling circumstances the administrative agencies should be free to fashion their own rules of procedure," *Pierce R.J, Jr.,* Waiting for Vermont Yankee II, Administrative Law Review, Vol. 57, 2005, 671-672.

[15] The Court said that the legislative history of the APA as well as policy considerations militated against such judicial requirement of extra procedural devices," *McFeeley N.D.,* Judicial Review of Informal Administrative Rulemaking*,* Duke Law Journal, 1984, 1984, 354, however Prof. Rubin notes that although, *Vermont Yankee* rejected the "quasi-procedural" hard look doctrine, the requirement that agencies take a hard look at the evidence provided in the notice and comment process… "the substantive hard look doctrine, which announces that courts will take a hard look at the quality of the agency's overall decision making, remains in force," *Rubin E.,* It's time to make the Administrative Act Administrative, Cornell Law Review, Vol. 89, 2003, 140.

[16] *Jordan W.S. III,* Ossification Revised: Does Arbitrary and Capricious Review Significantly Interfere with Agency Ability to Achieve Regulatory Goals Through Informal Rulemaking? Northwestern University Law Review, 2000, 398.

[17] *McGrath M.J.,* Convergence of the Substantial Evidence and Arbitrary and Capricious Standards of Review during Informal Rulemaking, George Washington Law Review, Vol. 54, 1986, 561-562.

[18] *Lubbers J.S.,* A Guide to Federal Agency Rulemaking*,* 5th ed., American Bar Association's Section of Administrative Law, 2012, 425.

[19] *Leland E.B.,* Agency Practices and Judicial Review of Administrative Records in Informal Rulemaking, Report to the Administrative Conference of the United States, 14, 2013, 6, <https://www.acus.gov/sites/default/files/documents/Agency%20Practices%20and%20Judicial%20Review%20of%20Administrative%20Records%20in%20Informal%20Rulemaking.pdf>.

[20] *Jordao E., Ackerman S.R.,* Judicial Review of Executive Policymaking in Advanced Democracies: Beyond Rights Review, Administrative Law Review, Vol. 66, No 1, 2014, 7.

2.2. Hard Look Review Doctrine

Traditionally, the APA's notice–and-comment procedure did not envisage the "development of an evidentiary record." Initially, agencies had to give only general overview of the grounds of the decision. Therefore the judicial control of rulemaking was "necessarily shallow."[21] However, the lower courts did not follow the procedures specified in the APA and "totally transformed the meager requirements for notices of proposed rulemaking contained in § 553 into an elaborate legal procedures."[22]

Throughout the history the "arbitrary and capricious" standard of review took various forms. The *Citizens to Preserve Overton Park Inc v Volpe*[23] was the decision establishing heightened standard of judicial scrutiny.[24] *Overton Park* articulated a new test for review of informal administrative actions (including rulemaking), according to which agencies were required to develop a record of the rulemaking. The Court viewed the record as the essential element for revision of agency's action.[25]

Overton Park, is known as the "seminal case to change the meaning of [the] arbitrary and capricious" standard of judicial review of agency action. Contrary to earlier applications of the "arbitrary and capricious" test, the court in *Overton Park* did not employ a presumption that the agency's decision was supported by the facts; instead, the Court undertook a "searching and careful" inquiry into the factual basis of the decision. The Court in *Overton Park* articulated a new standard of judicial review, requiring it to conduct a "substantial inquiry" . . . exploring "whether the decision was based on a consideration of the relevant factors.[26]

The Court underlined that: "Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency." However, the Court refused to accept "post hoc" rationalizations[27] as a basis for the

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[21] *Stewart R.B.,* Vermont Yankee and the Evolution of Administrative Procedure, Comment Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.: Three Perspectives, Harvard Law Review, 91, 1978, 1812.

[22] *Friendly H.J.,* Some Kind of Hearing, University of Pennsylvania Law Review, Vol. 123, 1975, 1307.

[23] *Citizens to Preserve Overton Park Inc v Volpe,* 401 U.S. 402 (1971).

[24] According to the heightened standard of scrutiny "the agency must allow broad participation in its regulatory process and not disregard the views of any participants. In addition to these procedural requirements courts have on occasion, invoked rigorous substantive standard by remanding decisions that the judges believed the agency failed to justify adequately in light of information in the administrative record," *Asimow M., Levin R. M.,* State and Federal Administrative Law, American Casebook Series, Thomson Reuters, 2009, 592-593, Moreover, Professor *Krotoszynski* notes that usage of record requirement as well as "concise general statement," toward informal rulemaking, is added procedural rules for the "enforcement of the APA itself." He also underlines that: "The APA requires an agency to consider relevant materials and afford interested parties an opportunity to comment on a proposed rule. The APA also requires the reviewing court to ascertain the rationality of the agency's course of conduct, with the burden of proof falling on the agency. Courts mandate new procedures not incident to a generalized procedural review, but incident to substantive "hard look" review of agency action," *Krotoszynski R.J., Jr.,* History Belongs to the Winners: The Bazelon- Leventhal Debate and the Continuing Relevance of the Process/Substance Dichotomy in Judicial Review of Agency Action, Administrative Law Review, 58, 2006, 1013.

[25] *Note,* Judicial Review of the facts in informal Rulemaking, Yale Law Journal, Vol. 84, 1975, 1755.

[26] Ibid, 155. *McFeeley* explains correctly the outcome of the case: the Supreme Court mandated that courts examine the agency record, and that agencies build a record to facilitate such review. In so doing, the Court "revolutionized the concept of judicial review of informal action," *McFeeley N.D.,* Judicial Review of Informal Administrative Rulemaking, Duke Law Journal April, 1984, 351.

[27] Post hoc rationalization means when the representatives of the agency claim their truth directly before the court.

agency decision, ruling that "to perform its review responsibilities, it must have before it "an administrative record that allows the full, prompt review of the agency's action."[28]

Scholars argue that *Overton Park* announced that "substantial evidence" test should be used for informal rulemaking.[29] Moreover, *Overton Park* established "searching and careful"[30]standard which is usually called "hard look" review and has been afterwards widely utilized by the lower courts to control substantive and procedural issues of rulemaking.[31]

As Professor Garry notes, the hard look review was stricter than the tests utilized by the court previously.[32] The test had two facets. First: to give explanation of fact findings in the record and second, to provide not only rational, but reasonable policy choice.[33]

However, the analyses of the US Supreme Court's decisions demonstrate that the hard look doctrine "as a facet of the arbitrary and capricious standard, has made that standard and the substantial evidence standard quite similar" [34] and today while considering if a rulemaking is "arbitrary and capricious," courts have also to analyze agency's basis for the decision and "determine whether the evidence is substantial enough to support the decision." The same rule applies with regard to the substantial evidence standard. When the Court utilizes this standard, it has to "examine the underlying facts to determine whether there is a rational connection between those facts and the ultimate decision." Finally, this means that both standards are "merely tests of rationality."[35]

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[28] *Lubbers J.S.,* A Guide to Federal Agency Rulemaking, 5th ed., American Bar Association's Section of Administrative Law, 2012, 7.

[29] *Note,* Judicial Review of the facts in informal Rulemaking, Yale Law Journal, 84, July, 1975, 1755.

[30] *Schiller R.E.,* Rulemaking's Promise: Administrative Law and Legal Culture in the 1960s and 1970s, Administrative Law Review, Vol. 53, 2001, 1154.

[31] *Garry P.M.,* Judicial Review and the "Hard Look" Doctrine*,* Nevada Law Journal, Vol. 7, 2006, 156.

[32] However, some scholars think that hard look review is not as strict as it seems. They argue that: "instead of a strict substantive review, it seeks to ensure that the agency's rule-making process is "reasoned, and candid" *Note,* Regulatory Analyses and Judicial Review of Informal Rulemaking*,* Yale Law Journal, 91, March, 1982, 745, Furthermore, Professor Pierce notes that hard look does not add procedural requirements to informal rulemaking and cites *Pension Benefit Guarantee* according to which hard look review "imposes a general 'procedural' requirement of sorts by mandating that an agency take whatever steps it needs to provide an explanation that will enable the court to evaluate the agency's rationale at the time of the decision," *Pierce R.J.Jr.,* Waiting for Vermont Yankee III, IV, and V?A Response to Beermann and La-wson, George Washington Law Review, Vol. 75, June, 2007, 905-906.

[33] *Garry P.M.,* Judicial Review and the "Hard Look" Doctrine*,* Nevada Law Journal, 7, fall, 2006, 156, Moreover, to fully describe the idea of the hard look review, Professor *Gary* adds that: "the hard look standard was also quasi-procedural, encompassing "a set of requirements intended to ensure that the agency itself had taken a hard look at the relevant issues before reaching its decision." He also cites (now Judge) Merrick *Garland's* explanation of the hard look doctrine: "As the doctrine developed, the courts demanded increasingly detailed explanations of the agency's rationale…an agency had to demonstrate that it had responded to significant points made during the public comment period, had examined all relevant factors, and had considered significant alternatives to the course of action ultimately chosen, Ibid, 156, quoting *Garland M.B.,* Deregulation and Judicial Review, Harvard Law Review, 98, 1985, 526-527.

[34] "As the hard look doctrine evolved, courts and commentators began to formulate a theory of convergence of the two standards of review. Under this convergence theory, the substantial evidence standard operates in the same fashion as the arbitrary and capricious standard when courts review notice-and-comment rulemaking," *McGrath M.J.,* Convergence of the Substantial Evidence and Arbitrary and Capricious Standards of Review during Informal Rulemaking, George Washington Law Review, Vol. 54, 1986, 552.

[35] Ibid, 561-562.

The analyses of the US Supreme Court's decisions show that despite the fact that the US Supreme Court leaves discretion of rulemaking to the agency, it still demands the review of the reasonableness of the agencies decision.

2.3. Deference Doctrine

Chevron U.S.A. Inc. v National Resources defense Council, Inc.[36] is the supreme courts leading decision providing agencies with wide discretion while interpreting the statute. Decision established the famous deference doctrine which explains how powers have to be separated between agencies and courts in interpreting statutes.

The decision established two-step test for resolving the question of statute interpretation.[37] At step one, the court inquires whether Congress has directly spoken about the issue in the statute. If it turns out that the issue is clearly formulated, then the agency has to act pursuant to the "unambiguously expressed intent of Congress" and the court must enforce law. If the issue formulated in the statute is not clear, the court must continue with the step two, where the question is "whether the construction furnished by the agency is one the court could have imposed by making law on its own. If it is, then the court must exercise its limited discretion by deferring to the agency."[38]

As Justice Stevens underlines in the *Chevron* decision: "Judges are not experts in the field, and are not part either political branch of the Government. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges' personal policy preferences…While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of Government to make such policy choices-resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency... In such case, federal judges-who have no constituency-have a duty to respect legitimate policy choices made by those persons who do."[39]

According to opinions of scholars, the *Chevron* pronounced several important innovations: "First, the Court laid down a new two-step framework for reviewing agency statutory interpretations…Second it departed from

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[36] *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

[37] *Merrill T.W.,* The Story of *Chevron:* The Making of an Accidental Landmark, Administrative Law Review, Vol. 66, No. 1, Spring 2014, 254, Part of the scholars think that Step one looks like a more "legal" step; whereas step two studies how agency makes policy. For the courts is much easier to legitimize their action when they annul an administrative decision for "legal reasons" and not for the unreasonableness of the policy. Therefore, scholars note, that it is rare for a court to set aside an agency action in step two, *Jordao E., Ackerman S.R.,* Judicial Review of Executive Policymaking in Advanced Democracies: Beyond Rights Review, Administrative Law Review, Vol. 66, No. 1, 2014, 20.

[38] *Liu F.,* Chevron As a Doctrine oh Hard Cases, Administrative Law Review, Vol. 66, No. 1, Spring 2014, 305, According to Antonin Scalia, "Judicial deference to agency decision-making is a function of congressional delegation of authority to an agency…statutory ambiguity is a product not of consensus on the part of Congress, but rather of congressional omission. That is, usually it is the case that where there is a statutory ambiguity or a silence, Congress simply failed to consider the matter altogether. You don't really think that where it's ambiguous Congress said. "Let's leave it ambiguous and leave it up to the agency." That may happen sometimes, but surely not as a general rule," *Scalia A.,* Remarks by the Honorable Antonin Scalia the 25th Anniversary of Chevron v NRDC, American University Washington College of Law April, 2009, Administrative Law Review, Vol. 66, No.1, 2014, 251.

[39] As Professor *Rubin* notes *Chevron* raises "conceptual difficulties." Its two-step formula causes problems because "if the statute is clear, the agency interpretation will be reviewed de novo, with no deference given to the agency, but if the statute is deemed ambiguous, deference will be extensive," *Rubin E.,* It's Time to Make the Administrative Act Administrative, Cornell Law Review, 89, 2003, 141-142.

previous law by suggesting that Congress has delegated authority to agencies to function as the primary interpreters of statutes they administer."[40]

3. Judicial Review of Discretionary Power Used in Administrative Rulemaking in Georgia

In this chapter the case law of Georgian Supreme Court is discussed with regard to judicial control of discretionary power used in administrative rulemaking. In this chapter emphasis are also made on the importance of expert knowledge in administrative rulemaking.

3.1. Limited Judicial Control of Discretionary Administrative Rulemaking

It is worth mentioning that the Supreme Court of Georgia establishes limited judicial control in cases where the normative administrative-legal act is made on the basis of discretionary power.

The Supreme Court's judgment of 31 May 2007 bs-565-534 (k-06)[41] is a clear example of restricted judicial control of the normative administrative-legal act issued on the basis of discretionary power. The claimants asked for invalidation of the Autonomous Republic of Adjara's Government Resolution adopted on November 29, 2005 related to the liquidation of the Folklore Research Center, where they worked. The plaintiffs indicated that procedures established by the law were violated in the process of issuing of the normative administrative-legal act. [42]

Firstly, the Supreme Court draw attention to the fact that the normative administrative-legal act was adopted by the use of discretionary power. The Cassation Chamber noted that "rationality of the decision concerning establishment as well as liquidation of a legal person of public law, achieving or impossibility of achieving the objective set before a legal person of public law, the effectiveness of the structural unit established by the government, is subject to discretionary authority of the Autonomous Republic of Adjara's Government." [43]

After establishing that administrative body exercised discretionary power in rulemaking, the Supreme Court noted that the court is unable to review the scope of discretionary power which is utilized by the collegial administrative organ, as the court scrutinizes the normative administrative legal act issued by the collegial administrative organ only on the basis of legality. [44]

The Supreme Court pointed out that pursuant to the Georgian legislation the "different rule of revision of the decision of the collegial administrative body is established and its examination is based only on the legality," which is conditioned "by the special status of the collegial body and because of the non-rationality of limiting its discretionary power." [45]

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[40] *Merrill T. W.,* the Story of *Chevron:* The Making of an Accidental Landmark, Administrative Law Review, Vol. 66, No. 1, 2014, 255-257.

[41] Decision N bs-565-534 (k-06) of 31 May 2007 of the Supreme Court of Georgia available at the electronic search engine of the Supreme Court judgments.

[42] Ibid.

[43] Ibid.

[44] Ibid.

[45] Ibid.

Consequently, the Court considered that the Autonomous Republic of Adjara's Government was authorized to make the most acceptable decision pursuant to the law, based on the evaluation of public and private interest, including the decision on liquidation of the Folklore Research Center. [46]

Despite the fact that the court left the decision making freedom to the administrative body, it also added that the use of discretionary power does not exempt the administrative authority from the non-compliance with the procedures prescribed by law, because: "conferral of power to publish legal norms independently, conferral of administrative rulemaking power to the executive organ is an essential part of the competence of any administrative authority which, conditions the proper protection of implementation of such power.[47]

Based on the formulation above, the Court found that because of the procedural violation resulting in a non-promulgation of the notice of administrative rulemaking, as well as non-promulgation of the project of the normative administrative-legal act, the Government Resolution of the Autonomous Republic of Adjara is invalid. The court especially highlighted the lack of the notice and comment procedure, which resulted in zero public participation, and noted that this amounted to infringement of the section 1 of article 60^1 of GAC, pursuant to which the normative administrative-legal act has to be set aside…when the statutory procedures of its preparation or promulgation are "substantially violated."[48]

Thus, in this case the Supreme Court used restricted judicial control over discretionary administrative rulemaking, but at the same time, it especially highlighted the importance of compliance with the procedural rules prescribed by law in issuing the normative administrative-legal act. By underlining the importance of procedural compliance with law, the Georgian Supreme Court used the same standard of review of discretionary administrative rulemaking as the US Supreme Court utilizes in "arbitrary and capricious" test.

3.2. The Administrative Body's Expert Knowledge as a Basis for Discretionary Administrative Rulemaking

The use of the limited judicial control of discretionary power is underlined also in the Supreme Court of Georgia's decision of 23 May, 2013 bs-622-610 (K-12).[49] The Georgian Supreme Court announces that where the decision is based on the administrative body's expert knowledge, the administrative body has wide discretion. According to the facts of the case in the claimants requested the issuance of the normative administrative-legal act related to the payment of the debt pursuant to the subparagraph "g" of Article 48.1 of the "Law on State Debt." [50]

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[46] Decision N bs-565-534 (k-06) of 31 May 2007 of the Supreme Court of Georgia available at the electronic search engine of the Supreme Court judgments.

[47] Ibid.

[48] In this case, the Supreme Court considered violation of the notice and comment procedure the "substantial infringement" of procedural rules that caused invalidation of the normative administrative-legal act. The Court did not stop here; it further mentioned that when promulgating the normative administrative-legal act the administrative authority had to apply not only the notice and comment procedure but also offer a public hearing, decision N bs-565-534 (k-06) of 31 May 2007 of the Supreme Court of Georgia available at the electronic search engine of the Supreme Court judgments.

[49] Decision N bs-622-610 (K-12) of 23 May 2013 of the Supreme Court of Georgia available at the electronic search engine of the Supreme Court judgments.

[50] Ibid.

The Supreme Court observed that the introduction of a clear payment mechanism of state debt required a difficult financial calculation. This demanded special knowledge and expertise of the administrative body. Particularly, "considering the extraordinary character of the issue… the need for mobilization of large amounts of funds, the lack of budgetary funds, the need for a rational economic approach to the settlement of the issue, considering the budget crisis, the economic-financial capacity, the need to balance the budget and a number of other issues, the Cassation Chamber acknowledges that it is necessary to study thoroughly the problems related to debt payment and to develop the strategy for drawing up appropriate resources for the issuance of requested sub-legal normative act." [51]

The Court specifically draws attention to the administrative body's need to use a "rational economic approach" in deciding the issue. The Court mentions that the administrative body has to decide all problematic issues related to the debt-payment mechanism rationally and reasonably. [52]

The Court then explains the meaning of administrative rulemaking. According to the Court's view, the idea of delegation is that in compliance with the requirements of the law the special capacity and professional knowledge of the executive branch is to be used for carrying out the regulatory tasks. [53]

Thus, the Court notes that the decesion to cover the state debt is beyond the scope of judicial competence, since this is a special competence of the administrative body and requires the special capacity of the executive branch. However, the court underlines that discretionary power does not release the administrative body from non-complying with the procedures established by the law and based on this argument remands the case back to the Appellate Court stating that it has to look through the factual circumstances of the case and determine if the rules concerning the issuance of the normative administrative legal act are observed.[54]

This decision of Georgian Supreme Courts resembles the deference doctrine established by the US Supreme Court in *Chevron* as the Georgian Supreme Court specially underlines the importance of expert knowledge of administrative bodies and their independence in interpretation of the law issued by the Parliament.

Despite the fact that above analyzed cases of the Georgian Supreme Court follow the path of the US Supreme Court and review the legality of the exercise of discretionary power there still remains one case where the administrative body's discretionary power was left without judicial control.

3.2. Deviation from Established Practice

In contrast with the decisions analyzed above the Supreme Court of Georgia did not use the already established approach to the control of discretionary power in its 2007 decision bs-107-101 (K-07)[55] handed down on July 11, a month after to the decision bs-565-534 (k-06). According to the facts of the case the claimants asked for invalidation of the resolution N 52 of 6 June 2006 of the Ministry of Labor, Health and Social Protection of the

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[51] Decision N bs-622-610 (K-12) of 23 May 2013 of the Supreme Court of Georgia available at the electronic search engine of the Supreme Court judgments.

[52] Ibid.

[53] Ibid.

[54] Ibid.

[55] Ibid.

Autonomous Republic of Adjara related to the liquidation of the Social Protection Unit of Batumi and the decree of the Head of the Social Protection Unit, according to which they were released from their jobs. The claimants noted that the procedures prescribed by law were infringed while issuing the normative administrative legal act. [56]

The Cassation Court emphasized the importance of discretionary power utilized by the administrative authority in this case and noted that pursuant to article 28^1 of the Law on "the Structure, Authority and Rules of Conduct the Government of the Autonomous Republic of Adjara's Government" the decision on the creation, transformation or termination of the Ministry's territorial authority is the exclusive decision of the government and represents it's discretionary power. The Court pointed out that the legislation does not provide any reservation or condition for the realization of this discretionary power, which will legally restrict the competence of the Autonomous Republic of Adjara's Government in deciding the above mentioned organizational-structural issue. Thus, according to the Court's view, the Government had the exclusive right to liquidate the Unit.[57]

After emphasizing that the discretionary power was the basis of the decision, the Court added that the discretionary authority of the Autonomous Republic of Adjara's Government does not exclude the obligation of the Autonomous Republic of Adjara's Government to act as an administrative agency to observe the rules established by the legislation for the issuance of a normative administrative-legal act. [58]

Despite underlining the importance of compliance with the law in making discretionary decesions and despite the fact that the Supreme Court did find violation of the notice and comment procedure, the court considered infringement of procedure as a "general harm" which will never trigger invalidation of normative administrative-legal act[59] and thus deviated from its established practice, where the Court reviewed the legality of discretionary power.

Based on the analyses of the decisions it is evident that the Supreme Court of Georgia, like the Supreme Court of the United States, in most cases grants the policy making freedom to the administrative bodies, however in contrast with the US court, Georgian Court not always fully review the legality of the rulemaking decision made on the basis of discretionary power.

4. Conclusion

The research shows that the US and the Georgian Supreme Courts leave policy making choice to administrative body. However, when the US Court mentions that it has limited power to control discretion used in administrative rulemaking, it still applies "test of reasonableness" to scrutinize the legality of the decision.

Georgian Supreme Court follows the path of the US Supreme Court and underlines that the administrative body while using discretionary power in administrative rulemaking has to comply with the law. However, the Supreme Court of Georgia not always controls the legality or reasonableness of utilized discretionary power. Therefore for the effective judicial control of discretionary administrative rulemaking, it will be preferable if Georgian courts in all circumstances review the legality of discretionary administrative rulemaking.

[56] Decision N bs-622-610 (K-12) of 23 May 2013 of the Supreme Court of Georgia available at the electronic search engine of the Supreme Court judgments.
[57] Ibid.
[58] Ibid.
[59] Ibid.

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8. *Jordao E., Ackerman S.R.,* Judicial Review of Executive Policymaking in Advanced Democracies: Beyond Rights Review, Administrative Law Review, Vol. 66, No.1, 2014, 7, 20.
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Mariana Tavadze*

The Concept of Business Reputation of the Legal Entity

The general personal non-property rights are the part of rights, which, to a great extent, condition the social status and stability for the civil circulation of legal entities and offer the guarantee for the steadiness and social calm. The catalogue of the personal non-property rights (personal rights) encompasses a number of rights, the most significant of which was chosen and included in the general part of the Civil Code. Among the personal non-property rights, the object of private legal protection is deemed to be the business reputation of a person along with the dignity and honor acknowledged and defined by the Constitution. A legal entity as well as a natural person can build its business reputation. In the modern civil circulation under the conditions of fierce competition the improvement of means of legal defense of the trademarks as well as business reputation of the legal entity is becoming increasingly important. The protection of business reputation of the legal entity is a matter of practical and legal interest but a problematic issue as well. If considering either the earlier or present effective legislation offering no normative concept of the business reputation, it is of utmost importance to clarify the essence of business reputation based on the Judicial Practice and Legal science and this is what the present paper aims at.

Keywords: *Business Reputation, Professional Reputation, Intangible and Non-Property Benefits, Intangible Assests, Goodwill, Types of Market, Image*

1. Introduction

Under the conditions of the market economy, the issue concerning the protection of business reputation is attached the great significance due to the fact that it is related not only to the ethical scope but the income of the enterprise as well. According to its legal nature, a legal entity is the abstract concept which is legally strengthened by each specific rule of law[1]. From this point of view, a legal entity is the artificially organized formation. The individualization and identification of the legal entity in the civil circulation can be made through the attributes such as the trade name, trade mark and business reputation. The business reputation as well as the goodwill of the trademark are the means which create the convenient market conditions for the interpreneurs, at the same time allow them to receive more income than their competitors through the price difference[2] The business reputation is one of the conditions for the successful performance of the legal entity. The positive business reputation promotes attracting the new clientale for the legal entity, whereas the negative reputation may account for the failure of its unsuccessful performance. Defining the concept of a legal entity is a matter of greatest importance, as the issues related to its breaching or protection are impossible to be discussed without being aware of the notion of business reputation. According to the recognized standpoint, the business reputation is the intangible and non-property right. However, it has the dual legal nature like its name.

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[1] *Chanturia L.,* General Part of Civil Law, Tbilisi, 2011, 217.

[2] *Dzamukashvili D.,* Intellectual Rights Law, Tbilisi, 2012, 164.

The business reputation is the non-property asset of the legal entity, and at the same time it can be transferred and alienated. The business reputation can be expropriated together with the enterprise as a complex property. The business reputation is alienated together with the trade mark as well. Defining the essence and concept of business reputation will ensure the significant simplification and transparency of the mechanism of protecting the right conferred on the legal entity and the means of civil legal liability upon the violation of this right.

2. The Concept of Business Reputation of the Legal Entity

2.1. The Concept of Business Reputation in the Legal Science

Compared to the old legislation, the catalogue of the personal non-property rights as well as the forms of civil legal protection of the rights, which were recognized by the old legislation as well, have been expanded in the Civil Code of Georgia. The protection of the non-property benefits such as privacy, personal immunity and business reputation hold the fixed position in the Civil Code in contrast to the old legislation providing the defense for only honor and dignity[3].

The personal non-property rights are regulated by Article 18 of the Civil Code (Hereinafter in the text the Articles of Civil Code are referred without mentioning –Civil Code), pursuant to the second part of which the legal entity reserves the right to protect its own honor, dignity, privacy, personal immunity or business reputation from the violation through the Court under the rule established by law. The non- property rights are also referred as personal rights[4], which represent the right originated from that of the dignity, honor and the development of an individual, imposing the liability to each entity (among them even the state) to treat the personality with respect[5].

Article 18 is based on the Constitution[6] and the European Convention of Human Rights.[7] In the French and German Law the civil legal protection of the personal non-property rights such as honor, dignity, business reputation, self- image, etc. were established as a result of the judicial practice and became the natural institutes of the Civil Law despite the fact that they had not been strengthened in Civil Codes. This experience was envisaged by the Georgian Civil Code and the personal rights were prescribed in its general part[8]

Most of the categories of non-property rights are that of the natural person. In accord with the established viewpoints, the legal person is equalized to a natural person in terms of all the rights which

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3 *Ninidze T.,* The Civil Code of Georgia, Comment, Book 1, Tbilisi, 1999, Article 18, 60.
4 *Kereselidze D.,* The Most General Systematic Concepts of Private law, The Publishing House of European and Comparative Law Institute, Tbilisi, 2009, 132.
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7 *Jorbenadze S.,* The Commentary to the Civil Code of Georgia, Book 1, Tbilisi, Article 18, 2017.
8 *Chanturia L.,* The General Part of Civil Code of Georgia, Tbilisi, 2011, 74.

are not qualitatively related to a human. The legal entity may be vested with the part of personal rights only in the modified form.[9]

Pursuant to the 5th part of Article 27, the rules envisaged by Article 18 of this Code are applied in case of the violation of business reputation of a legal entity. The essence of non-property rights of a legal entity follows primarily from this article, according to which such right is considered to be the business reputation[10].

The concept of business reputation of the legal entity is normatively stipulated neither in the Georgian nor Foreign legislation. On the one hand, Article 18 refers to the business reputation alongside the intangible benefits of natural and legal persons such as the name, honor and dignity, privacy and immunity of the private life, private image; on the other hand, the mentioned Article provides the unified rule for the defense of honor, dignity and business reputation.

From the etymological point of view, the French word "reputation" is derived from the Latin word "reputatio",where the latter means –thought, realization.[11] In the French language and later, from the international standpoint, the established meaning of this word was defined as "the mutual opinion about somebody or something i.e. the public evaluation." Hence, upon its lexical significance, *reputation* is the common opinion generally built up about somebody or something, the evaluation of a certain human according to the public opinion. This evaluation implies the positive as well as negative viewpoints and may refer to a human, a thing or some other phenomenon, an individual or a team. At the same time, in lexical terms, *reputation* is understood as the positive or negative evaluation for any quality of an individual, team, object or phenomenon.

Due to the fact that according to its lexical sense the word *reputation* does not differ from the word *honor* at all, the collocation "business reputation" is applied in the enterpreneurial practice and legal literature in order to attach the specific connotation to "*reputation* "

In the legal literature, especially in the post-soviet countries, the authors identified the sense of the collocation "business reputation" with the public opinion about the evaluation of business - related features. This is the meaning by which the mentioned term is defined in the Georgian legal literature as well. According to the primary commentaries on the Civil Code of Georgia the business reputation implies the public evaluation of the person's professional or some other peculiarities related to business, which is the basis of the attitude of the society towards a certain natural or legal person[12]. "The business reputation is the public evaluation of the professional and business features." – reads the guidebook, the author of which is P. Moniava[13]

The same definitions are met in the Russian literature. According to Bulovich, "the business reputation represents the evaluation of the business (manufactural, professional) superiorities[14]"

[9] *Kereselidze D.,* The Most General Systematic Concepts of Private Law, Tbilisi, 2009, 166.
[10] See the Decision of Supreme Court of Georgia, September 30, 2015, №AS -1052-1007-2014.
[11] *Chabashvili M.,* Dictionary of Foreign Words, Tbilisi, 2000, 50.
[12] *Ninidze T.,* The Commentary to Civil Code, Book 1, Tbilisi, 1999, 61.
[13] *Moniava P.,* The Introduction to General Part of Georgian Civil Code, Tbilisi, 2013, 344.
[14] *Zikratski C.,* Concepts of Business Reputation, <http://www.ziz.by/publications/23-p6>, [01.02.2018] (In Russian).

From Zingilevski's point of view, the business reputation means the evaluation in the sphere of business circulation[15]. And Anisimov defines the mentioned term as the established opinion in the business circulation including the manufacturing field[16]. Rozhkova considerers the business reputation to be the established public opinion about the natural or legal entity based on the professional activities and the quality of the work performance.[17] According to Frolovski, the business reputation of the organization is the opinion of the third parties established on the professional (business) competency of the legal entity[18]. In Maleina's view, the business reputation is the combination of the properties and evaluations, through which the entity possessing them is associated with the counteragents, clients, consumers, colleagues, fans (in case of show business), electors and thus personifying the professionals engaged in the specific field of the activities.[19] Based on the English-American Law Erdelevski[20] deems it expedient to use the general term for denoting the different types of reputation and considers the Court being able to identify the specific type of reputation according to the subject applying thereto. But Ulyanova holds the opinion that the mentioned approach could not be justified[21], because the nature of business reputation of the legal and natural person are diverse and the divergence between them should be stipulated at the legislative level, accordingly, it should not depend on the judgment of the Court.

The professional reputation of the natural person, who does not represent the subject of the enterpreneurial acitivity differs from the business reputation of the legal entity. The latter is characterized by the business activity and accordingly, has built the business reputation. The term " business reputation" is expedient to be applied to the legal entities (among them the non-commercial legal entities implementing the entrepreneurial activities) as well as the natural persons - individual entrepreneurs. The other natural persons are more reasonable to be referred to by the term "kind name", as the mentioned term, in its broad sense, completely includes the relationships related to using and protecting the professional habits and skills of the physical persons in the society[22]. According to Rozhkova, the identification of the legal entity with the natural person, who are not in business, has not been substantiated. At the same time, the notion "kind name" cannot adequately show the insight about the professional skills of the natural person existing in the society. The "kind name" comprises wider circle of relationships, e.g. the image of a person in the sphere of personal and friendly relations. The images in

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15 *Zikratski C.,* Concepts of Business Reputation, <http://www.ziz.by/publications/23-p6>, [01.02.2018] (In Russian).

16 Ibid.

17 *Rozhkova M.A.,* Judicial Practice on the Issues of Protection of Business Reputation of Legal Entities and Entrepreneurs, Appendix to Journal "Economy and Law", 2010, №2, 3-80.2 (In Russian).

18 *Frolovski N.G.,* Protection of Business Reputation of Legal entities// Laws of Russia: Experience, Analysis, Practice, 2012, № 4, URL:http://lexandbusiness.ru/view-article.php?id=493, [20.03.2015] (In Russian).

19 Ibid.

20 *Erdelevski A.M.,* Compensation of Moral Harm: Analysis and Review of Legislation and Judicial Practice, 3rd rev. ed., Walters Kluwer, 2004 (In Russian).

21 *Ulyanova O.A.,* Business Reputation of Legal Entities in Russian Civil Code: Concept and Distinguishing Peculiarities, The Young Scientist, 2015, №9, 891-896, 2, (In Russian) <http://moluch.ru/archive/89-/17830/>, [19.12.2017].

22 *Rozhkova M.A.,* Judicial Practice on the Issues of Protection of Business Reputation of Legal Entities and Entrepreneurs, Appendix to Journal "Economy and Law", 2010, №2, 5-6 (In Russian).

the professional activities may be called the professional reputation. **The business reputation of the legal entity is determined as its intangible assets, which is based on the image of the entrepreneurial subject and is formed in the process of entrepreneurial business.** According to Kudrjavtseva and Olefirenko, **the business reputation of the legal entity is the dynamic category established in the process of performance of the legal entity.** The authors mentioned above consider the business features to be the preconditions for the successful performance of the organization, among which the following is distinguished: the quality of the manufactured products or provided service, the reliability of the partner in the contractual relationship, the payment capability and good faith[23]. In Ulyanova's view, **only the subject of the entrepreneurial performance may be endowed with the business reputation, as the business reputation is originated and exists only in the field of entrepreneurial activities.** Respectively, if a non-commercial legal entity implements the entrepreneurial activities pertaining to his goals, it will build the business reputation in the process of its performance[24]. It is expedient to name the images originated in the process of basic activities of the non-commercial legal entity as the professional reputation. The business reputation may be acquired by the state, governmental and non-governmental authorities[25].

2.2 The Concept of Business Reputation in the Judicial Practice

As prescribed by the Case Law of European Court, "pursuant to the general principles the **commercial and non-commercial organizations** are entitled to file a defamation suit in order to defend their **corporate reputation**, which could have been inflicted the harm as a result of the defamatory announcements"[26]

It has been already mentioned that the concept of the business reputation of the legal entity does not exist in the legislation, but it has been interpreted by the judicial practice. In one of the cases[27] the Supreme Court of Georgia noted that **" the business reputation implies the public evaluation of the professional or other business peculiarities. The profession is a job, activity, specialty which requires the certain preparation and through which a human earns his living, but the business features, which are meant by the business reputation, are endowed to those participating in the economic (commercial) activities. Hence, the violation of the business reputation, which is envisaged by Article 18, should apply to the business operations implemented (or to be**

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[23] *Kudrjavceva A. V., Olefirenko S. P.,* Proof of Moral Harm in Criminal Proceedings, Yurlitinform, M., 2011, 126-127 (In Russian).

[24] Civil Code of Russian Federation (hereinafter: CCRF) Art., 2. Article 1, 3rd par. (In Russian).
Civil Code of Russian Federation (part one) of 30.11.1994, №51 – F3, <http://stgrf.ru/>, [17.12.2017] (In Russian).

[25] *Ulyanova O.A.,* Business Reputation of legal Entities in Russian Civil Code: Concept and Distinguishing Peculiarities, Young Scientist,2015, №9, 891-896, <http://moluch.ru/archive/89/17830/>, [19.12.2017] (In Russian).

[26] Steel and Morris v. the United Kingdom no. 6841/01, 1732, <http://hudoc.echr.coe.int>.

[27] See The Decision of Supreme Court of Georgia, July 18, 2001, № 3k/ 376- 01.

implemented) by the entity. This kind of violation may account for the tangible damage to the entity as well, e. g. miss out the profit, lose the client, etc.”

Pertaining to the viewpoint developed in the aforesaid interpretation offered by the Supreme Court of Georgia, the business reputation implies the business features revealed in the economic (commercial) activities, that does not exclude the existence of other social properties of the legal entities, among them commercial as well as non-commercial.

In another case[28] the Supreme Court of Georgia pointed out that the abuse of the business reputation is evident even when the prevalent information impacts and contradicts the proper “market image” selected by the entity, i.e. the commercial image, which the legal entity would like to establish in the society, in addition, the widespread information conditions its failure in the business relationships with the third parties.

The freedom of expression is acknoledged by Article 10 of Convention for the protection of Human Rights and Fundamental Freedoms[29]. The precedents of the European Court of Human Rights confirm that not only the natural but the legal entities as well are acknowledged as the subject of this legal norm. Pursuant to the clarification of the European Court, Article 10 is applicable to “all”, the physical as well as legal entities[30]. In one of the cases related to the dispute over the freedom of expression between the natural person and legal entity[31] the European Court did not share the claim of the contending party that the powerful multinational company, such as MacDonald, should have been principally deprived of the right to self-defense against the dafimatory accusations or the difendants should not have been vested with the obligation to prove the truth of the statements having been made. The truth of the matter is that the powerful companies consciously and properly put themselves in such a situation when their activities are open for the comprehensive critical discussions…, the scopes of admissible criticism is far wider with respect to such companies[32] However, alongside the social interest in the open debates on the business practice there also exists the competitive interest in the defense of commercial success and viability not only pertaining to the interests of shareholders and employees of these companies, but from the viewpoint of the broad economic benefits as well. Accordingly, a state reserves the right to freedom of evaluation in compliance with the internal Legislation while providing the means, which allows the company to dispute the truth of statements jeopardizing its reputation and thus reduce the damage.[33] Accordingly, it is prescribed by the Case Law of the European Court that the relevant party defending the reputation from the defamation may be the legal entities as well, however,

[28] See The Decision of Supreme Court of Georgia, September 30, 2015, № AS -1052-1007-2014.

[29] Everybody has right to freedom of expression, This right comprises the freedom of a human to have his/her own opinion, accept or distribute information or ideas without the interference of public power and despite the state borders. This article cannot hinder the state to license the Radio, TV communication and cinematographic production. The Convention for protection of Human Rights and Fundamental Freedoms, Rome, November 4, Art., 10, 1950, <http://www.supremecourt.ge/files/upload - file/pdf/aqtebi5>, [9.02.2018].

[30] See Autronic AG v Switzerland, 1990, par. 47, <http://hudoc.echr.coe.int>.

[31] Steel and Morris v. the United Kingdom no. 68416/01, & 32, <http://hudoc.echr.coe.int>.

[32] Fayed v. the United Kingdom, 1994.

[33] Markt intern Verlag GmbH and Klaus Beermann v. Germany, 1989.

the contracting states reserve the right to freedom of regulating the issue related to the protection of reputation of the legal subject by the internal legislation, in case the damage resulted from defamation is in dispute[34].

In one of the above mentioned precedent cases[35] where the plaintiff – the multinational corporation defended itself against the defamatory accusations related to the subjects of social care, such as reprehensible and immoral economic activities or employment practice, cutting down forests, the exploitation of children and their parents through the aggressive promotions and selling the junk food, the European Court noted that the plaintiff –the corporation had reasonable grounds to file suit and be granted the compensation for inflicting the damage thereto, in case of being able to prove that it had built the **reputation** on the basis of the relevant jurisdiction and the defamatory publications could have inflicted the damage to its **prestige**. **The mentioned above states that the Court deemed the prestige related to the economic activities of the corporation to be its reputation.**

In one of the cases Tbilisi Appellate Court explained, that the business reputation the entity is the opinion molded about the business peculiarities and the skills of a specific entity in the sphere of business circulation. Such an opinion is shaped in the public, society[36] and may condition the future success as well as the failure[37]. Thus, the business reputation of an entity may be regarded as its honor and dignity[38], as the business reputation is equalized to the competency of a person of the particular profession[39].

Hence, in the judicial practice and literature the concept of business reputation implies the established public opinion on the business, entrepreneurial and commercial features of a subject, as a participant in the economic circulation and in a manner of speaking, such understanding of the concept is unequivocal. In addition, such essence of the concept distinguishes it from the notions of honor and dignity, which first of all, comprise the moral traits of the person as a participant in the social relations[40].

In the legal literature and judicial practice the tendency of public evaluation of the business reputation, as the particulars of any economic entity, is being established only according to the positive signs. It is true, that in the Georgian legal literature the positive assessment of business features, as essential elements, expressed in the above mentioned explanation is not emphasized, but the general essence of the aforesaid interpretation made by the Supreme Court of Georgia explicitly shows that the business reputation means the values, the violation of which inflicts damage to the economic entity[41] However, the diverse viewpoints related to the public opinion on the positive evaluation, as an essential element of the concept of business reputation, exist even in the legal literature of the post-soviet

34 See the Decision of Supreme Court of Georgia, September 30, 2015, №AS – 1052 -1007 2014.

35 Steel and Morris v. the United kingdom no. 68416/01, &32, <http://hudoc.echr.coe.int>.

36 The Judgment of Tbilisi Appeal Court, June 25, 2013, №2 b/696-13.

37 *Dzlierishvii Z., Svanadze G., Tsertsvadze G., Tsertsvadze L, Janashia L., Robakidze I.,* Contract Law, Tbilisi, 2014, 669.

38 See the Judgment of AC, December 1, 2005, № AS-448-775-05.

39 See the Judgment of AC, November 15, 2013,№ AS – 378 -359 – 2013.

40 *Zikratski S.,* Concepts of Business Reputation, 3, <http://www.ziz.by/publications/23-p6>, [01.02.2018] (In Russian).

41 See The Decision of Supreme Court of Georgia of July 18, 2001, № 3 k/376 – 01.

countries: e.g. according to Anisimova, the business reputation is the public opinion about the qualities (positive and negative) of a person[42]. And Zingilevski considers that first of all, the business reputation may imply the positive evaluation of an conscientious entrepreneur made by other participants of the property circulation[43]. Pursuant to the word-by word interpretation of Article 18 the business reputation represents the benefits, the right to protection of which is conferred on the entities. As mentioned above, the latter includes the person, as a generic private-legal concept, the essence of which implies the physical and legal entities as well.

3. The Business Reputation and Other Non-Property, Intangible Benefits

The business reputation is referred to alongside such intangible benefits that have assumed the pure non-property (honor and dignity, privacy, personal immunity), as well as non-property and property values (e.g. the name of a person)

Despite the fact that the general rule of the protection of honor, dignity as well as business reputation is prescribed by the Civil Code of Georgia, the mentioned benefits are reviewed as different from each other phenomenon.

Premised on the above-mentioned the question arises- what are the signs distinguishing the business reputation, honor and dignity from each other, which are considered to be the benefits protected by law?

The business reputation is the specific case of the general term "reputation", running the concept of honor the closest. The latter, on its part, is defined as the public opinion on the positive qualities of a human. However, the distinctive interpretations on this issue also exist in the Georgian legal literature. In particular, P. Moniava thinks, that the concept of business reputation, with respect to the legal entities, includes the notion of honor and dignity as well[44] The author confirms his standpoint by denoting the 5th part of Article 27, which reads, that Article 18 shall be applied in case of the violation of reputation of the legal entity. Following from the aforesaid, according to the author, the right to protection of business reputation envisaged by Article 18 is vested only in the scope of the capacity for rights of the legal entities, and the essence of the capacity for rights of natural persons comprises the rights to honor and dignity as well as business reputation[45]. We think, that the author's interpretation is not ensued from the legal essence of Articles 18 and 27 due to the following circumstances: first of all, Article 18 refers to honor, dignity and business reputation, as the notions conceptually independent from each other and the diverse objects protected by the truth, that is expressed by the different from each other terms. In addition, Article 27 stipulates the rights to protection of two personal non-property benefits- the name and business reputation of one type of legal person of private law –the non-commercial legal entity. At the same time, the Article indicates the rule divergent from that of envisaged by Article 17 concerning

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42 *Zikratski S.,* Concepts of Business Reputation, 3, <http://www.ziz.by/publications/23-p6>, [01.02.2018] (In Russian).

43 Ibid, 2.

44 *Moniava P.,* The Introduction to General Part of Georgian Civil Code, Tbilisi, 2013, 344.

45 Ibid, 344.

the protection of a name. The norm of reference pertaining to the protection of business reputation is prescribed by the 5th paragraph of Article 27, in accord with which the rules envisaged by Article 18 are applied in case of violation of business reputation of the legal entity. [46] Following from the aforesaid, in case of violation of one intangible benefit, in this intense - business reputation, the rules protecting another non-property, intangible benefits (honor, dignity, name, privacy) are applied. To put it differently, the rules envisaged by the law, which directly regulate the relationships established as a result of the violation of other benefits, are exercised related to the relationships having been formed as a consequence of the infringement of business reputation. The right to banning the violation of business reputation of the person, to be more precise, the right to neutralizing of the accompanying activities, which were caused by such breaches, as well as the demand of the compensation for the harm inflicted thereto is prescribed by Article 27.5[47].

In accordance with the interpretation established in the science of ethics the honor of a person implies the public evaluation of moral or such other qualities of an individual. The honor is the objective evaluation of a person determining the public attitude towards the person. The protection of the honor means the right of the human not to be presented to the society in negative terms. The most significant component of abuse of the right to personal respect is the "injustice" The person should objectively deserve such evaluation, that means that the opposite reality must not be confirmed[48]/[49].

The dignity implies the person's self- assessment of his own moral or other qualities, capability, honorable fulfilment of his duty to the society and his social significance. At the same time, this self-assessment is premised upon the criteria of evaluation of the moral or such other qualities acknowledged by the society. The honor as well as dignity should be based on the facts pertaining to the reality[50].

On this basis, the person's rights may also be applicable to legal entities unless it contradicts the essence of the specific right, in particular, unless the relevant right follows directly from the personality. For example, the dignity is the inseparable category from the human. A person has the dignity exactly due to being a human. In addition, except for the human, nothing, even the legal entity, can be endowed with dignity[51].

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[46] In terms of legal technique, the 5th part of Article 27 became the target of criticism. First of all, the essence of the mentioned norm is not expedient to the title of Article 29 of CC. (the title of non-entrepreneurial(non-commercial legal entity) Secondly, it generally stipulates one of the rights of legal entity, whereas the Article, including it as the part, represents the special norm referring to only one type of the legal entity – non-commercial entity; Hence, the place of the norm envisaged by the 5th part of Article 27 is not correctly stipulated in the text of Code, as it contains nothing new in comparison with the content of Article 18.

[47] *Burduli I.,* Commentary to Civil Code, Book 1, Tbilisi, 2017, Art. 27, 211.

[48] *Kereselidze D.,* The Most General Systematic Concepts of Private law, Tbilisi, 2009, 146.

[49] The Decision of Supreme Court of Georgia of July 18, 2001 № 3k/376 – 01 is worth noting in terms of the demarcation of protection of business reputation from other personal rights.

[50] *Ninidze T.,* Commentary to CC, Book 1, Tbilisi, 1999, Art. 18, 60.

[51] *Kereselidze D.,* The Most General Systematic Concepts of Private law, Tbilisi, 2009,132.

The different approach has been established in respect of the honor. For example, the Federal Court of Germany recognized the honor of legal entity and, accordingly, deemed its legal protection to be admissible[52].

Importantly, in the German Legal Literature the general concept representing the public opinion about the evaluation of the legal entity is considered to be the honor of the legal person. According to Doctor Herbert Lesman's interpretation, the honor of the legal entity exists in its social significance that was gained by its members from their unified introduction into the environment and the performance of legal and moral responsibilities assigned to them[53]. From the author's point of view, the legal entities have capability of the moral as well as the specific professional and entrepreneurial honor. The social significance of the legal entities are grounded exactly in their economic authority[54]. Hence, in contrast to the opinions voiced in the Georgian Legal Literature the German author considers that the legal concept of Honor is the general concept, the essence of which encompass the moral as well as business peculiarities[55].

As it was mentioned, some of the rights are conferred on the legal entities only in the modified form. In particular, the protection of honor and social "image" of the natural person is related to the personality of an individual as separate. **But in case of the legal entity the protection of honor or social image of the individuals united therein is made in combination, i.e. the defense of all of them in homogeneity and not protecting the separate parts or independently from each other[56].**

In one of the cases[57] the Supreme Court of Georgia, based on its practice regarded the judgment of Appellate Court on the violation of honor of the legal entity to be unsubstantiated[58]. Concerning this case the Grand (Cassation) Chamber made the following interpretation: "The legal entity does not possess the benefits, such as personal immunity, privacy as well as the right to demand the compensation for the moral damage related to the moral emotions protected by Article 18. According to the Grand (Cassation) Chamber the moral harm cannot be inflicted to the legal entity as the essence of moral damage implies the **violation of the legally protected non-pecuniary interests having no property equivalent** (spiritual or physical pain, emotion, etc.) Accordingly, the demand of the legal entity on the compensation for moral damage is legally groundless"

Most of the categories of the non-property rights are conferred on the physical person. The content of Article 27 corresponds to the legal nature of the legal entity which cannot experience the physical or spiritual sufferings[59], for instance, while discussing the issue about the dignity[60]". In case of the abuse of

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[52] *Kereselidze D.,* The Most General Systematic Concepts of Private Law, Tbilisi, 2009, 132.

[53] Dr. Herbert Lessman, Persönlichkeitsschutz juristischer Personen, Münsteri.Westf. 274, <http:/www.-jstor.org/discover/10.2307/40994518?uid=3738048&uid.=2&uid=70&uid=4&sid=21103284645633>.

[54] Ibid, 274.

[55] Ibid.

[56] Ibid,166. (Regarding the protection of honor of legal entity, see BGH, NJW 1974,1762 and BGH, NJW 1975, 1882, 1883).

[57] The Decision of Supreme Court of Georgia, September 30, 2015, № AS – 1052 – 1007 – 2014.

[58] The Decision of Supreme Court of Georgia, December 21, 2001, № 3k/924 – 01.

[59] *Chikvashvili Sh.,* Compensation of Moral Damage for Violation of Non-property Rights of the Legal Entity, Journal "Law", № 1 -2/2004, 42-43.

non-property rights of the legal entity, there must exist the fact of violating the business reputation that hinders the latter from implementing its activities[61] on the grounds, that the prevalent information contradicts the "market image" and commercial opinion of the legal entity.[62] At the same time, in the specific case the addressee of the announcement, e.g. a legal entity or its director, etc. must be clearly determined,.[63].

4. The Business Reputation- the Object of Private Law or the Object Protected by Law

In order to reach the goals of the research it is interesting to review what is the essence of the legal impact on business reputation, as an object of the Private Law: is it the object of right or the object to be protected by law? To put it differently, does the business reputation represent the object of the civil legal regulation or the object to be protected by Civil Law?

The business reputation of the legal entity is the object of the Private Law. The question arises referring to the category of the objects of Private Law the business reputation belongs to - tangible or intangible, the benefits of property or non-property values.

The statute related to the business reputation as being the public evaluation for performance of the entity, i.e. the public opinion, which does not exist in any material form and belongs to the category of the ideal phenomenon, does not raise any doubt in the legal literature. The opinions diverge on the issues whether the business reputation is property or non-property benefits, or none of such values are assumed thereto.

The object of the relationships of Private Law represents the non-property (intangible) alongside the property benefits. The object of the relationships of the Private Law can be tangible or intangible benefits possessing the property or non-property values, which is removed from the circulation under the established rule[64]. The law differentiates the private non-property from property rights, first of all, according to its circulation capability. In compliance with the general rule, the indicator of the intangible benefits is the absence of economic essence and impossibility to be expressed by the monetary units as well as the constant contact to a person, due to which they are inadmissible to be transferred and expropriated[65]. It is true, that like the property, non-property right may represent the object of the Private Law, however, in contrast to property rights, it is inadmissible to alienate the private non-property rights or transform them into other type of (Contract Law) object[66]. This is the essence of their absolute nature. The mentioned classification follows from the property and intangible nature of the right. Particularly,

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60 *Kereselidze D.,* The Most General Systematic Concepts of Private Law, Tbilisi, 2009, 132.
61 The Judgment of Tbilisi Appeal Court, June 25, 2013, № 2B/696-13.
62 The Decision of Supreme Court of Georgia, September 30 2015, № AS – 1052 – 1007 – 2014.
63 The Judgment of Tbilisi Appeal Court, June 25, 2013, № 2B/696-13.
64 Civil Code of Georgia, Tbilisi, 1997, Art. 7, <www.matsne.gov.ge> [05.02.2018].
65 *Ulyanova O.A.,* Business Reputation of Legal Entities in Russian Civil Code: Concept and Distinguishing Peculiarities, The Young Scientist, 2015, № 9, 891 -896, <http://moluch.ru/archive/89/17830>, [19.12.2017] (In Russian).
66 *Kereselidze D.,* The Most General Systematic Concepts of Private Law, Tbilisi, 2009, 133.

the intangible benefits can be alienated in some of the cases, if it possesses the property nature, that is excluded in case of the non-property right[67]

According to the viewpoint existing in the literature, despite the fact that the definition of Article 7 refers to the "benefits of non-private values, which could have been easily understood as the non-property private rights as well, they are hindered from being considered as "objects" due to their inability to circulate, which is the significant indicator of the object. **The private non-property rights are removed from the circulation and it is has been doubted to deem them as objects.** The honor, dignity, business reputation, private image and similar to them non-property benefits represent the objects of civil legal protection, but not the objects of the civil circulation[68].

5. The Dual Legal Nature of the Business Reputation

The general opinion held in the legal literature states that some of the intangible benefits are granted the non-property as well as property values.

According to L. Chanturia the right to a name is considered to be of dual nature. From the author's point of view, "considering the right to a name as the personal non-property right must not hinder its recognition as the intangible property right either, especially when the name is applied in the commercial relations[69]"

In the commercial relationships there exist occurrences when the name of a person is possible to be transferred, i.e. it can be transferred to another person. **In this case the civil name is transformed into the trade (commercial) name, the part of the property belonging to the enterprise and it can be considered as an intangible property right[70]**

In our opinion, the business reputation of the legal entity, as an intangible right (benefit) is also of dual nature. Sometimes it possesses the capability to be circulated like the name, in particular, its alienation together with the legal entity is possible.

The business reputation cannot be independently, alone transferred to the third party like a name. As it is designated in the legal literature, the German judicial practice introduced the rule, pursuant to which "the right to a name and the similar thereto rights cannot be independently transferred to other persons according to the results of the Law of Justice[71].

According to the reverse conclusion inferred from the aforesaid, the transfer of the name and similar thereto rights (other personal non-property rights, among them the business reputation) is possible due to its property essence.

Premised on the above mentioned interpretation of Supreme Court of Georgia, the property values may reflect only the damage which can be the result of the violation of the business reputation[72]. The

67 *Kereselidze D.,* The Most General Systematic Concepts of Private Law, Tbilisi, 2009, 135.
68 *Chanturia L.,* General Part of civil Code of Georgia, Tbilisi, 2011, 139.
69 *Chanturia L.,* Introduction to General Part of Civil Code of Georgia, Tbilisi, 1997, 168.
70 *Chanturia L.,* General Part of Civil Code of Georgia, Tbilisi, 2011, 201.
71 Ibid, 201.
72 See the Decision of Supreme Court of Georgia of July 18, 2001, № 3k/376 – 01.

above mentioned decision does not contain the indication regarding the property value of the business reputation. In the legal literature including the legal science of the post-soviet countries there is expressed the opinion in accord with which the denotation to the intangible nature of the non-property rights should not be understood as if they do not possess the economic value. The business reputation represents the discrepancy between the purchase value of the enterprise and the balancing values of its assets and obligations[73].

The business reputation of the legal entity can be alienated[74]/[75]. The legal entity may sign the agreements in the scopes of both property and non-property rights. e.g. the business reputation may be alienated to the third person on the basis of the purchase agreement[76]. Apart from the aforesaid, the business reputation can be contributed to the corporation as a partnership share. Accordingly, alongside the other property of the corporation the business reputation represents the community property belonging to its members[77]. A member of the corporation, contributing its business reputation as the share, implemented its alienation in favor of the third party (corporation) and from then onward, its business reputation became the intangible asset of the corporation. The capability of alienation denotes to the fact that the business reputation is subject to evaluation or its value can be determined. As it is prescribed by the law, the share of a member of the corporation is deemed to be all its contribution including the **business reputation and contacts** made to the common cause[78]. Pursuant to the general rule, the value of shares of the corporation members is equal, unless otherwise stipulated by the corporation agreement or stated according to the factual circumstances. Correspondingly, the business reputation stipulated as the share of the corporation can always be determined and expressed in monetary equivalents. The mentioned signs – the expropriation to the third person and the possibility to be expressed in the monetary amount - is not characteristic to the non-property intangible benefits of the natural person. The business reputation acquired by the third party can be accounted as an intangible asset of the company. Considering the business reputation of the company to be the intangible asset is prevalent in the Anglo-American as well as Continental legal systems, particularly, in the French and German Law. The intangible assets of the company reflected in the financial accounts are identified by the term – "Goodwill" The latter is defined as the prestige, business reputation, contacts, clients and staff, as the assets of the company assessed and deposited on the special account. It does not have the independent market value[79]; It is worth noting, that Goodwill in the foreign legal order encompasses the business reputation alongside other categories, which represent the visiting cards of the entrepreneurial performance of the company (e.g. education, qualification, the vocational skills of the staff and their

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[73] *Zikratski S.,* Concepts of Business Reputation, < http://www.ziz.by/publications/23-p6>, [01.02.2018] (In Russian).

[74] *Ulyanova O.A.,* Business Reputation of Legal Entities in Russian Civil Code: Concept and Distinguishing Peculiarities, The Young Scientist, 2015, № 9, 891 -896, <http://moluch.ru/archive/89/17830>, [19. 12. 2017] (In Russian).

[75] CCRF Art., 150.1 (In Russian).

[76] CCRF Art., 132 (In Russian).

[77] CCRF Arts. 1042.1, 1043.1 (In Russian).

[78] CCRF Art. 1042.1 (In Russian).

[79] International Standards of Financial Statement № 38, (IFRS 2017), <www.saras.gove.ge>, [2. 02. 2018].

ability to acquire novelties and introduce the nonstandard methods of business management) [80] "Goodwill" is the accounting term reflecting the situation, when a firm purchases the other company at a little more expensive price than its net balance value, in this case the additional money paid voluntarily is called goodwill. When the procurement price is less than the net balance value of the assets, the amount of goodwill is of negative significance. Goodwill is the intangible assets reflected in the balance statement. The amount of negative goodwill is possible to be completely or partially written-off the profit upon compiling the accounting reporting[81].

The term - Goodwill is established in the laws and sub-legislative acts regulating the economic and financial relations in many countries. While purchasing the enterprise, as the property complex, the business reputation is reflected in the intangible assets upon the accounting. At the same time, the cost of the purchased business reputation is determined as the discrepancy between the procurement price and company and responsibilities according to the accounting balance on the date of purchase.

From the legal point of view, the business reputation created by the company and purchased by the third parties does not principally differ from each other. They are considered as the intangible assets of the enterprise, despite the fact that the latter is subject to the accounting and the former - is not.

The business reputation is not assumed to the legal entity in the process of the establishment. In contrast to the natural person having the non-property rights stipulated and protected by law from the birth, the legal entity cannot obtain the business reputation through the registration. The right to the business reputation is protected but not created by the law. The business reputation is established in the process of activities of the legal entity. That is why, the business reputation is not the same during the existence of the company. The business reputation may play the decisive role in the certain scope of its performance. For example, the violation of the business reputation of the organization implementing the legal, insurance or medical services may cause their liquidation as well. Unless otherwise stipulated by the law, i.e. the cases when the business reputation may be alienated to the third party or contributed to the community property under the general rule, the business reputation, as non-property benefits, cannot be transferred to the third person pursuant to the universal rule of hereditary justice [82].

The intangible property nature of the business reputation is confirmed by the international judicial practice [83], in accordance with which the business reputation of the enterprise is acknowledged as the property in compliance with the protocol №1 of Article 1[84]. The mentioned is

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80 *Ulyanova O.A.,* Business Reputation of Legal Entities in Russian Civil Code: Concepts and Distinguishing Peculiarities, The Young Scientist, 2015, № 9, 891- 896, <http://moluch.ru/archive/89/17830, [19.12.2017] (In Russian).

81 The International Standards of Financial Statement № 38 (IFRS 2017), <www.saras.gove.ge>, [02. 02. 2018].

82 *Ulyanova O.A.,* Business Reputation of Legal Entities in Russian Civil Code: Concepts and Distinguishing Peculiarities, The Young Scientist, 2015, № 9, 891-896, <http://moluch.ru/archive/89/17830>, [19. 12. 2017] (In Russian).

83 Iatridis v. Greece [GC], no. 31107/96, ECHR 1999 –II 9In English.

84 Each natural and legal person has the right to smooth use of property. A person may be deprived the property due to the public necessity in conditions envisaged by Law and general principles of the international Law.

the only Article of the Convention directly referring to the "legal entity"[85]. In addition, the enterprise deemed as the commonality of a number of rights and interests as well as the unanimity of relations, which has set the proper goals and is organized by the entrepreneur as the economic unit, is also protected by Article 1. The enterprise contains the interests and relations, such as the clientele and reputation, business secrecy and the potential sources of revenue, including the organization and promotions. In fact, Article 1 of Protocol №1 regarding the business (enterprise) performance is applied only to their clientele and reputation, as they represent the units having assumed the certain value which, in many respects, due to the nature of private right represent " the means of property", and accordingly, in the sense of the proposition of Article 1 they are determined as the "property"[86].

Are all the forms of protection of civil rights envisaged by Article 18 used to defend the business reputation in case of its violation?

The business reputation like honor and dignity represents the benefits which are not originated in the legal framework. In the process of creation and formation of the business reputation of persons as well as their honor and dignity is not directly associated with the law.

In compliance with the prevalent opinions, the business reputation is originated and shaped up in the field of economic relations; Accordingly, the conditions and essence of creating of the business reputation are determined by the economic criteria. In the economic science it is recognized that "the business reputation of the firm is the evaluation thereof by its contingent, consumers. Generally, the business reputation of the firm is evaluated by the qualitative indicator, in addition, the application of the quantitative indicators is accepted as well[87]. **However, we suppose that non-entrepreneurial legal entities also build their business reputation related to the activities pertaining to their ideal goals.**

6. The Right to Protection of the Business Reputation

In accordance with one of the classifications of the legal relations recognized in the legal literature the legal rules regulate the relations originated only from the violation of the business reputation, which represent the relationships of protective nature. Still in the 60s of the previous century, when in the soviet legislation the development of the tendency for the acknowledgment and protection of the non-property interests started, Pr. Yoffe noted that the only non-property right, whose relationships related to its creation, revision and termination are regulated by the Civil Law, is the right to a name of a person; Concerning other non-property benefits, these are the rights to their protection and not the rights conferred on them which are recognized by the Law. In the modern post-soviet civilized literature there

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[85] The Convention for Protection of Human Rights and Fundamental Freedoms, Rome, November 4, 1950, <http://www.supremecourt.ge/files/upload-file/pdf/aqtebi5>, [09. 02. 2018] (In English).

[86] "The Right to Property under European Convention on Human Rights", A guide to the implementation of the European Convention on Human Rights and its Protocols. Human Rights handbook, №10, Council of Europe, 2007, 10 (In English).

[87] The Economic Encyclopedic Dictionary, Tbilisi, 2005, 537.

is acknowledged the viewpoint according to which the civil legal relations pertaining to the intangible benefits represent the relations assuming the regulatory and protective nature[88].

The protection of the business reputation is connected to the same rules envisaged as protecting the honor and dignity of natural and legal entities by the Civil Law. In particular, the rights to defending of these intangible benefits are originated in the case of existing the similar foundations and are implemented by the similar legal forms.

7. Conclusion

The discussion developed in the research allows us to infer that in the judicial practice and legal literature the concept of the business reputation implies the established public opinion concerning the business, entrepreneurial, commercial features of the subject, as a participant of the economic circulation and this understanding is unambiguous. At the same time, such essence of the concept diverges it from the notion of the honor and dignity which include, first of all, the moral qualities of a person, as a participant of the social relations.

In addition, in the legal literature and judicial practice there is being established the tendency for the public evaluation of the features of business reputation, as an economic subject, only according to their positive signs. In our opinion, eventually the business reputation of the legal entity may be stipulated as the benefits having assumed the non-property as well as the intangible property essence, which is protected by the Civil Law. It is the positive public opinion on the professional qualities or other business (entrepreneurial or commercial) features. The business reputation, as a rule, represents the economic phenomenon and is reflected in the economic indicators. The Private Law regulates the relations pertaining to only the protection of the benefits and envisages the same rules of Civil Law protecting the business reputation, honor and dignity of the natural and legal entities.

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32. *Erdelevski A.M.,* Compensation of Moral Harm: Analysis and Review of Legislation and Judicial Practice, 3rd rev.ed., Walters Kluwer, 2004, 197.
33. Dr. Herbert Lessman, Persönlichkeitsschutz juristischer Personen, Münsteri, Westf, 274, <http://www.jstor.org./discover/10.2307/40994518?uid=373804&uid.=2&uid=70&uid=4&sid=21103284645633>.
34. Iatridis v. Greece [GC], no. 31107/96, ECHR 1999-II.
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Nikoloz Simonishvili*

Fairness, as the Standard of Restriction of the Contractual Freedom

Contractual fairness is an important principle of civil law and plays essential role in the stability of civil relationships. Article 325 of the Civil Code of Georgia provides the requirement to determine the contents of obligation on the basis of fairness. It includes not only the contractual relations envisaged by the CCG, but also the various institutions of private law.

CCG establishes the definition of the content of the obligation on the basis of fairness when the content of the obligation is determined by one of the parties or by a third party of the contract.

In this case the party by whom the content is defined is obliged to determine the content of the contract on the basis of fairness. There are cases when the participants of civil relations are in a state of inequality and there is a threat of abuse of the right from the favored party. Thus, the stipulation of the principle of fairness of the contract in CCG is of a crucial importance in order to establish the fair balance between the participants of the civil relationships.

Regardless of importance of the above mentioned article, it has not been the subject of research in Georgian doctrine and its importance was not understood by the court either. The presented paper aims to examine importance of contractual fairness in the private-legal relations and the principles and prerequisites of the use of the provision of Article 325 of CCG in these relations.

Keywords:*Fairness, Contractual Freedom, Contractual Fairness, Private Autonomy, Good Faith, Trust, Determination of Content of Obligation, Interpretation of the Will, Free Discretion, Contractual Party, Third Person.*

1. Introduction

Contractual fairness is cornerstone to stability of civil relationships. According to the article 325 of the Civil Code of Georgia (hereinafter referred to as CCG), if the terms for performing an obligation are to be defined by one of the parties or third person(s), then it is presumed, when in doubt, that such definition shall be constructed on a fair basis. If the party considers that terms are unfair or their determination is delayed, the court shall make a decision.

The content of the article is of general nature and in some cases it is specified in the different fields of private law. However, these articles are not concrete, thus, they are subject of the court's interpretation.

Article 325 of the CCG together with the principles of good faith and trust is one of the ground for the restriction of the freedom of contract - one of the most important principles of civil code and it obliges the participants of the civil relationships, to define the content of obligation fairly.

Due to the frequent inequalities in civil relations, the legislator allows the court to intervene in the determination of the obligation. With this in mind, the authors of the first comments of CCG,[1] projected,

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[1] *Zoidze B., Chanturia L.*, Comments on Civil Code of Georgia, 3rd Book, Tbilisi, 2001, 81 (in Georgian).

that this article would be used often in practice, but unfortunately, this norm has not been examined by any doctrine, and for a long time in the practice of contract law, article 325, have not been understood appropriately.

Therefore, due to the general content of the article and non-consistent or wrong usage in practice. It is essential to define the legal conditions and criteria, which will enable the parties and the court to determine the liability or legal conditions fairly.

2. The Scope of Contractual Freedom in Private Law

According to the part 2 of Article 10 of the CCG, Participants in a civil relationship may exercise any action not prohibited by law, including any action not expressly provided by law. This provision constitutes the principle of private autonomy, which is the crucial principle as for the civil law, as well as for the private law. It implies the right of the participants of private relationships to carry out any action or conclude a contract that is not prohibited by law.[2]

The private autonomy means the right granted to a person within the limits of his/her capacity of right to conduct and regulate his/her issue through concluding various contracts.[3] Principle of private autonomy in the Contract Law reflects in Article 319, which has proven to be a contractual freedom.

2.1. The Importance of Contractual Freedom

The contents of the obligation arising on the basis of the agreement shall be first and foremost determined by the agreement of the parties. On the basis of the principle of contractual freedom parties are free to define the content of the contract and make amendments to it.[4]

Parties are not obliged to define the contents of the contract exhaustively, it is sufficient if the content is definable. Regulatory holes can be filled with filler interpretation. Finally, it depends on the agreement of the parties, taking into consideration reasonable judgement, their interests,[5] the principles of good faith, trust and their hypothetical wills.[6] As long as the dispositive norms contain existing regulations of the CCG, the complementary definition of the contract is preferred.[7]

2.2. Restriction of Contractual Freedom

Parties are able to define the content of their contract according to their will on the basis of contractual freedom (private autonomy), which is stipulated in article 319 of the CCG. However, the

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2 *Khubua G.,* Theory of the Law, Tbilisi, 2004, 208 (in Georgian).

3 *Larenz K.*, AT, 7. Auflage, 40-41, see in: *Zoidze B., Chanturia L.*, Comments on Civil Code of Georgia, 3rd Book, Tbilisi, 2001, 57 (in Georgian).

4 *Looschelders D.*, Schuldrecht AT, 3.überarbeitete Auflage, Carl Heymans Verlkag, Rn. 231.

5 BGHZ 41, 271 (279).

6 BGHZ 84, 1 (7).

7 *Palandt/Heinrich*, §157, Rn 4 ff. see in: *Looschelders D.*, Schuldrecht AT, 3.überarbeitete Auflage, Carl Heymans Verlkag, Rn. 230.

principle of pre-eminent contractual freedom can be restricted. These restrictions must be prescribed by law. For instance, when the content of the agreement is contrary to the current legislation or the norms of morality the freedom of contract is restricted.[8] The right to define the content and form of the contract as well as the right to modify the content of the obligation can be subject to restriction.[9]

Determining the content of the obligation may be restricted by prohibitions of law, morals,[10][11] public order,[12] provisions that promote civil law principles and other general norms.[13] These issues have long been interpreted as limited,[14] but now, the basic importance of the terms of the contracts for controlling the contents of the contract is reflected in the circumstances of prohibition of the inequality, taking into consideration the fundamental rights.

In civil law, contractual freedom is not an absolute notion and it is limited by contractual fairness. As parties enjoy equal contractual rights, the obligations should be determined on the basis of contractual fairness.[15] Two points of view can be found in legal doctrine. According to one opinion, in order to be fair the decision, it must be based on the accounting rules and the requirements of the law, whereas, pursuant to another point of view the contents of the obligation cannot be restricted by the accounting rules, but the economic reality must be taken into account, so that the consumer is not deceived.[16]

3. Defining of the Content of the Obligation on the Basis of Fairness

The contents of legal obligation arise from a particular agreement or directly from the law.[17] Under Part 1 of Article 317 of the CCG, for an obligation to arise there shall be a contract between the parties except when the obligation arises from tort (delictus), unjust enrichment or other grounds prescribed by law. Only when the content of the obligatory relationship is determined, the questions whether the obligation was terminated by the performance of the obligation, whether the ground for termination of the contract on basis of violation of obligation and thus, the right to claim damages exist.

The idea of social state includes the protection of the weak party of the contract and the obligation to define fair conditions.[18] The standard of fairness of the contract, to some extent, is imposed by the CCG which establishes the protection of principles of good faith and trust.[19]

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[8] *Hütte F., Helborn M.*, Schuldrecht AT, 3. Auflage, Verlag Dr. *Schmidt R.*, 2005, Rn 46.

[9] *Looschelders D.*, Schuldrecht AT, 3.überarbeitete Auflage, *Heymans C.*, Verlkag, Rn. 233.

[10] BGHZ 37, 319 (323);104, 279 (281); BGHZ 37, 319 (324).

[11] *Bydlinski P.*, Bürgerliches Recht, Bd 1, 5., aktualisierte Auflage, Wien, 2010, Rn. 7/39.

[12] *Mohr J.,* Sicherung der Vertragsfreicheit durch Wettbewerbs- und Regulierungsrecht, Verlag Mohr Siebeck, Bd. 196, 820.

[13] *Looschelders D.*, Schuldrecht AT, 3.überarbeitete Auflage, Carl Heymans Verlkag, Rn. 238.

[14] *Krammer,* MünchKomm, Verlag C.H. Beck, München, 2012, §145, Rn. 19.

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[17] *Brox/Walker*, Allgemeines Schuldrecht, 37. aktualisierte Aufl., München, 2013, 69.

[18] *Dzlierishvili Z., Tsertsvadze G., Robakidze I., Tsertsvadze L., Janashia L.*, Contract Law, Tbilisi, 2014, 56 (in Georgian).

3.1. General Grounds for Determining of Contents of the Obligation

In the case of a contractual obligation, the obligation must be defined or definable, and the agreement is deemed to be construed as if its contents are defined or at least definable.[20] In the case of indefinite obligation, a debtor cannot be required to perform the obligation,[21] and it is practically impossible to enforce obligation.[22]

Often the obligations are not determined by the parties, for example, when it comes to the subject and type of the obligation, the time and place of fulfillment. Nevertheless, the contents of the obligatory relationship are, of course, clear when the contents of the obligation are determinable. There are many ways to establish these objective circumstances, such as a price list when purchasing goods at the store, or market price of purchasing stock shares. Additionally, the legislative regulations will be taken into account when determining the content. For example, in accordance of part 2 of Article 630 of the CCG, if the amount of compensation is not agreed upon, a tariff rate shall be deemed to apply where such rate exists, but where no tariffs exist, a customary fee shall apply.[23] The identical content is the German Civil Code (hereinafter referred to as "GCC"), §632 II, which implies that if the item is to be repaired and the payment is not imposed, it is deemed to be conventional remuneration.[24]

If the content of the agreement is not expressed clearly from the Agreement of the Parties, it may be possible to explain the interpretation of the will based on general norms (Article 52 of the CCG). There is same case, when contents of the obligation are unclear, ambiguous or mutually exclusive, as well as when its expressions demand amendment and completion.[25] If the explanation of the parties can not lead to a predetermined definition, then we should use the so-called methods of filling interpretations of the agreement. The purpose of determining the contents of the agreement by interpretation of the will is to determine whether or not a particular action has any value or what the content might be, when the purpose of the filling interpretations of the agreement is to eliminate the gaps of the contract.[26] It is linked to a purpose of the parties and is understood as a legal source from which the open-ended content can be filled with considering of good faith and trust.[27] When the filling interpretation of the contract the separate issues are missed or the terms of the contract are given in certain shortcomings. While interpreting the will the content of the internal will of the party with its expression has to be determined

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19 *Dzlierishvili Z., Tsertsvadze G., Robakidze I., Tsertsvadze L., Janashia L.*, Contract Law, Tbilisi, 2014, 57 (in Georgian).

20 BGHZ 55, 248, 250; BGH NJW-RR1990, 270, 271 (in Georgian).

21 *Hütte F., Helborn M.,* Schuldrecht AT, 3. Auflage, Verlag Dr. *Schmidt R.*, 2005, Rn 45.

22 *Brox/Walker*, Allgemeines Schuldrecht, 37. aktualisierte Aufl., München, 2013, 69, Rn. 1.

23 For example, we can also refer to Article 510 of the CCG for determining the price of redemption, in determining the cost of the cargo value of Article 692, the value of the cargo, for the determination of the amount of remuneration during the mediation of Article 744.

24 *Brox/Walker*, Allgemeines Schuldrecht, 37. aktualisierte Aufl., München, 2013, 70, Rn. 1.

25 Decision of the Civil Cases Chamber of the Supreme Court.of Georgia, 23.02.2015, № as-1144-1090-2014 (in Georgian).

26 *Hütte F., Helborn M.,* Schuldrecht AT, 3. Auflage, Verlag Dr. Rolf Schmidt, 2005, Rn 46.

27 BGHZ 9, 273ff; BGHZ127, 138, 142.

and thus the contents of the agreement will be defined.[28] After the expiry of this method, the content of the contract cannot be established, the dispositive norms of the CCG can be used.[29]

3.2. Define the Contents of the Obligation by the Contracting Party or the Third Person

The Contents of the Agreement may be determined by the agreement of the Parties, and there is also the possibility that the Parties may leave the details open or specify details of the contract by one of the parties or by third person.[30] The contents of the fulfillment in such cases are not absolutely certain at the moment of concluding the contract, it must be determined after the concluding of the contract, before the commitment of the obligation.[31] Such an agreement does not contradict the requirement of the determination of the contract, because this content in all cases is determinable.[32]

The CCG allows the possibility that separate conditions of the contract may be determined by one of the parties or third person(s). In such case, it is essential that there must be agreement between the parties that there is such a contract on the determination of the obligation, and which party (the person) is authorized to make this determination.[33]

To use of Article 325 of the CCG the contents of the obligation shall not be determined, and if the Parties specifically define terms of the contract or if it is determinable by other circumstances, Article 325 of the CCG is no applicable. Therefore, first of all, the content of the fulfillment cannot be determined by the agreement of the parties by the filling interpretation or by other regulations, but if it cannot be established in this way, Article 325 shall be applied.[34]

Definition of the terms of the agreement on the basis of fairness is important to determine how well the obligation is fulfilled. The duly fulfillment of the obligation is mainly related to the subject of performance, in particular the debtor shall make fulfillment according to the agreement. If the concrete condition is not agreed or its determination is the prerogative of one of the parties, the performance shall be fulfilled in good faith and fair. In such a case, the assessment of these principles is a court authority and gives the opportunity to make a decision based on the principles of good faith and fairness.[35]

If the Party does not consider the terms as a fair or their determination are delayed, the Court shall make a decision on basis of part 2 of Article 325. In addition, if the determination is delayed, there is a possibility to determine the content of obligation or require compensation for damage.[36]

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[28] Decision of the Civil Cases Chamber of the Supreme Court.of Georgia, 23.02.2015, № as-1144-1090-2014 (in Georgian).

[29] *Hütte F., Helborn M.*, Schuldrecht AT, 3. Auflage, Verlag Dr. *Schmidt R.*, 2005, Rn 47.

[30] Ibid, Rn 50.

[31] *Brox/Walker*, Allgemeines Schuldrecht, 37. aktualisierte Aufl., München, 2013, 70, Rn. 2.

[32] *Hütte F., Helborn M.*, Schuldrecht AT, 3. Auflage, Verlag Dr. *Schmidt R.*, 2005, Rn 50.

[33] Ibid, Rn 51.

[34] Ibid, Rn 52.

[35] *Dzlierishvili Z., Tsertsvadze G., Robakidze I., Tsertsvadze L., Janashia L.*, Contract Law, Tbilisi, 2014, 380 (in Georgian).

[36] *Brox/Walker*, Allgemeines Schuldrecht, 37. aktualisierte Aufl., München, 2013, 72, Rn. 9.

We also find similar content norms in the GCC, but the main difference is that this case is not regulated by one legislative norm. Determining the terms of the contract by the party is provided by §315 and the determination of the terms of the contract by the third person(s) is provided by §317.

The norms set out not only the basic criteria for determining the obligation, but also its rules and basis of authenticity of the agreement. According to the GCC §315 II, the determination is made by a statement to the other Party which has to be handed over to the other party and the withdrawal is not permitted.[37] There is no special form for revealing this will, unless it is established by the law.[38] According to GCC §315 III, if the definition is to be evaluated fairly, then the other party is obliged only if it is fair.[39]

The GCC, unlike CCG, also regulates the case when condition is determined by several third persons. In such a case, in case of a dispute, it is assumed that it is necessary to make a joint decision.[40] More detailed regulation is included in the GCC §315 and §317 about rescission of definition, which is not regulated by the CCG.

3.2.1. Determine by the Contracting Party

The Parties may either directly or concisely agree that one of the parties shall be entitled to determine the subject and content of the obligation. In such case, questions arise what basis and rules of determining the content of the obligation need to be determined.[41]

3.2.1.1. Authorized Person to Determination

The type of performance or its procedure can be defined as the creditor's and the debtor's prerogative. German legislation in case of bilateral obligations also makes an exception: if the compensation for the performance is not determined, then the right holder is entitled to determine the remuneration.[42] On the contrary, the CCG does not allow such exceptions and as it makes permissible to determine the any obligation by any party.

The creditor has the right to determine the obligation in cases when there is an agreement on leaving the price issue open or the change of price in case of specific circumstances, namely, the time of delivery of goods.[43] We deal the debtor's determination of the obligation, when employer promises to insure employees.[44]

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[37] BGH NJW 2002, 1424.

[38] *Hütte F., Helborn M.*, Schuldrecht AT, 3. Auflage, Verlag Dr. *Schmidt R.*, 2005, Rn 53.

[39] *Kropholler J.,* Study Comment of the German Civil Code, 13th edition, translation of Darjania T. and Chechelashvili Z., Tbilisi, 2014, 220 (in Georgian).

[40] *Kropholler J.,* Study Comment of the German Civil Code, 13th edition, translation of Darjania T. and Chechelashvili Z., Tbilisi, 2014, 221 (in Georgian).

[41] *Looschelders D.*, Schuldrecht AT, 3.überarbeitete Auflage, *Heymans C.* Verlkag, Rn. 241.

[42] *Brox/Walker*, Allgemeines Schuldrecht, 37. aktualisierte Aufl., München, 2013, 70, Rn. 3.

[43] Ibid, 71, Rn. 4.

[44] *Brox/Walker*, ErbR, Rn. 443; see in: *Brox/Walker*, Allgemeines Schuldrecht, 37. aktualisierte Aufl., München, 2013, 71.

It should be noted that often defective obligation, the opposite performance can be interpreted by the explanation of the will. Consequently, in such case the relevant norms of determination are not applied.[45] If opposite performance is determined by the schedule or duties of the obligation, set with the minimum or maximum payments, a person with the right of claim can determine the bilateral limit.[46]

3.2.1.2. Determination on Basis of Will of the Parties

According Article 52 of the CCG, the explanation of the will is to be established as a result of reasonable judgment, and not only from the literal meaning of the statement. When explaining the content of the agreement, first of all it is necessary to determine the true will of both parties.[47] In this explanation, the main problem is in impartiality and fairness of explanation,[48] so it is necessary to have specific criteria.

The reasonable judgment should be based on certain criteria, in particular the explanation of the will should be taken by the possibility of understanding (comprehension) of the receiver of the will. Besides, it is possible to use trade traditions and customs (Article 338 of the CCG), as well as principles of contractual law.[49] The explanation must be made as the person being in the place of the contracting party does.[50]

The obligation shall be determined by revealing will by the authorized person. Revealing the will is not withdrawal, as well as expressing any will which became part of the contract. It does not require the form even when the contract or fulfillment requires the protection of the form. In this case, general norms of invalidity of contract are used.[51]

3.2.1.3. Determination on Basis of Fairness

First of all, it is important to define what conditions of the Article 325 of the CCG are applicable. Determination will be based on fairness unless otherwise agreed in the agreement. The second prerequisite of the norm is that determination should be carried out by either one of the parties or by a third party/person(s) or the determination to be delayed or unable to be established, and as regards the code entry, "in doubt", the value is no longer valid. Article 325 of the CCG sets out the possibility of

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[45] BGHZ 94, 98, 101.

[46] *Brox/Walker*, Allgemeines Schuldrecht, 37. aktualisierte Aufl., München, 2013, 71, Rn. 4.

[47] *Zoidze B., Jorbenadze S., Akhvlediani Z., Ninidze T., Chanturia L.*, Comments on Civil Code of Georgia, 1st Book, Tbilisi, 2002, 299 (in Georgian).

[48] *Canaris C-G., Grigoleit H.C.*, Interpretation of Contracts, Towards a European Civil Code, 3rd Edition, 2004, 449. See in: *Bachiashvili V.*, Definition of the contract according to the principles of the European Contract Law and the expediency of its implementation in the Georgian legislation, "Journal of Law" №1, Tbilisi, 2013, 10 (in Georgian).

[49] Decision of the Civil Cases Chamber of the Supreme Court.of Georgia, 23.02.2015, №as-1144-1090-2014 (in Georgian).

[50] *Lando O., Beale H.G.*, Principles of European Contract Law, Parts I and II, Kluwer Law International, London/Boston, 2000, 289.

[51] *Brox/Walker*, Allgemeines Schuldrecht, 37. aktualisierte Aufl., München, 2013, 71, Rn. 5.

determination of content of contract on basis of fairness in valid contract and it is not ground of the invalidity of the agreement because of the unfairness, even though there was the case when the court considered the contract unfair[52] and immoral, which contradict to the conditions, because unfair conditions in the invalid contract cannot be discussed.

If the definition does not fit in fairness, then it is not a barrier to the party of the contract.[53] The party must protest determination, which should be expressed by applying a claim to the court by the authorized person.[54] Before the decision is made by the court, determination of content of the contract is active.[55] However, there is an opinion in the legal literature that the determination is made by the court itself and not by the party. In case of invalidation of the determination, the condition shall be determined by a court decision.[56] This is possible even when the determination of the terms of the contract is delayed by the party (lagging).

The fairness gives the party the ability to make decisions, but the decision is based on the criteria of fairness, the consideration of the interests of the parties and the study of the specific case.[57] The authorized person on defining the performance has a reasonable assessment of the action area and may not have only one "correct" result. Determination is made by the court when the borders of fairness are overcome and not when the court considers that the other definition is correct.[58]

In accordance with part 2 of Article 319 of the CCG, if one of the parties to a contract holds a dominant position in the market, then it shall be bound by the obligation to enter into a contract in this field of activity. This party may not unjustifiably offer unequal contractual terms to another contracting party. The mentioned norm represents classic example of the obligation to contract, when the market dominant entity is obliged enter into a contract with a customer, but at the same time the provision in the second sentence will strengthen the principles of fairness as the stronger party will not be able to determine the conditions of the obligation only after own interests.[59]

There is a difference of opinions whether the contractor is obliged to the other party in determining the terms of the contract. The answer to this question is unimaginable. In order to determine whether such obligation exists, it is to be defined by each specific case, but generally we should agree with it, if the party is directly interested in the performance of the contract.[60] The question of discussion is of particular importance to the results of the delay.[61] The lawmaker wanted to introduce this line by opening

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[52] Decision of the Civil Cases Chamber of Tbilisi City Court, 03.11.2015, №2/15651-15 (in Georgian).

[53] *Kropholler J.,* Study Comment of the German Civil Code, 13th edition, translation of Darjania T. and Chechelashvili Z., Tbilisi, 2014, 220 (in Georgian).

[54] *Palandt/Heinrichs*, §315 Rn. 6. See in: Looschelders D., Schuldrecht AT, 3.überarbeitete Auflage, Carl Heymans Verlkag, Rn. 243.

[55] OLG Frankfurt am Main, NJW-RR 1999, 379.

[56] *Brox/Walker*, Allgemeines Schuldrecht, 37. aktualisierte Aufl., München, 2013, 71, Rn. 6.

[57] *Hütte F., Helborn M.,* Schuldrecht AT, 3. Auflage, Verlag Dr. Rolf Schmidt, 2005, Rn 53.

[58] BGHZ 41,280; BGH NJW-RR 1991, 1248.

[59] *Dzlierishvili Z., Tsertsvadze G., Robakidze I., Tsertsvadze L., Janashia L.*, Contract Law, Tbilisi, 2014, 380 (in Georgian).

[60] *Hütte F., Helborn M.*, Schuldrecht AT, 3. Auflage, Verlag Dr. *Schmidt R.*, 2005, Rn 54.

[61] *Brox/Walker*, Allgemeines Schuldrecht, 37. aktualisierte Aufl., München, 2013, 71, Rn. 7.

a simple way of defining the contents of the contract. Without this division, the case should go through the procedure of the claim and its execution.[62] The Contracting Party may also specify the term of the contract as a special requirement.[63]

3.2.1.4. Determination on Basis of Free Judgment

The GCC[64] and Legal Literature distinguish the definition based on fairness and free judgment. If the Parties agree that the obligation shall be determined on the basis of free judging of one of the Parties, the norms for determining the obligation on the basis of fairness are not applicable.[65] In the case of a valid agreement on defining the terms of the agreement on the basis of free judgment, the decision of the court cannot be based on fairness.

To verify whether the Parties have agreed on the determination of the obligation on basis of fair or free judgment, they should pay attention not to the literal meaning of wording, but to the contents of the agreement. It is assumed that there is an agreement on the definition on basis of fairness, for example, the condition is given in the contract: "The agreement on the price is openly left".[66]

3.2.2. Determination by a Third Person(s)

Due to the provisions of Article 325 of the CCG, the parties may also agree that the content of the performance is determined by a third person(s). Such a case occurs when special knowledge is required for determination of performance[67] and at the same time, the contractual obligation must be decided by a person with a trust.[68] In such a case, there is a need for an agreement that the right to determine the obligation is transferred to a third person (or several third parties).

In a contract that is concluded by a third person, the beneficiary third party is not a party of the contract. Nevertheless, it will not be understood for the purposes of a norm as a third party, as it has the authorities to determine the performance of the agreement as a party of the contract.[69]

3.2.2.1. The Contents of the Legal Norms for Determination of Performance

In the literal sense, the third persons must be given the right to determine the performance; under this, it is also meant to determine the possibility of one performance only. For example, we can consider the case where “a” and "b" make a purchase agreement on the picture provided that “c” should define the purchase of agreement on a painting and place of fulfillment.

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62 *Brox/Walker*, ZVR, Rn. 1065 ff.
63 Compare: BGH NJW 1983, 2934.
64 §319 II GCC.
65 *Brox/Walker*, Allgemeines Schuldrecht, 37. aktualisierte Aufl., München, 2013, 71, Rn. 8.
66 Ibid.
67 *Hütte F., Helborn M.,* Schuldrecht AT, 3. Auflage, Verlag Dr. *Schmidt R.*, 2005, Rn 56.
68 *Brox/Walker*, Allgemeines Schuldrecht, 37. aktualisierte Aufl., München, 2013, 73, Rn. 10.
69 BGH NJW-RR 2003, 1355.

Often the third person is not obliged to complete the non-existing performance in order to make an indefinite agreement real, but rather intentionally, but only to determine the contents of the contract or to set certain conditions, which are indirectly intended to determine the content of the performance (mediator in a narrow sense).[70]

There is the third person arbitrator, when he parties agreed with the sale price and the third person must determine the value. We have similar results even, when dividing property between "a" and “b” is distributed by “c”. If the “b” disagrees with any of the rules of division, and “c” decides to divide the property by another rule, “a” is not obliged to agree with this rule of division and, moreover, “c” should take into account the interests of the parties and the principle and rules of fair decision. Such agreements are called the expert decision (Schiedsgutachtenvertag). Such an agreement is aimed at binding definition of obligation by the competent third person, in actual circumstances. Theoretically there is only one correct decision, but in reality, the third person has a large area of action for decision-making.[71] The terms of the Article 325 shall apply to the agreement on the expert in such a way that the strict separation is not obligatory.

It should be distinguish from the mediator in accordance with Civil Procedure Code.[72] In such case, instead of court, the mediator shall decide the issues relating to the contract, in which are not used Article 325 of the CCG. For the separation it is crucial not the will of parties of contract, but the will of third person. The third person establishes only the elements of actual circumstances, so that the decision on the request is protected by the court, while mediator decides the legal relationship between the parties directly.[73]

3.2.2.2. Determination on Basis of Fairness

Definition of a liability by a third person, as well as determining the obligation of one of the Parties, shall be carried out by the application of one of the contracting parties to the other[74] and shall not be withdrawn.[75] If the determination of performance is to be made by a third person, in case of suspicion or dispute, it is assumed that the determination shall be based on justification. If the determination of his obligation is obviously unfair, then it has no power to bind the party. In such a case, definition should be based on a court decision. If we compare a determination by third person to the contracting party's determination in connection of non-binding of obligation because of unfairness, we conclude that different regulation is caused by the fact that the third persons determine the content of obligation with more accuracy and there is better guarantee than by determination of performance by the contractual party[76] The Court's decision shall be apply instead of the third person’ determination, when the third

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70 *Brox/Walker*, Allgemeines Schuldrecht, 37. aktualisierte Aufl., München, 2013, 73, Rn. 11.

71 *Looschelders D.*, Schuldrecht AT, 3.überarbeitete Auflage, *Heymans C.* Verlkag, Rn. 252.

72 *Brox/Walker*, Allgemeines Schuldrecht, 37. aktualisierte Aufl., München, 2013, 73, Rn. 11.

73 BGHZ 6, 335.

74 *Hütte F., Helborn M.*, Schuldrecht AT, 3. Auflage, Verlag Dr. *Schmidt R.*, 2005, Rn 57.

75 *Brox/Walker*, Allgemeines Schuldrecht, 37. aktualisierte Aufl., München, 2013, 74, Rn. 12.

76 Ibid, Rn. 13.

person by impartial and competent observer's estimation[77] will violate the credibility of the trust and good faith,[78] which may misuse the right granted to him.[79]

Determination of liability is based on a court decision, even if the third person fails to decide or does not want to decide whether or when it is delayed. This regulation is corresponds with the views of the Parties: When a third person determines the obligation on the basis of fairness, it depends on the trust of this person[80] as well as the decision on the subject. That is why the court can make a decision on defining the obligation instead of third person.[81]

The difference between the party and the third person in determining the obligation is that in the case of the latter, the court makes a decision when determination is grossly unfair. This step is based on the idea that the third person is usually neutral and has knowledge of the subject, which, in the case of a small scale of unfairness, should not be invalid.[82]

3.2.2.3. Determination on Basis of Free Judgment

The parties may also agree that the third person will make a decision based on free judgment. In such a case, the determination of the obligations under the court's decision is not acceptable, as the parties attach importance to the decision of the third person. If the third person fails to define or delay it, the contract will not be true.[83] However, the parties may agree that in this case the court will determine the performance on basis of fairness.[84] In the event that a third person decides on determining the obligation, it shall be deemed to binding the parties in the frames of law and morality, even when defined content is unfair[85]

3.2.2.4. Determination of Performance by Several Third Parties.

If the obligation is determined by several third persons, it is necessary to take the joint decision (§317 II GCC).[86] If there is no joint decision, its legal consequences are identical to the fact that it has not been determined at all.[87] In this case the court will decide.[88]

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[77] BGH, NJW 1991, 2761.
[78] Compare: BGH NJW 1958, 2067; 1991, 276; *Looschelders D.*, Schuldrecht AT, 3.überarbeitete Auflage, *Heymans C.* Verlkag, Rn. 248.
[79] *Bydlinski P.*, Bürgerliches Recht Bd 1, AT, 5. aktualisierte Aufl., Wien, 2010, Rn. 3/19.
[80] *Looschelders D.,* Schuldrecht AT, 3.überarbeitete Auflage, *Heymans C.* Verlkag, Rn. 247.
[81] Prot I, 468 f.; Mot. II, 193. see in: *Brox/Walker*, Allgemeines Schuldrecht, 37. aktualisierte Aufl., München, 2013, 74, Rn. 14.
[82] *Hütte F., Helborn M.*, Schuldrecht AT, 3. Auflage, Verlag Dr. *Schmidt R.*, 2005, Rn 59.
[83] *Brox/Walker*, Allgemeines Schuldrecht, 37. aktualisierte Aufl., München, 2013, 75, Rn. 15.
[84] *Looschelders D.*, Schuldrecht AT, 3.überarbeitete Auflage, *Heymans C.*Verlkag, Rn. 249.
[85] Hk-BGB/Schulze §319 Rn. 6; see in: *Looschelders D.*, Schuldrecht AT, 3.überarbeitete Auflage, *Heymans C.*Verlkag, Rn. 249.
[86] *Hütte F., Helborn M.*, Schuldrecht AT, 3. Auflage, Verlag Dr. *Schmidt R.*, 2005, Rn 58.
[87] *Brox/Walker*, Allgemeines Schuldrecht, 37. aktualisierte Aufl., München, 2013, 75, Rn. 16.
[88] *Looschelders D.*, Schuldrecht AT, 3.überarbeitete Auflage, *Heymans C.* Verlkag, Rn. 251.

Nevertheless, there is a case in the German judicial practice when the majority principle is used.[89] As for the case when determining the amount of money and given the different amount of money, in case of the dispute the average amount is implied.[90]

3.3. Invalidation of Determination of Contents of the Obligation

The CCG does not regulate the request of a party or a third person to rescind and invalidate this condition when determining the condition of the obligation. In contrast, the issue of rescission of the fulfillment of obligation by a party or a third person in a particular way is regulated by the German law.

Determination of the terms of the contract is the reveal of the will and is a transaction in the sense of Article 50 of the CCG. Consequently, the determination of the obligation is related to general norms on the invalidation of the legal transaction, but the right to claim has only contractual party, because they are the carriers of the legal burden of the transaction, not the third party.[91]

Rescission may be due to error, threatening or deceiving, but the right to claim is only for contractual party.[92] The third person cannot request rescission because he/she does not have legal interest in it. Rescission on the basis of deceiving or error should be made immediately, after having learned about the grounds for rescission (§318 II GCC).[93]

If it becomes clear that the parties agree on determination of conditions of obligation on the basis of free discretion or fairness, the question arises whether this agreement is valid, or creditor is entitled to define the term on basis of fairness and if such an agreement may be invalidated on the basis of §138 GCC (Invalidation of the agreement due to immorality; for example, condition for the debtor by determining the price by the seller).[94] The agreement on determination is not valid and therefore will not be a binding if it is contrary to the §134 GCC (invalidation of the agreement is due to its illegality).[95]

4. Cases of Defining the Contents of the Liability in Private-Legal Relations

Article 325 of the CCG is placed in the first general part of the third book of the CCG, which establishes the unity provisions of the obligationary-legal relationship. The general part of the obligatory law consolidates the general norms which regulate the obligatory relations in private law, when special norms does not exist. Article 325 of the CCG is placed in the CCG, but its field of action is larger and includes private law.

The content of the obligation is determined on the basis of fairness not only in civil law but in labour, corporate, consumer protection, or competition law, which will be discussed below.

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89 BGHZ 22, 343 (346).
90 *Looschelders D.*, Schuldrecht AT, 3.überarbeitete Auflage, *Heymans C.*Verlkag, Rn. 251.
91 *Hütte F., Helborn M.*, Schuldrecht AT, 3. Auflage, Verlag Dr. *Schmidt R.*, 2005, Rn 58.
92 §318 II GCC.
93 *Brox/Walker*, Allgemeines Schuldrecht, 37. aktualisierte Aufl., München, 2013, 74, Rn. 12.
94 Ibid, Rn. 16.
95 Ibid, Rn. 9.

4.1. Defining the Contents of the Liability in Contracts Envisaged by the CCG

The private autonomy of the parties envisaged by the CCG, allows the parties to specify the contents of the Agreements, however, in some cases the Code establishes the rules, according to which the certain conditions should be determined by one party. In such cases article 325 of the CCG is applicable. For instance, during travelling, the time limit for the elimination of the shortcoming of the travel is set by tourist (Article 659 CCG)[96]. There is a similar solution if the time for the fulfillment of the obligation is not agreed, creditor determines according to the Article 365 of the CCG[97], however, "the term set by one party should also respect the interests of the other".[98] As mentioned above, the autonomy of the parties is decisive factor, while determining the terms of the contract, but the contractual freedom is limited by contractual fairness and does not allow the side to abuse the right.[99] We meet another expression of this principle in the subparagraph "a" of Article 347 of the CCG, which prohibits the standard conditions by which the offeror fixes unreasonably long or obviously insufficient periods of time for accepting or refusing to accept an offer, or for performance of certain actions.[100]

Moreover, the CCG contains other legal cases, when the determination of the obligations on the basis of fairness, and, thus, the usage of corresponding provisions is essential.

4.1.1. Self-Contracting

Part 1 of Article 103 of the CCG allows the contract to be made through a representative, except when due to the nature of the contract, it should be concluded by a particular person, or when the law prohibits the making of a contract through representative.

The aforementioned provision is stipulated in Article 114 of the CCG, which prohibits self-contracting. According to the article 114, unless otherwise provided by the consent, representative is not allowed to make any legal transaction on the behalf of the principal with himself/herself, either in his own name or as an agent of a third party, except when the legal transaction already exists for the performance of certain obligations. This provision prohibits conclusion of a contract when one side of the transaction and the other party's representative is the same person. However, the ban on self-contracting has an exception, namely, if the representative acts on the behalf of the power of attorney, or if he/she fulfills the obligation.[101]

The exception of Article 114 of the CCG provides that if the principal has granted representative the right to make an agreement with himself/herself, then he/she appears to be both parties of the

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[96] *Dzlierishvili Z., Tsertsvadze G., Robakidze I., Tsertsvadze L., Janashia L.*, Contract Law, Tbilisi, 2014, 416 (in Georgian).

[97] *Zoidze B., Chanturia L.*, Comments on Civil Code of Georgia, 3rd Book, Tbilisi, 2001, 287 (in Georgian).

[98] Ibid, 57 (in Georgian).

[99] *Dzlierishvili Z., Tsertsvadze G., Robakidze I., Tsertsvadze L., Janashia L.*, Contract Law, Tbilisi, 2014, 415 (in Georgian).

[100] Ibid.

[101] *Zoidze B., Jorbenadze S., Akhvlediani Z., Ninidze T., Chanturia L.*, Comments on Civil Code of Georgia, 1st Book, Tbilisi, 2002, 299 (in Georgian).

contract, therefore, the content of the obligation will be defined by himself/herself only. In such case, the parties have not directly agreed obligation to be determined by one person only, however, due to the specificity of this legal relationship, it is deemed that the power of attorney granted representative the power to determine the contents of the obligation.

In case of self-contracting, definition of the contents of the obligation entirely depends on the representative. This makes it possible to abuse the right and use it for receiving the personal benefits, against the interests of the principal. Thus, principal is entitled on the basis of Article 325 of the CCG to demand the fair determination of the content of the agreement and failing that, he/she is entitled to apply to the court.

4.1.2. Adjustment of the Terms of the Contract to the Changed Circumstances

In accordance with Article 398 of the CCG, if the circumstances that were the grounds for the conclusion of a contract have evidently changed after the conclusion of the contract, and, the parties would not have concluded the contract or would have executed it with different contents, if they were aware of such changes, the modification and adaptation of the contract to the changed circumstances can be demanded by each party. Failing that, taking into account individual circumstances, a party to the contract may not be required to strictly observe the unchanged contract.

For appliance of the provision must be fulfilled these preconditions: after the conclusion of the contract, the circumstances must be changed and the parties would not have concluded the contract or would have executed it with different contents.

The second part of Article 361 of the CCG establishes the presumption of duly performance of the obligation, which implies that the obligation must be fulfilled, but this provision is not an absolute in its character, as the circumstances may clearly change and the parties may not be liable for undue burden.

As it is known, contractual freedom includes not only the conclusion and determination of its content but also the freedom to amend it.[102] The order prescribed by the CCG provides for protection of contractual fairness. Article 398 of the CCG guarantees contractual fairness when the parties may change the conditions which are unfair for them, due to the modification of the circumstances.[103] The changed circumstance makes impossible to fulfill the terms of the contract and demanding to remain it inforce without adaptation contradicts the principles of fairness and good faith – the cornerstones of the civil circulation.[104]

In case of change of circumstances, Article 398 of the CCG determines rule of expected behavior of the parties and its legal consequences. The Parties must first try to adjust the agreement with the changed circumstances. If it is impossible to adapt the contract to the changed circumstances, or the other party disagrees with it, then the party, whose interests have been infringed may refuse the contract.

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[102] *Looschelders D.*, Schuldrecht AT, 3.überarbeitete Auflage, *Heymans C.*Verlkag, Rn. 231.

[103] *Tabatadze D.*, Adjusting the Terms of the Contract to the Changed Circumstances, Georgian Bussines Law Review, 2nd edition, Tbilisi, 2013, 30 (in Georgian).

[104] Decision of the Civil Cases Chamber of the Supreme Court.of Georgia, 06.07.2010, №as-7-6-2010 (in Georgian).

If the circumstance has changed, one party of the contract addresses the other party for the amendment of these conditions. In case if the Parties fail to agree on the adaptation of specific terms, the party who considers that his/her rights are breached is entitled to refuse the fulfillment of the contract, which is followed by a bilateral restitution According to the article 352 of the CCG.[105]

In most cases when the circumstances of the contract change, one party of the contract is more likely to suffer damage than the other. Thus, restitution is impossible and continuation of the contract with the modified conditions which apply to the changed circumstances is more beneficial. There can be a case when the parties agree on the need of adjusting the contract to the new circumstances, however, specific conditions hamper their agreement. In both cases, special importance should be given to the crucial principle of law, which states that "the obligation must be fulfilled".[106] In the first case, determination of fulfillment of the obligation largely depends on the party which is better positioned compared to another party, and in the second case due to the disagreement of the parties, the determination of the specific content of the obligation is delayed. In both cases, the court must guide with Article 325 (2) of the CCG, to determine most fair condition in relation to the changed circumstances[107] and thus, restore the contractual fairness.[108]

4.1.3. Defining Standard Conditions of the Contract on Basis of Fairness

Article 342 of the CCG establishes the definition of the standard of contractual conditions. Standard contract terms are provisions prepared in advance for repeated use that one party (the offeror) proposes to the other party, and which lay down rules that deviate from, or supplement statutory provisions.

There is the standard condition if it is set by one of the contracting parties, intended for multiple use and is determined by the terms of the law or its complementary conditions. From this definition it becomes clear that the standard conditions are used by the persons participating in civil relations, who are in the many contracts daily, and thus, in order to facilitate this relationship, use the previously agreed terms of the contract.[109] This is not surprising, because a person who has a lot of legal relationships every day thinks to make these procedures easy to pass because the definition each contract definition will take much time. That is why standard terms of the contract are often referred to as conditions for accession to the contract.[110]

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[105] Decision of the Civil Cases Chamber of the Supreme Court.of Georgia, 06.07.2010, №as-7-6-2010 (in Georgian).

[106] *Legashvili D.*, Impact of Changed Circumstances on Contractual Relations, "Journal of Law" №2, Tbilisi, 2013, 80 (in Georgian).

[107] Compare: *Chitashvili N.*, Complication and Impossibility of Performance of Changed Circumstances, "Journal of Law" №2, Tbilisi, 2011 (in Georgian).

[108] *Tabatadze D.*, Adjusting the Terms of the Contract to the Changed Circumstances, Georgian Bussines Law Review, 2nd edition, Tbilisi, 2013, 30 (in Georgian).

[109] *Kakoishvili D.*, The Standard Conditions of Contract, Georgian Bussines Law Review, 2nd edition, Tbilisi, 2013, 68 (in Georgian), <http://nccl.ge/m/u/ck/files/Geo_Comm_Law_Review_2013.pdf>, [10.04.2018].

[110] *Zoidze B., Chanturia L.*, Comments on Civil Code of Georgia, 3rd Book, Tbilisi, 2001, 181 (in Georgian).

When it comes to determining conditions for one of the contracting parties, it is necessary to consider the provisions of Article 325 of the CCG. Therefore, it is necessary to verify the authenticity of the standard conditions on the basis of the criterion of fairness.[111]

When using the standard conditions, the contractor's condition may have a risk that this right may be used in an unfair manner, prohibited to the Article 346 of the CCG. The principle of good faith is, first of all, involving the interests of the other party, in the absence of which the right is abused.[112] It is a civil law assessment criterion according to which, by distinguishing of fair and unfair, the person makes the fairest decision by the estimate of objective observer.[113] In accordance with the Austrian case law, the standard condition of the contract contradict the principles of trust and good faith if it is against the buyer in accordance with the Austrian Civil Code (ABGB) §879 III. §879 The ABGB defines that the agreement is invalid, in which the contractual parties are in unequal conditions and considering all circumstances, is contrary to the other party.[114]

According to the Principles of the European Contract Law (PECL), each party must act in accordance with good faith and fair dealing, which cannot be restricted or excluded from the contract.[115] The principle of good faith and trust is regarded as a comprehensive principle, if there is no specific provision for a specific case.[116] The principle of good faith and trust differs from fairness, but in this case, Article 325 fills Article 346 of the CCG, prohibits dishonest and unfair contracing and establishes the rule of fair dealing.[117]

4.1.4. Determining the Amount of Penalty by the Court

According to the Article 416 of the CCG, parties may take into account the kinds of additional remedies for securing the performance of obligations: penalty, advance payment or a debtor’s guarantee.

With regard to Article 417 of the CCG, the penalty is an amount of money determined by agreement of the parties to be paid by the debtor in the case of non-performance or improper

[111] *Bauer J., Koch M.,* Arbeitsrechtliche Auswirkungen des neuen Verbraucherschutzrechts, DB 2002, 45. See in: *Kereselidze T.*, Control of content of Standard conditions in Labour Contracts, Labour Law (Collection of Articles) II, Tbilisi, 2013, 69 (in Georgian).

[112] Decision of the Civil Cases Chamber of the Supreme Court.of Georgia, 29.06.2015, №as-1338-1376-2015 (in Georgian).

[113] *Kereselidze D.,* General Systemic Concepts of Private Law, Tbilisi, 2009, 83 (in Georgian).

[114] OGH № 2Ob73/10i, 22.12.2010. <http://www.ris.bka.gv.at/Dokumente/Justiz/JJR_20101222_OGH0002_0020OB00073_10I0000_002/JJR_20101222_OGH0002_0020OB00073_10I0000_002.pdf>, {20.10.2015].

[115] Principles of European Contract Law (PECL), Art. 1:201.

[116] *Lando O.*, Is Good Faith an Over-Arching General Clause in The Principles of European Contract Law?, European Review of Private Law, 6-2007, Kluwer Law International, 842.; Compare: *Beale H.*, General Clauses an specisic rules in the Principles of European Contract Law: the good faith Clause in S. GRUNDMANN & D. MAZEAUD (eds.) General Clauses and Standards in European Contract Laws – Comparative Law EC Law and Codification chapter 12.

[117] *Khunashvili N.*, Control of Standard Conditions of Contract and Restriction on Basis of Good Faith, “Journal of Law” №1, 2013, 273 (in Georgian).

performance of an obligation. The penalty is an additional remedy for securing the performance of obligation[118] which has two main purposes: first - stimulate the debtor to fulfill the obligation properly and secondly, compensate the alleged damage to the creditor.[119]

According to Georgian legislation, penalty can be expressed only in monetary form and can be determined in two terms: one time payable (fine) or the sum for violation of timeframe (penalty for daily basis).[120]

Relating to the Article 420 of the CCG the court is entitled to control amount of the penalty and taking into account the circumstances of the case, court may reduce a disproportionately high penalty.[121] "when the penalty reduction, court takes into account the economic conditions and other circumstances, namely, whether the performance of the obligation and the ratio of damage caused due to its non-compliance or improper performance, to the amount penalty, as well as, - economic interest of creditor."[122] The penalty is disproportionately high when its sum will significantly exceed the possible damage caused by the failure of the obligation.[123] The legitimate aim of reducing the penalty is to protect the "weak side" of the contract from possible inappropriate obligations[124] so that the creditor does not get much more penalty for alleged damage.[125]

When dealing with the proportionality and reasonableness of the agreed penalty,[126] Article 420 of the CCG directly relates to Article 325, when the creditor determines the amount of penalty, which defines the terms of the contract on the basis of fairness by the court,[127] if the agreed condition disproportionately obliges the debtor and therefore, it is unfair.[128]

4.1.5. Definition of the Excessively Obligation in the Debtor's Guarantee

The parties may agree to a debtor's guarantee as an additional means of securing an obligation. According article 424 of the CCG debtor's guarantee is an undertaking to perform an unconditional action or an action that is beyond the scope of the contract.

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[118] *Chanturia L.*, Security Interest Law, Tbilisi, 2012, 234 (in Georgian).
[119] *Zoidze B., Chanturia L.*, Comments on Civil Code of Georgia, 3rd Book, Tbilisi, 2001, 488 (in Georgian).
[120] *Akhvlediani Z.*, Obligatory Law, Tbilisi, 1999, 78-79 (in Georgian).
[121] The Court can reduce only Contractual Penalty and not the normally established. See in: Decision of Civil Cases Chamber of Appeal Court of Tbilisi, 25.12.2013, №2b/6267-13 (in Georgian).
[122] Decision of the Civil Cases Chamber of the Supreme Court. of Georgia 12.09.2012, №as-819-771-2012 (in Georgian).
[123] Decision of Civil Cases Chamber of Appeal Court of Tbilisi, 30.11.2011, №2b/2103-11 (in Georgian).
[124] *Meskhishvili K.*, Penalty (The Theory and The Case Law), 10 (in Georgian), <http://www.library.-court.ge/upload/pirgasamtekhlo_k.meskhishvili.pdf>, [10.04.2018].
[125] Decision of Civil Cases Chamber of Appeal Court of Tbilisi, 17.02.2015, №2b/4400-11 (in Georgian).
[126] Decision of the Civil Cases Chamber of the Supreme Court.of Georgia 15.11.2011, №as-988-1021-2011 (in Georgian).
[127] BGH NJW 1994, 45, 46.
[128] Decision of the Civil Cases Chamber of the Supreme Court. of Georgia 12.02.2016, №as-896-746-2015 (in Georgian).

The Parties can freely define the contents of the debtor's guarantee, but it is not absolutely free, since the debtor's guarantee is not valid if it contradicts the law or obliges excessively the debtor (Article 425 of the CCG). Thus, the contractual freedom in this field is bound by the values recognized by the law, and whether it obliges a guarantee excessively, each case is to be judged by the court.[129]

When we discuss about the debtor's guarantee, it is important to refer to its essence and place in civil legislation, and thus establish its scope and legal basis for restricting. According to German law, additional remedy for securing the performance of obligation are placed in one general part[130] of the GCC and referred to as a contractual penalty.[131] This institution implies the agreement of the parties that, in case of violation of the obligation, the debtor is obliged to pay a certain amount of money[132] or to perform any action.[133]

If we compare the norms of the law with Georgian law, the CCG envisages only monetary payment and thus the Article 417 of the CCG corresponds to the context of §339 of the GCC, while the debtor’s guarantee implies the performance of the action, which is equivalent to the alternate contractual penalty provided by §342 of the GCC. In both cases the GCC envisages a reduction of the agreed contractual penalty[134] if it is disproportionately high.

Article 425 of the CCG contains identical content as it is in the Article 420 of the CCG, which allows the possibility to reduce the penalty if it is disproportionately high. As the penalty and debtor's guarantee have general basis and differ only in form, it is necessary to consider the criteria set out in Article 420 in relation to Article 425 as well as the GCC.

As mentioned in the previous section, one of the indicators of determining the disproportion of the penalty is Article 325 of the CCG and the contractual fairness. That is why the Article 325 of the CCG may be used to fill the Article 425 and if the Court considers, that debtor’s guarantee obliges excessively the debtor and it is unfair, court can reduce it on basis of fairness. Of course, we must use the criteria referred in Article 420 to determine the fairness of the claim and this issue shall be settled on the basis of the confrontation the creditor and the debtor’s legitimate aims.

4.1.6. Insurance Relations

According to the part 1 of Article 799 of the CCG, insurer shall be obligated to compensate the insured for the damages resulting from the occurrence of an insured event, subject to the terms of the contract. The first Article regulating the insurance contract indicates that regulation of this contract is mostly entrusted to the agreement of the parties and they must define the substantive terms of the contract.

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[129] Decision of the Civil Cases Chamber of the Supreme Court. of Georgia 19.10.2010, № as-379-352-2010 (in Georgian).

[130] GCC §336-§345.

[131] Vertragsstraffe.

[132] GCC §338.

[133] GCC §342; *Brox/Walker*, Allgemeines Schuldrecht, 37. aktualisierte Aufl., München, 2013, 101.

[134] GCC §343.

One of the parties to the Insurance Agreement, the insurer, under the Insurance Law, is organized under the legal form of either limited liability company or joint stock company,[135] meets the requirements of the National Bank of Georgia[136] and its financial solidarity is guaranteed by share capital, insurance reserves and reinsurance systems.[137] Depending on the above, it is obvious that insurance companies (insurers) are financially strong subjects and in insurance relationships with consumers as a strong party of the contract, and therefore it is important to ensure fair balance between the parties of the contract.

An essential instrument of securing a fair balance in the insurance relations is Article 800 of the CCG, which states that a person who publicly offers an insurance contract, is obliged to conclude this agreement if there is no significant ground for refusal. This article is a special case of obligation to contract, which aims to prevent the insurer from failing to conclude the contract and in case the insurer still refuses to conclude the contract, the person may apply to the Court and on basis of Article 325 (2) of the CCG demand the determination of contents of contract fairly.

Together with the discussed issue, it is important to ensure that the contents of the terms in the contract are fair. The contents of the contract must be maximally exhaustive and comprehensive, due to the fact that according first part of the article 799, the payment of insurance reimbursement depends on the agreement of the parties.

Regardless of this norm of the law, it is difficult to find a contractual relationship that will be perfectly regulated and defined without law. In the practice of common courts there was the case when the parties agreed for the compensation of the cost of replacement parts in the case of car damage, but by the contract it was not regulated the case when the replacement of damaged parts were impossible.[138]

In this case, the Court came out of the essence of the CCG and explained that the principles of good faith and contractual fairness are based on the principle of contractual freedom, based on which the court can set new rules of conduct. The Court pointed out that the insurer in the insurance contract is a "strong party", which proceeds to offer the terms of the contract and thus has more influence on their content. The terms of contract were not exhaustive and did not allow the insured for the compensation that was unfair to this party, therefore the court considered that it had the right to determine the conditions of contract itself, which were based on the principle of good faith of the civil relations.[139] It is also noteworthy that the decision of court was appealed by the insurer, but the Supreme Court threw out this appeal.[140]

4.2. Labour Relations

The Labour Code of Georgia ("LCG") considers the principle of the CCG in relation to contractual freedom and according to second section of Article 2 of the LCG, labour relations arise on the basis of

[135] Law on Insurance, Article 2, subsection "g.a".
[136] Law on Insurance, Article16.
[137] Law on Insurance, Article14.
[138] Decision of Civil Cases Chamber of Appeal Court of Tbilisi, 08.05.2014, №2b/6571-13 (in Georgian).
[139] Decision of Civil Cases Chamber of Appeal Court of Tbilisi, 08.05.2014, №2b/6571-13, 4.1 (in Georgian).
[140] Decision of the Civil Cases Chamber of the Supreme Court.of Georgia 20.10.2014, № as-698-668-2014 (in Georgian).

the parties' equality, by the agreement reached through the free expression of the will. It is clear from the provision that conclusion of the contract and determination of its contents depend on the will of the parties, but we should pay attention to the second first of Article 2, which states that labour relations shall be performance of work by an employee for an employer under organised labour c onditions in exchange for remuneration. Therefore, the equality of parties existing before the contract shall be transformed into subordination for the employee.[141] Thus, "in this relationship the preeminent position of the employee is "weak" in relation to the employer, which is undoubtedly the "strong" party and may abuse of the rights".[142]

The protection of equality between the "strong" and "weak" party in labour law is mostly ensured by the contractual fairness and the norms for determining the content of the obligation on the basis of fairness,[143] prescribed in Article 325 of the CCG. The applicability of the norm also indicates that section 2 of Article 1 of the LCG states that the issues relating to labour relations not regulated by this Code or other special law, are regulated by the norms of the CCG. Thus, the necessity of using Article 325 of the CCG indicates the principles of labour law and possibility of use of Article 325 of the CCG envisaged by the LCG.

On June 12, 2013, amendments were made to the LCG,[144] which made significant steps for protection of employees' rights and ensure fair environment in the labour relations. A significant part of the amendments touched upon the work time and overtime work and the issues of its remuneration, although by the legislative amendments was not be perfectly established the contractual fairness in labour relations.

The duration of the overtime work was defined by the legislative amendments. Overtime work shall be deemed the work performed by an employee under agreement between the parties in the period of time, the duration for which exceeds 40 hours a week for an adult, 36 hours a week for a minor between the ages of 16 and 18, and 24 hours a week for a minor between the ages of 14 and 16.[145] According to section 2 of Article 4 of the European Social Charter,[146] with a view to ensuring the effective exercise of the right to a fair remuneration, the parties undertake to recognize the right of workers to an increased rate of remuneration for overtime work, subject to exceptions in particular cases. Taking into consideration, the sections 4 and 5 of Article 17 of the LCG defined the forms of compensation for overtime work, in particular in one case it could be a monetary remuneration,[147] and in the second case

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141 *Adeishvili L., Kereselidze D.*, The Draft Law of Labour Code and Several Principles of States of Continental Europe, Georgian Law Review, №6/1-2003, Tbilisi, 2003,10 (in Georgian).

142 Decision of the Civil Cases Chamber of the Supreme Court.of Georgia 23.03.2010, №as-1261-1520-09 (in Georgian).

143 *Bamberger/Roth*, BGB Kommentar, 3. Auflage, Verlag C.H. Beck, München 2012, §315, Rn 6.

144 Organic Law №729-IIs, 12.06.2013, which come into force 04.07.2013.

145 Article 17, section 3 of LCG.

146 Ratified by the Resolution of Parliament of Georgia №1876, 01.07.2005.

147 Directive 2000/EEC of the European Parliament and of the Council of 22 June 2000 amending Council Directive 93/104/EC concering centrain aspects of the organization of working time to cover sectors and activities excluded from that Directive, <http://eur-lex.europa.eu/legalcontent/EN/ALL/?uri=CELEX:320-00L0034>, [10.04.2018].

the parties may agree to give an employee additional time off in lieu of overtime pay. In both cases, what kind of overtime work will be "paid" depends on the agreement of the parties.

In the first case, overtime work shall be paid in an increased amount of the hourly rate of pay and conditions for which shall be determined by agreement of the parties. In the second case, the employee may be given additional holidays, in relation to which the Code does not have any other provisions but its amount is also determined by the parties' agreement.

In both cases, which of them should be agreed upon to pay for overtime work, its specific capacity is not established by the LCG. Subsection "v" of section 9 of Article 6 of the LCG, considers the rule of payment for overtime work as an essential condition of the labour agreement and defining this condition is necessary. However, in most cases, this condition may not be regulated either by the contract or because of the dominant position of the employer, it is regulated by the work rules and regulations, the terms of which are entirely determined by the employer.

If the rule for remuneration of the overtime work is not contracted, it will not result in annulment of the contract, and in respect of Article 17, section 4, the condition on compensation for overtime work shall be deemed to be agreed,[148] but its specific amount shall not be determined. In particular, it will not be specified how much of the increased amount of wage rate will be paid by the employer for overtime work, or how much he/she can benefit from the right for leisure time. Under the EU regulations, the internal legislation of member States establishes fair compensation for overtime work, from 25% to 150% increased amount of hourly salary, by considering the volume, hardness, and spent time of overtime work.[149]

Unlike foreign legislation, the LCG does not include the amount of compensation for the overtime work and it depends on the agreement of the parties, but in case of non-existence of such an agreement or it is determined by the employer, it is relevant to use Article 325 of the CCG and condition must be determined on basis of fairness, taking into consideration the volume and specificity of the work. In case the amount of compensation cannot be reached between the parties, the court makes a decision on the basis of fairness and determines its amount (Article 325, Part 2). The question as to which form of overtime "pay" should use the employee, should be resolved taking into account to the employee and employer interests on basis of fairness, as it is the employer's interests to give leisure time instead of paying monetary compensation and thus conserve financial resources, but the employee may be restricted to receive remuneration by less work.[150]

4.3. Corporate Law

Corporate-legal relations, are characterized by certain specificities and thus, they are subject to special regulations. Majorly, these regulations are dispositive, however, the principles of good faith, trust and fairness still apply.

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148 *Brox/Walker*, Allgemeines Schuldrecht, 37. aktualisierte Aufl., München, 2013, 70, Rn. 1.

149 <http://ilo.org/wcmsp5/groups/public/---ed_project/---protrav/---travail/documents/publication/wcms_161734.pdf>, see in: *Mazanashvili M.*, Overtime Job and its Remuneration/Compensation, Labour Law (Collection of Articles) III, Tbilisi, 2014, 383 (in Georgian).

150 *Mazanashvili M.*, Overtime Job and ist Remuneration/Compensation, Labour Law (Collection of Articles) III, Tbilisi, 2014, 387 (in Georgian).

On 24 June 2005, the Law on Entrepreneurs (Legislative Amendments, Law No. 1781-RS)[151] was enacted and Article 53^3 was added about the mandatory sale of shares. This law envisaged exclusion of minority shareholders by the majority of shareholder in the way that the minority shareholders were obliged to sell their shares in fair price to the shareholder with the majority shares. The above mentioned provision is an example of special regulation imposed in corporate law.

Such legislative regulations are common for legislation of developed countries, including the member States of European Union.[152] In 2004, the European Union adopted the Directive on takeover of Enterprises. The deadline for the implementation of Directive was established until 20 May 2006.[153]

In order to harmonize with EU legislation, the amendment was introduced to the Law on Entrepreneurs and the legislative regulations for mandatory sale of shares were stipulated. The first sentence of section 1 of Article 53^3 of the Law on Entrepreneurs provided that if the shareholder had more than 95% of shares with the right to vote, then this shareholder (buyer) had the right to redeem other shareholders' shares, according to the rules envisaged by Article 53^2, but the minority of shareholders were entitled to get fair price for shares. According to the content of the section 2 of Article 53^2 if the rules for determining fair price was not stipulated in the Charter of the Company, it should have been defined by an independent expert or brokerage company. The law set the minimum margin of fair price, according to which the offered redemption price must have been no less than the maximum price that the redeeming shareholder has paid within the last 12 months for the company's share of the same class.

Article 53^3 of the Law on Entrepreneurs was appealed at the Constitutional Court of Georgia and the Court made a decision on 28 May 2007 and Article 53^3 of the Law on Entrepreneurs was recognized as unconstitutional.[154] The Court ruled that mandatory sale of shares sets obligation of contracting for minority shareholders and the regulatory provisions of this procedure must comply with the constitution and its principles.[155]

The Constitutional Court ruled that the legislator had to establish the rules of mandatory sale of shares so that the possibility of abuse of economic power of the shareholder with majority of shares was excluded. However, in the aforementioned case the interests of shareholders was not balanced and they favored majoritarian shareholder.[156] Furthermore, the establishment of the procedures for determination

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151 < https://matsne.gov.ge/ka/document/view/26860#>, [10.04.2018].

152 *Burduli I.*, Tender Offer, Mandatory Sale of Shares: Abuse of Right or Necessary Precondition for Capital Market Development, Journal "Judiciary and Law", №2, Tbilisi, 2007, 10 (in Georgian).

153 *Gotschev/Staub*, GesKR 2006, 266; See in: *Burduli I.*, Tender Offer, Mandatory Sale of Shares: Abuse of Right or Necessary Precondition for Capital Market Development, Journal "Judiciary and Law", №2, Tbilisi, 2007, 30 (in Georgian).

154 Decision of Constitutional Court of Georgia 28.05.2007, №2/1-370,382,390,402,405, on Case: Citizens of Georgia Zaur Elashvili, Suliko Mashia, Rusudan Gogia and others and Public Defender of Georgia against Parliament of Georgia (in Georgian).

155 Decision of Constitutional Court of Georgia 28.05.2007, №2/1-370,382,390,402,405, on Case: Citizens of Georgia Zaur Elashvili, Suliko Mashia, Rusudan Gogia and others and Public Defender of Georgia against Parliament of Georgia, II, 10 (in Georgian).

156 Ibid, 28 (in Georgian).

of fair price, which would be unambiguous and clear was essential. The case when the offered price was not acceptable for a minority shareholder should have been the subject of regulation.[157]

On the basis of the decision of the Constitutional Court of Georgia, the regulatory norms for the mandatory sale of shares were established in the new edition of Article 53^4 of the Law on Entrepreneurs and the $XXXIV^2$ Chapter of the Civil Procedure Code enacted under the Law of 11 July 2007 (Law No. 5286),[158] through which the mandatory sale procedure and the determination of fair price became completely subject of judicial control.

As the Constitutional Court stated in its decision, these provisions imposed the obligation to contract in corporate law, when the minority shareholder was obliged to sell the shares and get fair price.[159] The mandatory sale of shares implied the need of bilateral contract on the sales of shares and receiving the fair compensation, where the essential condition of the obligation, such as the amount of the price, depended on the third person, independent expert or brokerage company. These persons were special knowledge holders in the relevant field and according to the legislation, majoritarian shareholder applied to them to determine the fair price. According to a determined price of independent expert or brokerage firm, the transaction was made on the mandatory sale of shares. The liability was set by the third person, hired by the shareholder with the majority of shares.

Article 325 of the CCG is applicable not only for the obligation-legal relations regulated by CCG, but for the private law as well, if no special provision exists.[160] According to the first part of the above mentioned article, if the conditions for the fulfillment of the obligations are determined by one of the parties or third person(s), then it is suspected that such a definition should be based on fairness. This provision corresponded to the Law on Entrepreneurs, namely, Article 53^3 before the amendment. Thus, the contents of this obligation should have been fair, but in case if the determined price was unfair and substantially violated the legitimate interests of minority shareholders, part 2 of Article of the CCG was applicable. Namely, if the party considered that the terms were unfair or their determination was delayed, it should fall under the competence of court.

Thus, the Constitutional Court's reference to the argument that the legislation did not provide for a minority shareholder the right to protest against a certain price, lacks the legal basis. Constitutional Court dismissed Article 325 of the CCG, especially the Part 2 of this Article, through which the minority shareholder was granted the right to apply to the court in case if shareholder considered offered price to be unfair.

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157 Decision of Constitutional Court of Georgia 28.05.2007, №2/1-370,382,390,402,405, on Case: Citizens of Georgia Zaur Elashvili, Suliko Mashia, Rusudan Gogia and others and Public Defender of Georgia against Parliament of Georgia, II, 32 (in Georgian).

158 <https://matsne.gov.ge/ka/document/view/19846#>, [10.04.2018].

159 Decision of Constitutional Court of Georgia 28.05.2007, №2/1-370,382,390,402,405, on Case: Citizens of Georgia Zaur Elashvili, Suliko Mashia, Rusudan Gogia and others and Public Defender of Georgia against Parliament of Georgia, II, 10 (in Georgian).

160 *Chanturia L.,* Introduction to the General Part of Georgian Civil Law, Tbilisi, 2000, 85-86 (in Georgian).

4.4. Consumer Rights Protection Law

Fairly defining the contents of the obligation is particularly relevant to the Consumer Protection Law. It is noteworthy that the protection of consumers' rights in Georgia was made law "on Consumer Rights Protection" of 20 March 1996.[161] The current product security and free circulation code does not provide for protection of the rights of the consumer in terms of the fair provision of the contract, but it is envisaged by the provisions of the standard conditions of the CCG.

The fact that consumers' rights are especially important when using standard conditions is indicated by Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts.[162] According to Article 3 of the directive, a contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer. Such a condition is not binding for the parties (Article 7).[163] In Particular it elaborated on the concept of "good faith", holding that the assessment of that criterion requires the court to determine whether the seller or supplier dealing fairly or equitable, could reasonable assume that the consumer would have agreed to the term concerned in individual negotiations.[164] These provisions are envisaged in the new draft law on consumer protection rights,[165] in the first section of Article 12, which is identical to the European directive.

Furthermore, the 6th paragraph of the law on Austrian Consumer Protection Law,[166] which explicitly suggests that an unfair or vague agreement will be understood against the party which has entered into the agreement.[167]

4.5. Competition Law

Establishing the terms of the contract on basis of fairness is not unknown to competition law. The Law on Competition defines the principles of protection against free and fair competition from unlawful restrictions, which are the basis for the development of free trade and competitive market.[168] The object of protection from unfair competition is not only the interests of the entrepreneur's competitor or his/her partner but also the interests of the public.[169]

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161 Invalid – Law №6157, 25.05.2012, <https://matsne.gov.ge/ka/document/view/1659419>, [10.04.2018].
162 *Erman* BGB Kommentar, Bd 1., 12. Aufl, Köln 2008, Anh. §305-310.
163 Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31993L0013:en:HTML>, [10.04.2018].
164 Case C-415/11, Mohamed Aziz, [2013] ECR; Case C-408/08, Caja de Ahorros, [2010] ECR; Case C-240/98, Océano Grupo, [2000] ECR; Cases C-541/99 and C-542/99, Cape and Idealservice, [2001] ECR; Case C-237/02, Freiburger Kommunalbauten, [2004] ECR; Case C-191/15, VKI V Amazon, [2016] ECR.
165 <http://info.parliament.ge/file/1/BillReviewContent/120599?>, [10.04.2018].
166 KSchG §6.
167 *Simonishvili Z.*, Das Transparenzgebot im Sinne der Rechtsfertigung beiderseitiger Interessen und dessen Verhältnis zu den Vertragsauslegengsregeln des ABGB, Graz, 2012, 75.
168 Law on Competition of Georgia, Article 1, section 1.
169 *Hefermehl W., Baumbach A.*, Wettebewerbsrecht, 15., neubearbeitete Aufl., München 1988, 168, Rn. 41.

Taking into consideration these interests, Article 6 of the Law on Competition states that Any abuse of a dominant position by one or more undertakings (in the case of joint dominance) is prohibited. One of the manifestations of misuse of the dominant position, in accordance with subsection "a" of Article 2 of the same article, may be regarded either imposing, directly or indirectly, unfair purchase or selling prices or other unfair trading conditions.

In this case, based on the claim of a consumer or competent economic agent affected by a dishonest competition, the court may, define fair price or fair trade conditions on basis of the Article 325 of the CCG.

5. Conclusion

Contractual freedom is of great importance for all private law, it is one of its main principle and provides contractual equality. In order to ensure fair dealing with the latter, the contractual freedom became the subject of self-control, the basis of which was the contractual fairness.

The providing of fairness in contractual relations is mainly specified by article 325 of the CCG, which establishes the obligation of justifying the contents of the obligation in the case of predefined preconditions. For using of this provisionf, is necessary that the content cannot be determined by the explanation of will or filling interpretation. Also, there shall be agreement of the Parties that the content is determined by one of the parties or third parties. Norm may also be used when a party or a third person fails to define the contents of the obligation and thus the determination of the contents of the contract is delayed. It is noteworthy that article 325 of the CCG is the basis for determining the content of the obligation, and not the ground for the invalidation of the unfair agreement. If the contract or its condition is unfair, the court can determine this condition fairly. It is noteworthy that the use of article 325 of the CCG is especially important when protecting the weak party of the contract.

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66. BGHZ 127, 138, 142.
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Impact of Non-Property (Moral) Damage Functions on the Sum for Determining Compensation Criteria

The article relates to compensation of non-property damage, which serves as one of the key areas of the Civilistics in an angle of arguing on recognition and protection of personal non-property rights. For the sake of having a comprehensive insight into legal problem, one shall carry out systematic analyses of various conceptual matters related to the topic and determine how the Georgian model ensures protection of non-property rights in line with standard of trust, which has been cultivated by the progressive rule of laws that implies all the characteristics of the information époque.

Doctrinal analysis uncovers numerous problematic issues, which are twofold, caused by limited and vague legislative base and on the other hand, resulted from the difficulty of assigning non-property damage to an objective category that limits establishment of uniform legal practice on the matter.

The research is founded on the analyses of both, legislative doctrine and judicial practice. It features the conceptual approaches elaborated by various legislative systems and drawbacks of improvement of Georgian legislation from an angle of comparative legal analyses.

Keywords: *Personal Non-Property Rights, Compensation Criteria, Compensation, Satisfaction, Prevention, Nominal Damages.*

1. Introduction

One of the key targets of the legislation with regard to protection of personal non-property rights is civil law's institution of high importance, such as compensation of non-property (moral) damage. As an integral part of civil system, protection of the rights related to a person is the highest value system, which sets legal scale of freedom that is human dignity. Society of free humans is a priority of those states, where human dignity is a fundament for values' system.[1] Out of various mechanisms of non-property rights protection as set forth by the civil code, the most twisted, complexed and diverse is compensation of non-property (moral) rights; and, analyses of the latter has uncovered numerous major drawbacks.

Aim of the research is to identify correlation between the functions of non-property damage and determining criteria for compensation's sum; also, to shed light on legal or practical connotations from an angle of dimensions of private law, while bearing in mind legal stylistics and judicial practice and scholar discourse analysis.

The respective research reviews a notion of non-property rights and practical issues of compensation of non-property damage with a property upon gradual transformation of attitudes. Afterwards,

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[1] Decision № 1/4/592 of the Constitutional Court of Georgia on October 24, 2015, on the Case "Beka Tsikarishvili, citizen of Georgia against the Parliament of Georgia", II-1.

the paper features detailed characteristics of damage compensation objectives and functions within a prism of the most progressive legislative orders, and compliance of these principles with the Georgian legislation; as well as influence of the criminal law punishment for compensation of non-property damage caused by crime on the function of satisfaction. The final part of the research entails specific recommendations on the key matters discussed in the paper.

2. A Notion of Non-Property Damage

Non-material goods of a person protected by an institute of non-property damage are part to universal rights and freedoms[2]. Causing a moral damage implies harm to moral emotions and relationships, which, besides material expenditure can also result into infringement/psychological struggle (moral damage) of non-material rights.

A notion of non-property rights in contemporary tendencies are discussed in an angle of negative human sufferings[3] and harm to mental health, hence it offers a different solution of featuring a problem in financial forms. For example, the French law differentiates mental, psychological and aesthetic damages (*souffrances moral ou physiques, pretius doloris*), which determine grounds for different amount of compensation[4]. The English law differentiates notions of pain and suffering and loss of amenities (*Pain and suffering, loss of amenities*), which infringes and damages a right of a person to enjoy life[5]. The German law specifically does not differentiate legal aspects of moral damage; however, the legal doctrine could not bypass an issue of highlighting every interest within value system and it didn't succeed in underlining double function[6] of moral damage in compensation's[7] and satisfaction's[8] elements[9].

Analyses performed on intersystem differences makes it possible to learn on which specific aspect of personal values are stressed out in the respective legislative orders.[10] By all means, it shall be noted that each and every case is unique due to factual content, hence, subject to a law in this context as an every other system's target is core to determining sum of non-property damage.

[2] Decision of 02 November 2016 # 2/32168-16 of the Civil Cases Panel of Tbilisi City Court (can be accessed at Court's archive).

[3] „Human suffering".

[4] *Le Tourneau* (2004), nr. 1583-1587, which also implies a term - Le prejudice sexuel. Indicated: *Dam C. V.,* European Tort Law, Oxford University Press, 2013, 322.

[5] Indication of ground is „Expectation of life", which was suspended by an act of 1982. Indicated: *Dam C. V.,*, European Tort Law, Oxford University Press, 2013, 322.

[6] BGH GrZS NJW 55, 1675, 95, 781; BGHZ 128, 117 [119 f.] = NJW 1995, 781 f. mwN; OLG Celle NJW 2004, 1185; OLG München BeckRS 2016, 06809.

[7] "Ausgleich".

[8] "Genugtuung".

[9] *Dam C. V.,*, European Tort Law, Oxford University Press, 2013, 322.

[10] Ibid.

3. General Principles of Non-Material Damage Compensation

The rights of a human to name, dignity, honor, reputation and to be protected from defamation are extremely personal. Upon infringement of such rights (subject to defamation), one shall imagine emotional condition of a victim, however, determining adequate sanction for the latter infringement is difficult due to numerous characteristics related to non-property (moral) damage; such difficulties are linked to individual perception of feelings, consideration of emotions and objective measurement of these.

Georgian civil law did consider a general rule[11] established within the continental Europe and set forth reasonable and fair as measures for determining compensation for non-property damage in article 413 (1) of the Civil Code of Georgia (later to be referred as CCG), which we can refer to as legislative restriction for a party to demand artificially boosted compensation.

Absence of boundaries for damage compensation, trends of utilizing personal space for commercial reasons and prevention of such actions from the judiciary branch harms the process of establishment of rational and effective mechanisms for protection. Upon selection of compensation criteria, judiciary faces enormous challenge, which is twofold, as it shall ensure reasonable balance between effective protection of personal space set forth by the CCG's rules and threat of encouraging unsystematic usage of non-property damage.

Due to absence of binding circumstances for damage compensation, the anticipated legal circumstances are strengthened within article 408 of the CCG and article 249 (1)[12] of the German Civil Code (later to be referred to as GCC), whose normative goal entails that for compensation of damage, it shall be crucial to determine environment that would have existed prior to occurrence of binding circumstances for damage compensation. However, peculiarities for non-property damage compensation shall be underlined within a general system of damage compensation; the difference of the latter type from the rest is that consequences cannot be reversed and no matter what the compensation is, it will never restore initial state of an injured party[13]. The latter peculiarity is the one, which makes it difficult to determine compensation of non-property (non-material) damage, since unlike property damage, so called hypothesis of differentiation[14] is not applicable in the respective case. Non-property damage is prominent due to the fact while contrasting incumbent and hypothetical (excluding binding circumstances for

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[11] *Bichia M.,* The Georgian Model of Compensation of Non-property Damage for Violating Personal Rights in Line with European Standards, "Journal of Law", №1, 2017 5.

[12] *Chitashvili N.,* General Legal Preconditions for Moral Damage Compensation, in the collection: Fundaments of the Georgian Civil Law in the Georgian Judiciary Practice, TSU, Tb., 2018, 196; Decision of the Chamber of Civil Cases of the Supreme Court of Georgia of July 1, 2016 on the case #ac-167-163-2016.

[13] Decision of the Supreme Court of Georgia of April 3, 2012 on the case #ac-1477-1489-2011.

[14] *Rusiashvili G.*, New commentary on the Civil Code, article 408, 4, < www.gccc.ge>, indicates: *Grüneberg,* in Palandt, BGB Komm., 73. Aufl., 2014, Vorbem., §249, Rn. 10; on the Decision of the Supreme Court of Georgia of October 7, 2015 on the case #ac-12-459-438-2015; Decision of the Supreme Court of Georgia of July 1, 2016 on the case #ac-167-163-2016; Decision of the Supreme Court of Georgia of June 10, 2016 on the case #ac-301-286-2016: Court of Appeal has explained that damage is compensatory difference between "shall be" and "is within circumstance" (hypothesis of difference).

compensation) property state, monetary loss is not determined[15]; especially in the course of the subjective perceptions, which are related to social and professional status of a person and there is no direct counterweight material equivalent for these[16].

Practical need for functional essence of non-property damage becomes especially visible during determining amount of compensation, which simplifies legal interpretation of general clauses and notions that remain open. In such circumstances, one shall argue on whether or not the Georgian legislation and judiciary practice ensure the same standard of trust, which is set forth by an international practice; also, whether or not there is consistency in judiciary practice while perceiving functional essence of non-property damage for the sake of determining amount of compensation. In this regard, it will be worthy to study judiciary practice and identify specifically which circumstances have caused legal consequence and whether or not there are grounds, which could have constituted to ensuring effective outcome within evaluation of the norm.

4. Objectives of Non-Material Damage Compensation

Upon deviating from an established norms of conduct, which will result into infringement of rights and interests, a victim has an opportunity to demand compensation caused by damage and restitution of the infringed rights[17]. The right to demand compensation is a legal mean for restoring misbalance caused by damage, aiming at eradicating negative consequences toward victim and is imposed on a party, which is a target of the respective civil circulation regarding realization of the specific risk[18]. The latter clearly indicates that the primary function of the law is to compensate damage[19]. Besides, the law also has a preventive influence effect on a potential perpetrator and it can also fully ensure that he/she will not cause any damage at all (preventive function)[20]. Threat of being imposed with an obligation to compensate damage has preventive influence on behavior of civil circulation's actors and forces them to have an empathy toward others' rights and interests[21]. Non-economic damage is positioned separately as it is different from other types of damage[22]. Compensation of non-property damage does not aim at full

15 *Rusiashvili G.*, New Comment on the Civil Code of Georgia, article 408, 6, <www.gccc.ge>.
16 *Jager L., Luckey J.,,* Schmerzengeld, 8. Auflage, Jurion, 2016, Rn. 996.
17 *Batlidze G.*, Liability imposed due to offensive action within the delictive law, Journal "Georgian Business Law Overview", # 4, 2015, 18.
18 Ibid. indicates: *Looschelders,* Schuldrecht, AT, 9, Aufl. , 2011, Rn. 1167.
19 *Batlidze G.*, Liability imposed due to offensive action within the delictive law, Journal "Georgian Business Law Overview", #4, 2015, 18.
20 *Rusiashvili G.*, New Comment on the Civil Code of Georgia, article 408, 2-3, <www.gccc.ge>.
21 For further information, please, see *Turava M.*, Criminal Law, Review of General Part, Tb., 2010, 287; *Vardzelashvili S.*, Objectives of Liability, Ivane Javakhishvili Tbilisi State University, Tbilisi, 2016.
22 *Chitashvili N.,* General Legal Preconditions for Moral Damage Compensation, in the collection: Fundaments of the Georgian Civil Law in the Georgian Judiciary Practice, TSU, Tb., 2018, 196. It indicates: *Hondius E., Janssen A.,* Disgotgement of Profits, Gain-based Remedies throughout the World, International Academy of Comparative Law, Springer Cham Heidelberg New York Dordrecht London, Springer International Publishing Switzerland, 2015, 258.

restitution of damage, due to the fact that caused damage has no monetary equivalent and it is impossible to fully compensate it[23].

It is a well-known fact that the Georgian Civil Code was developed following an example of the German Civil Code, therefore, combination of three functions - satisfaction, compensation and prevention, have been set as uniform objective for compensation of moral damage[24].

4.1. Compensation

Functional objective of compensation of damage is stressed out within any legal order, as it constitutes to improvement of negative consequences and replacing sufferings with positive emotions[25]. Besides, the criteria for restitution are intensity and lengthy duration of interference in the protected area[26].

4.1.1. Function of Compensation in German Legislation

An intense legal discussion over the functional essence of moral damage burst out in Germany in the last third of the 19th century[27], as before that there was a well-cemented idea within the legal doctrine, which had a skeptical idea on monetary compensation of suffering and did refer to such type of sanction as penalty under private law[28]. The argument behind the latter approach was the concept that an individual is made of elements defining a person, which excludes an opportunity to utilize human dignity for commercial purposes[29]. Historical understanding of the latter function was that compensation of moral damage caused upon infringement of the right and by bearing into consideration intensity and duration, such compensation should have caused easing of suffering[30], rival of mental peace and positive emotions[31], as much as the quality of damage and sufferings would allow in an objective perspective[32]. Later, judiciary practice reasonable focused attention on the circumstance that due to complexity of psychological

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[23] Decision of the Supreme Court of Georgia of November 5, 2015 on the Case # ac-594-562-2015; Decision of the Supreme Court of Georgia of April 3, 2012 on the Case # ac-1477-1489-2011; Decision of the Chamber of Civil Cases of the Supreme Court of Georgia of January 6, 2017 on the Case # 2b-7243-15.

[24] *Chitashvili N.,* General Legal Preconditions for Moral Damage Compensation – on the Case Daduli Kavteladze vs. LLC "Travel Safe", #ac-979-940-2014, Fundaments of the Georgian Civil Law in the Georgian Judiciary Practice, TSU, Tb., 2018, 200. Functional essence of non-property damage in the judicial practice is formulated in the following way: satisfy the victim, make an influence on the causer of damage; refrain from infringement of personal rights by other parties.

[25] BGH NJW 2007, 2475.

[26] *Bichia M.*, Protection of Personal Life, in Accordance with the Civil Law of Georgia, Tb., 2012, 194.

[27] *Staudinger J., Schiemann G.,,* Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen, Buch 2.,2005, §253, 28.

[28] *Windscheid B.,* Lehrbuch des Pandektenrechts, Bd II, [1865], §455, 31.

[29] *Bichia M.*, Protection of Personal Life, in Accordance with the Civil Law of Georgia, Tb., 2012, 194.

[30] BGHZ 7, 223, 226, 229; Luckey J., in: Pütting/Wegen/Weinreich/Medicus, §253, Rz.11; RG, Urt. v. 14.06.1934 – VI 126/34.

[31] BGH NJW, 2007, 2475. in: *Soergel W., Ekkenga J., Kuntz S.,* Inhalt des Schuldverhältnisses, Immaterialer Schaden, 7 Auflage, 2016, §253, 10.

[32] *Jager L., Luckey J.,* Schmerzengeld, 8. Auflage, Jurion, 2016, Rn. 996.

suffering, not every subjective aspect of an individual can be "balanced" with positive emotions[33]. For example, upon complete loss of consciousness, crucial precondition for compensation of damage would be feeling of damage felt by a victim[34], if considered purely from an angle of compensatory function, which would serve as an unjust restriction for the scope of compensation of moral damage.

Revalue of the essence of compensation as mentioned above was caused by the judiciary practice of the following years[35], which resulted into legal admissibility to allow compensation of moral damage in cases of minor or major loss of consciences. One may assert that lawmakers did cause systematization of protected rights and interests, however, it also imposed a positive obligation upon court to ensure, upon infringement of the rights set forth in the legislation, adequate restoration of the victim's rights while fully considering objectives and functions of moral damage.

4.1.2. Function of Compensation in English Law

Function of compensation is a well-known matter in England, however there is no difference between compensation of non-material and material damages[36]. Due to the full reparation of non-property damage being objectively impossible, the priority falls on recognition of the right upon discussing functional essence of the damage[37]. In fact, English law was the one, which developed peculiar form of compensation, such as nominal compensation (*nominal damages*[38]), which has a function of symbolic compensation upon minor damage[39]. The same context is applied in the article 41 of the European Convention on Human Rights (ECHR) with regard to just satisfaction to the injured party by the court[40].

In England, upon cases of physical damage, the Jury acts based on recommendatory indications, which sets forth that such type of harm may go up to maximum of 200, 000 pounds in non-property damage[41]. It shall be noted that in early 1990-ies, there was a tendency among English courts to raise compensation amount to the maximum[42], which was later on restricted upon the spirit of the article 10 (freedom of expression) of the European Convention on Human Rights (ECHR) [43].

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33 BGHZ 18, 149; Pütting/Wegen/Weinreich/Medicus, §253, Rz.13.

34 *Jager L., Luckey J.,,* Schmerzengeld, 8. Auflage, Jurion, 2016, Rn. 996.

35 BGH, Urt. v. 13.10.1992 – VI ZR 201/91 , BGHZ 120, 1 = VersR 1993, 327 = NJW 1993, 781;. მითითებულია: *Jager L., Luckey J.,,* Schmerzengeld, 8. Auflage, Jurion, 2016, Rn. 996.

36 *Bichia M.*, Protection of Personal Life, in Accordance with the Civil Law of Georgia, Tb., 2012, 194.

37 *Dam C. V.,*, European Tort Law, Oxford University Press, 2013, 302.

38 Nominal damage was defined by the Earl of Halsbury in the following way: „… technical phrase wich means that you are negatived anything like real damage, but that are a affirming by your nominal damages that there is an infraction of a legal right which, through it gives you no right to any real damages at all, yet gives you a right to the verdict of judgment because your legal rights has been infringed..." The Mediana, [1900], AC 113, 116 (HL); *Dam C. V.,*, European Tort Law, Oxford University Press, 2013, 302.

39 Equivalent of nominal damage in the French legislation is - *franc symbolic.*

40 European Convention of Human Rights, Council of Europe Secretary General, 1950, 41.

41 *Dam C. V.,,* European Tort Law, Oxford University Press, 2013, 303.

42 Sutcliffe v Pressdram Ltd [1991], 1 QB 153. Amount of compensation was up to 600, 000 pounds.

43 Sec. 8 of the Courts and Legal Services Act 1990; John v Mirror Group Newspaper Ltd [1997] QB 586 in the case where court decreased sum of 350, 000 pounds to 50, 000 pounds as a compensation for defamatory statements published against singer Elton John.

4.1.3. Function of Compensation in Georgian Legislation

In Georgia, which is a country whose legal order follows the Romano-Germanic law traditions, one shall discuss compensation of damage caused as a primary objective of non-material damage. It is a fact that it is impossible to ensure complete restitution of infringed rights[44], and there is no amount of compensation, which can restore injured party's state prior to infringement[45]. The doctrine also speaks about "restitutive" nature of non-property damage[46]. Besides, due to the fact that there are times when an injured party is unable to achieve easing of his/her suffering, often, compensation for infringement of personal rights is additional component[47] for balancing non-material damage, which shall not exceed the quality of caused damage's intensity, otherwise it will turn into a punitive institution and by its nature it would fall out of civil law liability system. Such approach was stated by the Supreme Court of Georgia in one of the cases, where it stressed out that amount of compensation for moral damage shall not exceed moral damage's legal category's objective – that is to ease mental state of an injured party[48].

4.2. Prevention

In Civil Law, the primary objective of the damage is the function of improvement of loss[49]; it shall be noted that besides initial idea of the latter function, there is also so called "secondary" – "desired side effect[50]" function, which serves the purpose to prevent the offence through warning and raising awareness[51]. In Civil Law, there is no definition of a notion of prevention function; the latter derives from the criminal law, which entails positive and negative aspects of offence's general prevention[52]. Besides remuneration, compensation also anticipates warning or preventative measures, and mainly it is associated with temporary legal protection[53] during damage of those legal goods protected by personal rights, when restoration of the original state of affairs aka restitution of non-material damage of an injured party is impossible[54] and complete compensation cannot be ensured.

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[44] *Jorbenadze S.*, Commentary on Civil Code, article 18, Book I, Tb., 2017, 35. Indicates decision of the Chamber of Civil Cases of the Supreme Court of Georgia of April 24, 2003 on the case # 3k-1240-02..

[45] Ibid, indicates decision of the Chamber of Civil Cases of the Supreme Court of Georgia of December 27, 2012 on the Case # bs-78 (კ-12).

[46] Bamberger/Roth, §253 Immaterieller Schaden, 42. Auflage, 2017, Rn. 14.

[47] *Bichia M.*, Protection of Personal Life, in Accordance with the Civil Law of Georgia, Tb., 2012, 196.

[48] Decision of the Chamber of Civil Cases of the Supreme Court of Georgia of September 10, 2015 on the Case # ac-979-940-2014.

[49] *Rusiashvili G.*, New Commentary on the Civil Code, article 408, 2-3. Indicates: *Looschelders, Schuldrecht,* AT, 9, Aufl., 2011, S. 299.

[50] "Erwünschte Nebenprodukt".

[51] *Bichia M.*, Protection of Personal Life, in Accordance with the Civil Law of Georgia, Tb., 2012, 192.

[52] For further information on objectives for liability, please, see *Vardzelashvili S.*, Objectives of Liability, Ivane Javakhishvili Tbilisi State University, Tb., 2016.

[53] *Bichia M.*, Protection of Personal Life, in Accordance with the Civil Law of Georgia, Tb., 2012, 190.

[54] OLG Köln VersR 2003, 602 [603]; OLG Celle NJW 2004, 1185; OLG Düsseldorf VersR 2003, 601; ; *Grüneberg C.,* in: *Palandt,* Rn. 4; *Bamberger P., Roth C.,* §253 Immaterieller Schaden, 42. Auflage, 2017, 14.

General objective for prevention within Civil Law is mainly utilized for encouraging voluntary protection of the norm[55]. We shall discuss general wording of the article 413 of the CCG in the same angle when it relates to the criteria of reasonable and fair compensation that shall be used for judiciary[56]. We shall regard the latter as somewhat hint for lawmaker and that practice shall ensure development of the just system, which will, one on hand, guarantee prevention of disproportional liability of a respondent, and on the other hand, pose a leverage for cultivating fear among potential perpetrators. Due to the fact that the Georgian judiciary remains on the positions of the Romano-Germanic law, in its justification and upon calculation of amount, it often refers to general thesis of preventive influence leverage from an angle of threat to repeat[57] and possible benefit[58] of the legal offence.

4.2.1. Prevention Function in the GGerman Law

Upon enforcing the GCC, the higher courts were spotted to having attempted to ground non-property compensation on the most general just principle, which became especially visible with regard to moral damage that had occurred due to infringement of personal non-property rights. Such deliberate continues attempt served as grounds[59] for elaborating an idea of prevention along with compensation and satisfaction functions within an independent legal institute[60] of non-property damage.

The first time that the Federal Court of Justice in Germany directly underlined the preventive function of non-property rights was with regard to Princess Caroline of Monaco[61], which also related to the articles 1(1) and 2 (1) of the Basic Law for the Federal Republic of Germany on protection of right to be depicted in an angle of personal freedoms. In the ruling the Court stressed out that upon compensation of moral damage, it is important to restrict perpetrator from committing similar offences in the future, especially when it related to gaining commercial benefit as a result of deliberate damage of a person's personal non-property space. Supreme Constitutional Court for the Federal Republic of Germany shared the same logic with regard to Princess Soraya's case[62], when the Court had to verify non-material damage's regulatory norm's methodological grounds in a constitutional-judiciary angle. The Court

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55 *Vardzelashvili S.*, Objectives of Liability, Ivane Javakhishvili Tbilisi State University, Tb., 2016, 75.

56 *Chikvashvili Sh*., Moral Damage in Civil Law, 1998, 88.

57 Decision of the Chamber of Civil Cases of the Supreme Court of Georgia of October 23, 2015 on the case # ac-547-519-2015; Decision of the Chamber of Civil Cases of the Supreme Court of Georgia of April 3, 2011 on the Case # ac-1477-1489-2011; Decision of the Chamber of Civil Cases of the Supreme Court of Georgia of November 22, 2010 on the Case # ac-868-817-2010; Decision of the Chamber of Civil Cases of the Supreme Court of Georgia of November 9, 2009 on the Case # ac-823-1109-09; Decision of the Chamber of Civil Cases of the Supreme Court of Georgia of July 30, 2002 on the Case # ac-423-03.

58 Decision of the Supreme Court of Georgia of November 8, 2013 on the Case # ac-370-352-2013.

59 Ibid.

60 *Zafer Z.,* Zur Problematik des Schmerzengeldes: Feststellung und Ersatz des entschädigungpflichtigen immateriellen Schadens und die Doppelfunktion des Schmerzengeldes, Berlin, 2001, 213.

61 BGH 1994, BGHZ 128, 1= NJW 1995, 861. Respondent party was LTD "Burda", which published journals Freizeitreveu"and „Burda".

62 *Bichia M.*, Protection of Personal Life, in Accordance with the Civil Law of Georgia, Tb., 2012, 191; BVerfGE 34, 269 (280 ff.), Soraya.

stressed out that civil law protection without adequate sanction upon infringement of personal rights is not sufficient[63].

Upon arguing on the necessity of restriction of intrusion into protected area of non-property rights within the German doctrine, there is an argument that the factor of calculation of compensation amount shall serve so called "deterrent effect" with regard to governing objective of unjust benefit with monetary compensation[64]. It shall also be noted that infringement of general personal freedoms and upon calculation of moral damage resulted into suffering and damage of non-property rights, there was a major contrast while calculation and that was a challenge; however, the Supreme Constitutional Court for the Federal Republic of Germany[65], ruled out that 70, 000 German Marks to the mother and 40, 000 German Marks to the father was not an adequate compensation to the suffering caused due to loss of three underage children in a car accident, while the parties were asking for twice of an amount. The respective ruling is important in a perspective of preventive function, since in the motivation part of the ruling, the Court stressed out reasonability of increasing compensation amount for achieving desired side effect. The Court fully approved that in affairs when there is no deliberate commercialization of a person, car accident committed solely by unprotecting the relevant quality of sympathy does not pose grounds for restricting the sanction, since increase of monetary amount would not ensure prevention of legal offence committed due to carelessness. With such a precedent, the Court established a practice, which justifies restriction of responsibility upon contrasting motive of an offence and the respective interest for protection.

4.2.2. Prevention Function in the French Law

The preventive impact effect is not a strange matter for the French legislation[66]. Despite of the fact that core clause of damage remuneration within the delictive law[67] is compensation, nevertheless, the legal literature refers to the principle of liability within private law (*peine privee)* with regard to moral damage, and it certainly constitutes to preventive impact effect of the civil law sanction[68]. The French scholars indicate that upon increasing compensation for defamation of dignity, religion or honor, the Court intends to merge away from the fact of infringement of persona non-property rights[69] and therefore, play a corrective judiciary role.

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63 BVerfG NJW 2000, 2187 [2188].

64 *Bamberger P., Roth C.,* §253 Immaterieller Schaden, 42. Auflage, 2017, 17; BGHZ 128, 1 [16] = NJW 1995, 861 – Caroline von Monaco I; BGH NJW 1996, 984 [985] – Caroline von Monaco II; BGHZ 160, 298 = NJW 2005, 215; BGH NJW 2014, 2029 Rn. 38; OLG Hamm NJWRR 2004, 919; OLG Köln NJWRR 2000, 470 [471].

65 BVerfG 8 March 2000, NJW 2000, 2187.

66 *Dam C. V.,„* European Tort Law, Oxford University Press, 2013, 305.

67 In France, the Court does not have a right to utilize previous actions of perpetrator as a criteria for calculation of compensation amount. Indicated: *Dam C. V.,„* European Tort Law, Oxford University Press, 2013, 305.

68 *Viney-Jourdain* (1998), nr. 254. *Suzanne Carval*, La responsabilite civile dans sa function de peine privee (Paris: LGDJ, 1995). Indicated: *Dam C. V.,*, European Tort Law, Oxford University Press, 2013, 305.

69 Ibid.

4.2.3. Correlation of Preventive Function of Non-Property Damage to the Principle of Nominal Damage

In the Georgian judiciary practice, despite of attempts to stress out the preventative function, one comes across rulings favoring the applicants, where respondents had been imposed with symbolic amount (1 GEL) to be payed as compensation[70]. Based on the article 3 (1) of the Civil Procedure Code of Georgia, the parties themselves determine subject of litigation; also, the very same Code's article 248 restricts a judge to assign to an applicant something that the latter has not asked for, however, it is doubted whether such symbolic compensation can be applicable or adequate mean for ensuring any objective of moral damage. Undoubtedly, an affair that for the preventive function to have an effective enforcement objective, there shall be public perception that perpetrator had been imposed with a sanction that is not a symbolic sum, but the latter's property will be severely affected proportionally with a damage. Enhancement of the judiciary practice in this direction will contradict not only well-established postulate[71] of compensation of moral damage of minor nature within the German doctrine, but will also contradict essence of the norm, which primarily aims at ensuring protection of the parties' space and restriction for free use of the prohibited space. An element of nominal damage principle of the English law has entered the Georgian judiciary practice without any conceptual argument, with regard to determining practice of symbolic compensation; it shall be noted that the latter element, within an incumbent legal order, cannot ensure complete realization of the listed objectives and it will turn the system of leverages as set forth by the norm into illusion and ineffective.

4.3. Satisfaction

Upon infringement of general personal rights, the function of non-material damage's moral satisfaction is especially important, which is featured in Latin term as „*Satisfactio*"; [72] one of the definitions of the term, besides other important aspects, implies mechanisms perceived internally and physically while being insulted upon infringement of personal space, so that pain can be "healed" [73]. The Administrative Chamber of the Federal Court of Justice in Germany was the one, which endorsed the function of satisfaction with German legal order[74], which caused various attitudes within the doctrine. Upon the critical assumptions expressed, satisfaction assigns an effect of denied criminal law penalty to

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[70] Decision of the Supreme Court of Georgia of June 16, 2017 on the Case #ac-291-275-2017.

[71] "Bagatellklausel".

[72] *Bichia M.*, Protection of Personal Life, in Accordance with the Civil Law of Georgia, Tb., 2012, 192.

[73] Deutsches Rechts-Lexikon, 2 Bd., 2. Aufl., Beck: München, 1992; Upon the definition voiced by the Stoll during the conference dedicated to the 45th Day of Law: "Muting an injured party for the purpose of compensating a damage - Genugtuung ist die Besänftigung des Verletzten durch Sühnung der Tat": Deutsches Wörterbuch 5. Bd. Deutscher Taschenbuch Verlag. München, 1984.

[74] BGH, Beschl. v. 06.07.1955 – GSZ 1/55 , BGHZ 18, 149 = VersR 1955, 615 = NJW 1955, 1675 = MDR 1956, 19 m. Anm. Pohle-"Es soll aber zugleich dem Gedanken Rechnung tragen, dass der Schädiger dem Geschädigten für das, was es ihm getan hat, Genugtuung schuldet".

moral damage by the German doctrine[75]; especially when calculation of non-property damage does not depend on an offence committed by perpetrator[76]. In such affairs, objective reality is not being considered, but satisfaction of subjective requirements of an injured party[77]. In other words, moral damage serves a purpose to neutralize suffering caused of an injured party and freeing the latter from the feelings of hate and revenge[78]. Obviously, non-material damage compensation cannot restore original state of affairs, it can ease physical and moral sufferings caused by infringement of non-material goods, as well as decrease negative pressure and intensity[79].

4.3.1. Negative Sides of Satisfaction Function

Opponents of the satisfaction function often talk about its contra productive effect in those circumstances, when perpetrator and injured party have a close emotional connection[80] and complete sanctioning of the respective person will not neutralize mental suffering of an injured party. There are categories in the German judiciary practice when satisfaction occurred after compensation does not play an important role, these are: cases of medical delict[81], mostly due to absence of a doctor's deliberate action to cause damage in medical mistake[82], cases of severe damage of brain and car accident that resulted into loss of consciousness of an injured party and it is deprived of an opportunity to enjoy positive emotions after compensation[83]. In such circumstances, moral damage mostly serves as a compensation function, however, the contemporary practice aims at changing the respective attitude in favor of an injured

75 *Jager L., Luckey J.,,* Schmerzengeld, 8. Auflage, Jurion, 2016, Rn. 1003; *Bamberger P., Roth C.,* §253 Immaterieller Schaden, 42. Auflage, 2017, 16; Staudinger J., Schiemann G.,, Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen, Buch 2.,2005, §253, 29.

76 Implies a delict that entails threat, where liability does not depend on offence: *MünchKomm* zum BGB, Immaterialer Schaden, 7. Aufl., 2016, §253 12; OLG Brandenburg BeckRS 2012, 04236; Staudinger J., Schiemann G.,, Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen, Buch 2.,2005, §253, 16; *Grüneberg,* in Palandt, BGB Komm., 73. Aufl., 2014, Vorbem., §249, 4.

77 *Staudinger J., Schiemann G.,,* Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen, Buch 2.,2005, 30.

78 *Jager L., Luckey J.,,* Schmerzengeld, 8. Auflage, Jurion, 2016, Rn. 1003.

79 Decision of the Supreme Court of Georgia of August 4, 2009 on the Case #bs-972-936 (3კ-08).

80 *Bamberger P., Roth C.,* §253 Immaterieller Schaden, 42. Auflage, 2017, 16. Indicates: OLG Hamm VersR 1998, 1392 [1393]-relations between a father and mother.

81 OLG Köln, Urt. v. 08.12.2014 – 5 U 122/14-is not published, indicated: *Jager L., Luckey J.,,* Schmerzengeld, 8. Auflage, Jurion, 2016, Rn. 1012.

82 OLG Oldenburg, Urt. v. 16.09.2008 – 5 U 3/07, NJW-RR 2009, 1110, where, upon arguing on the satisfaction function, Court paid attention to the fact that after brain surgery and leaving small metal peace inside the body, the damage caused and resulted into psychological suffering could have only been compensated through monetary means; OLG Koblenz, Urt. v. 13.07.2006 – 5 U 290/06, VersR 2007, 796 = MedR 2009, 93-contradicting the latter, the doctor, without the patient's consent, performed sterilization with the judgement and the patient already had many children, and such circumstances didn't serve as unconditional exclusion of satisfaction function.

83 In such circumstances, moral damage compensation varies from 614 000 Euros to 619 000 Euros: LG Kiel, Urt. v. 11.07.2003 – 6 O 13/03 , VersR 2006, 279 = E 2181. Indicated: Jager/Luckey, Schmerzengeld, 8. Auflage, Jurion, 2016, Rn. 1010.

party[84]. A question arises in the respective matter on how just is correlation between moral damage and calculation of its amount with regard to perception by an injured party of a damage caused?

Based on one of the positions[85], it is reasonable to make a comparison between potential requirements for property and non-property damage compensation of an injured parties', where decreasing demand for damage compensation or exclusion solely due to that fact that a subject protected by the norm is unable to perceive damage causes; and the latter case is considered as unjust outcome. Such outcome contradicts standards set forth with regard to parties willing to receive material damage compensation in the same circumstance, and it creates unequal affairs for the parties that are essentially equal. Based on another position, due to the fact that moral damage is suffering or physical pain, which is solely felt by an injured party, perception of sufferings and understanding of the latter is purely based on an injured party's subjective assessment.[86]

As for the matter, on whether or not, the guarantees set forth by the Civil Code can be applicable to a person, who no longer has a capacity to subjectively perceive caused damage, decision of the matter will depend on the nature of the law, its purpose and essence, as well as balance set forth by the legislation of interests' coexistence.

Personified nature of the laws, primarily, imply that it belongs to a specific individual and, therefore, not and cannot belong to someone else. Therefore, the rights of a specific individual cannot be exercised by someone else[87]. Admissibility of such possibilities would contradict the nature of personal rights, which implies that personal rights are related to consciousness and perception of a specific individual. Due to the latter general rule, there is a reasonably fixed exception upon which – when there is no possibility for a holder of a right to demonstrate will, in the least cases, there will be an obligation to replace his/her need (for example, people in coma, persons with disabilities)[88]. Therefore, referring to a person's right as a subject does not always and not unconditionally depends on a person's will (perception of a right, exercising of rights or expressing will for its protection) authenticity, possibility to express will[89]. Obviously, it does not invalidate the need for a person's will to exercise rights, however, there is an objective need for exceptions from this general approach.

4.3.2. Effect of the Imposed Criminal Penalty over the Satisfaction Function in Terms of the Compensation of Nonpecuniary Damage Caused by a Crime

Studying the satisfaction function for non-property damage raised an issue in German doctrine as to how the criminal sanctions imposed against the perpetrator of the crime affect the satisfaction of the

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84 *Jager L., Luckey J.,,* Schmerzengeld, 8. Auflage, Jurion, 2016, 6.
85 Ibid.
86 Decision of the Supreme Court of Georgia of August 4, 2009 on the Case #bs-972-936 (3k-08).
87 Decision # 1/6/561,568 of the Supreme Court of Georgia of September 30, 2016, Iuri Vazagashvili vs. the Parliament of Georgia.
88 Ibid.
89 Decision # 1/6/561,568 of the Supreme Court of Georgia of September 30, 2016, Iuri Vazagashvili vs. the Parliament of Georgia.

victim in cases where the damage is caused by that crime.[90] It should be noted that this approach was largely accepted in German judiciary practice until the landmark decision of the Supreme Court issued in 1994[91], which changed the previous practice and marked a strict boundary between criminal and civil law methods[92]. This finding echoes the undoubtedly positive content of the current edition of Article 92 of the Criminal Code (adopted in 2009), which unlike the previous edition of the Criminal Procedure Code,[93] enables the victim to file a claim for the compensation of damage relying solely on the civil proceedings.[94] New edition[95] does not differentiate the damage and no longer contains detailed description of the damage compensation mechanisms, which is a clear indicator of the legislator's intention to place the damage compensation mechanism entirely in the civil law realm.

Herewith, differentiation of the notion of damage should be deemed as the circumstance hindering the moral damage caused by a crime. Even in the teleological reduction of Article 413 of the Criminal Code, if any of the legal benefits secured by the provision is damaged in result of a crime, the opportunities for compensation of nonpecuniary damage will not be based on relevant provision of Article 92 of the Criminal Procedure Code, but rather on the concept envisaged by Article 413 of the Criminal Code. Stemming from the aforesaid, the emphasis on "compensation of damage" in Article 92 of the Criminal Procedure Code remains unaffected by the position expressed in relevant literature according to which the reference to "compensation of damage" in any provision implies the compensation of property damages, unless the possibilities of compensating non-property damage is clearly indicated therein.[96] The latter, in the given case, is only a reference provision. It does not create an independent ground for a claim, nor does it fulfill the function of a guarantee for civil turnover stability. Herewith, qualitatively new rules for civil claims in the Criminal Procedure Code converges with the pathos of the decision of 1994 by the Supreme Court of Germany and is a clear indicative of the

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[90] BGH, Urt. v. 29.11.1994 – VI ZR 93/94 , VersR 1995, 351 = NJW 1995, 781- 29.11.
OLG Saarbrücken, Urt. v. 27.11.2007 – 4 U 276/07 , NJW 2008, 1166 = SP 2008, 257.

[91] According to which the victim was deemed to be satisfied by the mere fact of imposing criminal liability upon the perpetrator - *Jager L., Luckey J.,,* Schmerzengeld, 8. Auflage, Jurion, 2016, 1004.

[92] *Jager L., Luckey J.,,* Schmerzengeld, 8. Auflage, Jurion, 2016, 1004.

[93] Article 30 of the Criminal Procedure Code: "(1) person, who suffered property, physical or moral damage directly in result of a crime, shall have the right to demand the compensation of damage in the course of criminal case proceedings and file a civil claim to this end", Bulletin of the Parliament, 13-14, 20/03/1998, registration code: 090.000.000.05.001.000.327.

[94] *G. Dadeshkeliani.,* Comments to the Criminal Procedure Code of Georgia, Tb., 2015, 319.

[95] Article 30 of the Criminal Procedure Code: "(5) moral damage shall be compensated in monetary or other pecuniary form for the damage inflicted to the victim in result of a crime, including physical mutilation, distortion, disrupt or deterioration of biological and moral functions, as well as other ordeals caused by physical of moral damage. The amount of monetary compensation for the moral damage caused by a crime shall be determined by the court in consideration of the graveness of damage and property conditions of the defendant (civil respondent)", Bulletin of the Parliament, 13-14, 20/03/1998, registration code: 090.000.000.05.001.000.327.

[96] *M. Tsiskadze,* Problem of Compensating Nonpecuniary Damage for Bodily Injury in the Legislation of Georgia, Justice and Law Journal, #2, 2008, 17; *M. Bichia,* Compatibility of Georgian Model of Nonpecuniary Damage Compensation for the Violation of Personal Rights with the European Standards, Law Journal, #1, 2017, 17.

legislator's aspiration to completely level the legal outcome of the criminal proceedings for the perpetrator in the context of satisfaction function of the moral damage.

Grand Senate of Civil Cases in Germany has held that while assessing the satisfaction function it is desirably to consider the level of culpability of the perpetrator as one of the relevant circumstances and modify the "all-or-none" principle applicable in the property damage through a flexible system for calculating the compensation amount.[97] Expanding this concept, the second package of legislative amendment in 2002, modernizing the provisions that regulate the compensation of damage, somewhat reduced the satisfaction function and fully separated it from the endangering delicts or the cases of negligent breach of obligation.[98]

Despite the fact that the prevention function is largely recognized, bringing forward the predominant role of the subjective aspects of satisfaction creates the risk of incorporating the punitive element in civil law. In order to identify and minimize the mentioned risk, it is crucial to consider the connection and relation of the prevention function with other objectives, to assess the personality and relevant level of culpability of the perpetrator and bring forward those factors especially when the restitution is impossible due to the intensity of the damage of the interest.[99]

4.4. Punitive Damages

Punitive functions of the compensation of non-property damage is intensively applied in US law and is known as the so-called "punitive damages".[100] In certain circumstances, illegal action of the debtor triggers the right of the victim to claim additional monetary compensation exceeding the actual damage inflicted, which (generally) largely exceeds the inflicted damage.[101] Jurors determine the amount of monetary compensation.[102] In US court practice, compared to the cases of physical damage, the amount of damage is even higher in case of claims concerning the violation of personal rights. In such case, the punitive function is aimed at preventing further actions of the perpetrator and warning a third person to refrain from similar actions.[103]

In European jurisdictions, there is a certain level of doubt in relation to this peculiarity of the US law. German lawyers, rightly so, indicate that by imposing the amount several times exceeding the

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97 *Jager L., Luckey J.,,* Schmerzengeld, 8. Auflage, Jurion, 2016, 1034.

98 Ibidem .

99 *MünchKomm* zum BGB, Immaterialer Schaden, 7. Auflage, 2016, §253 Rn. 13.; IdS auch 3. Aufl. § 847 Rn. 4 ff.; See similar position in *Soergel W., Ekkenga J., Kuntz S.,* Inhalt des Schuldverhältnisses, Immaterialer Schaden, 7. Auflage, 2016, §253 12 – Satisfaction if the Recovery of the Damaged Self-esteem of the Victim - „Genugtuung ist einer Wiederherstellung des beeinträchtigten Selbstgefühls des Geschädigten".

100 Ibid.

101 *Dzlierishvili Z., Tsertsvadze G., Robakidze I., Svanadze G., Tsertsvadze L.,. Janashia L,* Contractual Law, Tb., 2014, 674.

102 *Dam C. V.,,* European Tort Law, Oxford University Press, 2013, 303.

103 *Shapo S. M.,* Principles of Tort Law, Thompson West, Chicago, 2003, 494.

amount of actual damage, the US law incorporates the criminal fine elements into the private law, which generally is unacceptable for the states with continental Europe law traditions.[104]

In Georgia, it is also less probable and possible to apply this specific form of damage compensation. This attitude is echoed in the fact that Article 413 of the Criminal Code defines the criteria (reasonability, fairness) for the compensation of non-property damage, which reflects the intention of the legislator to strengthen the compensative function of the non-property damage. Interpretation by the Supreme Court of Georgia, concerning the necessity of correctly establishing the objective of the provision, bears the same pathos, which – in contrast with the approach applied in English and US laws – is much careful in considering the compensation of moral damage.[105] In Result, teleological reduction of the provision attempts to reduce and restrict the unsubstantiated expansion of the legal consequence in the name of securing the stability of civil turnover.

5. Conclusion

The respective paper would greatly benefit if we summarize grounds for imposing non-property damage compensation in a judiciary practice's angle. Due to the fact that the matter relates to protection of an absolute rights of a subject, and whose rights become subject as clearly and unequivocally set forth by the Constitution of Georgia, the Law is obliged to somehow ensure protection of these rights through the best possible perspective; and upon hope and attitude that rights of a person, even during absence of subjective perception of violation, shall be recognized and prospected from an unjust intrusion.

Upon analyses of the doctrine and judicial practice, the key shortcoming identified is incorrect interpretation of normative grounds unbalanced through legislation and absence of uniform judiciary practice. Obviously, the latter does not imply that the law shall entail detailed formulation of functions and criteria for non-property damage compensation, which would be adapted to every type of different case despite of factual circumstances and subjective perceptions. While determining non-property damage compensation, judges shall preferably consider factors, besides other circumstances, such as motivation to exercise protected rights due to social, economic and political objectives. After concentrating on such type of details, it is desirable to feature every function entailed within non-property damage notion in an uniform perspective; so that the latter detailing can be utilized as grounds for determining different amounts of compensation in those circumstances, when an individual's personal space is being used for commercial benefit, and quality of interference in a protected space is especially intensive. Such approach of somewhat manipulating with compensation's amount will constitute to ensuring every function within non-property damage's essence.

It is important that judiciary shall pay special attention to satisfaction effect only in those cases, which relate to deliberate delicts or damage of personal space in a higher intensity. In every other case, an objective of a law shall not be punishment of a party who caused damage while bearing every single

104 *Dzlierishvili Z., Tsertsvadze G., Robakidze I., Svanadze G., Tsertsvadze L.,. Janashia L,* Contractual Law, Tb., 2014, 676.

105 Decision of the Chamber of Civil Cases of the Supreme Court of Georgia, 20 January 2012, Case #ac-1156-1176-2011.

subjective concern of an injured party. From a legal perspective, it will be wise to assess correction of injustice with the highest possible measure.

As an antipode of non-property damage prevention effect can be considered establishment of symbolic compensation within the Georgian judiciary practice. It is highly doubtful that such practice will be effective and perspectives for complete realization of the objectives discussed.

While discussing preventive function, it is crucial not to exclude the importance of freedom of expression for the country striving for democratic and pluralistic societies, and which is counterweight to personal rights. Upon assessment of factual circumstances of the case, and upon researching subjective deliberation of an offence, it became obvious that causing damage has different motives, such as promotion of one's production[106], getting material profit, increase of ranking, and discretion of a partner in public or professional networks. Upon empirical research, it became evident that courts try not to restrict freedom of press through their rulings[107] and upon considering cases of compensation for moral damage, they are being guided with simple schemes and automatically decrease demanded amount, which does not ensure the standard of trust established in developed legal orders with regard to personal space protection.

For the purpose of elaboration of clear and foreseeable protection mechanisms, courts shall ensure development of uniform and balanced practice; the latter will constitute to existence of leverages and guarantees that are effective, efficient, exhaustive, sufficient and most importantly transparent, which will not only exclude threats of unjust judiciary law, but will make protection of personal space of each and every member of the society trustworthy.

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[106] BGH, 14.02.1958- I ZR 151/56, BGHZ 26, 349=NJW 1958, 827 (mit Anm. *Larenz*)= GRUR 1958m 408 (mit Anm. *Bussmann*)-Herrenreiter.

[107] *Sajaia L.,* Press and Moral Damage, journal "Georgia Law Review, 8/2005-1/2, 2005, 178.

12. *Dam C.,M.,* European Tort Law, Oxford University Press, 2013, 302, 303, 305, 322,
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17. *Grüneberg,* in Palandt, BGB Komm., 73. Aufl., 2014, Vorbem., §249, 4 (In German).
18. *Jager L., Luckey J.,,* Schmerzengeld, 8. Auflage, Jurion, 2016, 6, 996, 1003, 1004, 1010, 1032 (In German).
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21. *MünchKomm* zum BGB, Immaterialer Schaden, 7. Auflage, 2016, §253 12, 13 (In German).
22. *Rusiashvili G.,* New Commentary on the Civil Code, article 408, 2, 3, 4, 6.
23. *Sajaia L.,* Press and Moral Damage, Journal "Georgia Law Review, 8/2005-1/2, 2005, 178 (In Georgian).
24. *Shapo S. M.,* Principles of Tort Law, Thompson West, Chicago, 2003, 494 (In English).
25. *Soergel W., Ekkenga J., Kuntz S.,* Inhalt des Schuldverhältnisses, Immaterialer Schaden, 7. Auflage, 2016, §253 10 (In German).
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33. Decision of the Supreme Court of Georgia of June 16, 2017 on the Case #ac-291-275-2017 (In Georgian).
34. Decision of the Chamber of Civil Cases of the Supreme Court of Georgia of January 6, 2017 on the case #2b-7243-15 (In Georgian).
35. Decision of the Chamber of Civil Cases of the Supreme Court of Georgia of July 1, 2016 on the case #ac-167-163-2016 (In Georgian).
36. Decision of the Supreme Court of Georgia of June 10, 2016 on the Case #ac-301-286-2016 (In Georgian).
37. Decision #1/6/561,568 of the Supreme Court of Georgia of September 30, 2016, Iuri Vazagashvili vs. the Parliament of Georgia (In Georgian).
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39. Decision №1/4/592 of the Constitutional Court of Georgia on October 24, 2015, on the Case "Beka Tsikarishvili, Citizen of Georgia against the Parliament of Georgia", II-1 (In Georgian).
40. Decision of the Supreme Court of Georgia of October 7, 2015 on the Case #ac-12-459-438-2015 (In Georgian).
41. Decision of the Chamber of Civil Cases of the Supreme Court of Georgia of October 23, 2015 on the Case #ac-547-519-2015 (In Georgian).
42. Decision of the Supreme Court of Georgia of November 5, 2015 on the Case #ac-594-562-2015 (In Georgian).

43. Decision of the Chamber of Civil Cases of the Supreme Court of Georgia of September 10, 2015 on the Case #ac-979-940-2014 (In Georgian).
44. Decision of the Supreme Court of Georgia of November 8, 2013 on the Case #ac-370-352-2013 (In Georgian).
45. Decision of the Supreme Court of Georgia of December 27, 2012 on the Case #bs-78 (k-12) (In Georgian).
46. Decision of the Supreme Court of Georgia of April 3, 2012 on the Case #ac-1477-1489-2011 (In Georgian).
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48. Decision of the Supreme Court of Georgia of April 3, 2012 on the Case #ac-1477-1489-2011 (In Georgian).
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50. Decision of the Chamber of Civil Cases of the Supreme Court of Georgia of November 22, 2010 on the Case #ac-868-817-2010 (In Georgian).
51. Decision of the Supreme Court of Georgia of August 4, 2009 on the Case #bs-972-936 (3k-08) (In Georgian).
52. Decision of the Chamber of Civil Cases of the Supreme Court of Georgia of November 9, 2009 on the Case #ac-823-1109-09 (In Georgian).
53. Decision of the Supreme Court of Georgia of August 4, 2009 on the Case #bs-972-936 (3k-08) (In Georgian).
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55. Decision of the Chamber of Civil Cases of the Supreme Court of Georgia of July 30, 2002 on the Case #sk-423-03 (In Georgian).
56. Sec. 8 of the Courts and Legal Services Act 1990 (In German).
57. John v Mirror Group Newspaper Ltd [1997] QB 586 (In English).
58. BGHZ 7, 223, 226, 229 (In German).
59. BGH NJW, 2007, 2475 (In German).
60. BGH, Urt. v. 13.10.1992 – VI ZR 201/91 , BGHZ 120, 1 = VersR 1993, 327 = NJW 1993, 781 (In German).
61. OLG Köln VersR 2003, 602 [603] (In German).
62. OLG Celle NJW 2004, 1185 (In German).
63. OLG Köln, Urt. v. 08.12.2014 – 5 U 122/14 (In German).
64. OLG Düsseldorf VersR 2003, 601 (In German).
65. BGH 1994, BGHZ 128, 1= NJW 1995, 861 (In German).
66. BVerfGE 34, 269 (280 ff.), Soraya (In German).
67. BVerfG NJW 2000, 2187 [2188] (In German).
68. BGHZ 128, 1 [16] = NJW 1995, 861 – Caroline von Monaco I (In German).
69. BGH NJW 2014, 2029 Rn. 38 (In German).
70. OLG Hamm NJWRR 2004, 919 (In German).
71. OLG Köln NJWRR 2000, 470 [471] (In German).
72. BVerfG 8 March 2000, NJW 2000, 2187 (In German).
73. BGH, Beschl. v. 06.07.1955 – GSZ 1/55 , BGHZ 18, 149 = VersR 1955, 615 = NJW 1955, 1675 = MDR 1956, 19 m. Anm. Pohle (In German).
74. BGH, Urt. v. 29.11.1994 – VI ZR 93/94 , VersR 1995, 351 = NJW 1995, 781- 29.11 (In German).
75. OLG Saarbrücken, Urt. v. 27.11.2007 – 4 U 276/07 , NJW 2008, 1166 = SP 2008, 257 (In German).
76. BGH, 14.02.1958- I ZR 151/56, BGHZ 26, 349=NJW 1958, 827 (mit Anm. *Larenz*)= GRUR 1958m 408 (mit Anm. *Bussmann*)-Herrenreiter (In German).
77. BGH GrZS NJW 55, 1675, 95, 781; BGHZ 128, 117 [119 f.] = NJW 1995, 781 (In German).
78. OLG Celle NJW 2004, 1185 (In German).
79. OLG München BeckRS 2016, 06809 (In German).

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Mediation and Online Dispute Resolution (odr) as an Innovative Form of Dispute Resolution[1]

Mediation, as an alternative dispute resolution technique, has been rapidly getting a strong position in a daily usage as the most acceptable form for conflicting parties to come to a solution. Many European countries apply forms of mandatory use of mediation before initiating court proceedings in domestic jurisdictions, further promoting the alternative dispute resolution and increasing its affordability in the society. For the purpose to save own finances and time this alternative form of dispute resolution has many users among conflicting parties. Different states also think and work on more innovative forms of using mediation, which will make this process more important and usable. The article deals with mediation as an alternative dispute resolution and its innovative form – Online Dispute Resolution.

Keywords: *Alternative Dispute Resolution (ADR), Mediation, Online Dispute Resolution (ODR), Online Mediation, Legislative Regulation, Civil Procedural Legislation, Amicable Settlement, Advantages of Mediation.*

1. Introduction

There is no unified definition of mediation[2] [3]. Mediation is an old[4], traditional technique of solving the conflict which was re-discovered in the 20th century as a rapidly growing[5] effective means[6] for solving conflict. Mediation was used[7] centuries ago, its popularity, so called "Re-discover"[8] as an alternative dispute resolution mechanism, especially has been growing[9] since the 1970s, when so-called

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2 *Buhring-Uhle C., Kirchhoff L., Scherer G.,* Arbitration and Mediation in International Business, Kluwer Law International, London, 2006, 176.

3 The word "mediation" has Latin root and derives from the word medius, which means "being in the middle", and the term "mediation" derives from the English word mediation / to mediate (vermitteln in German) which means facilitation.

4 *Brooker P.*, Mediation Law, Routledge Taylor &Francis Group, 2013, 1.

5 *McLaren R.H., Sanderson J.P.,* Innovative Dispute Resolution: The Alternative, Carswell, Toronto, 2006, 4.

6 *Glenewinkel W.,* Mediation als ausergerichtliches Konfliktlosungsmodell, 1999, 68.

7 *Englert K., Franke H., Grieger W.,* Streitlosung ohne Gericht – Schlichtung,Schiedsgericht und Mediation in Bausachen, Werner Verlag, 2006, 239.

8 *Von Bargen J.M.,* Gerichtsinterne Mediation, Mohr Siebeck, 2008, 5.

9 *Brooker P.,* Mediation Law, Routledge Taylor &Francis Group, 2013, 20.
(In England mediation as a key component of the civil justice system started to develop from 1996, which is known as Lord Woolf-'s reform, as a result of which some changes were made to the Civil Procedure Act

ADR movement began in the west, and the main focus of this movement was on mediation[10] as the most practical and effective alternative dispute resolution mechanism[11]. Mediation has been formed as a hybrid, because from scientific point of view, it combines elements of law, psychology, psychiatry, ethnology and communication skills[12].

Many scientists and researchers believe[13] that originality of mediation is that it simultaneously involves absolute voluntariness of parties towards the process, confidentiality of the process is provided, it is characterized with the principles of neutrality and impartiality and which is the most important, mediation offers disputing parties a unique solution and strengthens and stabilizes future personal and business relationships between the them.

There is often expressed a skeptical opinion about mediation that it is the excess supplement to conflict resolution process between the parties, because the disputing parties can find solution around the conflict better than others. Although the practice has shown that disputing parties actually cannot independently communicate in a civilized manner, due to the fact that generally preconditions of conflict do not allow them to act so, but through involvement of the third independent and impartial party in the process, the parties seeking solution, are more productively involved in the dispute resolution process[14].

Today many lawyers are involved in mediations as mediators or a representative of the parties in mediation; this latter plays an important role in legal practice[15]. Although some part of the society is still skeptical towards the functionality and outcomes of mediation[16], this new institution becomes more popular every day.

2. The Concept of Mediation

Mediation is defined as a structured process based on a trust in which one or more neutral[17] physical[18] person[19] as an out-of-conflict[20] mediator assists the parties to complete the dispute voluntarily

and the parties of the civil dispute were offered to solve the conflict via out-of-court methods. In particular, as a result of Lord Woolf changes the court was authorized to offer an alternative dispute resolution to the parties, and if the party unreasonably refused to participate in the process, the court has been given the right to impose a penalty to such party.)

10 *Alfini J., Press S., Sternlight J., Stulberg J.*, Mediation Theory and Practice, 2001, 2.

11 *Stephen J.W.*, Principles of Alternative Dispute Resolution, West Academic Publishing, 2016, 387.

12 *Englert K., Franke H., Grieger W.*, Streitlosung ohne Gericht – Schlichtung, Schiedsgericht und Mediation in Bausachen, Werner Verlag, 2006, 244.

13 *Spencer D., Brogan M.*, Mediation Law and Practice, Cambridge University Press, Cambridge, 2006, 3.

14 Ibid.

15 *Reuben R.*, The Lawyer Turns Peacemaker, A.B.A.J. 1996, 54-55.

16 *Leung E.*, Mediation: A Cultural Change, Asian Pacific Law Review, 2009, 17.

17 *Kajkowska E.*, Enforceability of Multi-Tiered Dispute Resolution Clauses, Hart Publishing, Oxford and Portland, 2017, 9.

18 See Law on Mediation in Civil Disputes, Turkey, Article 2, 2012.

19 *Göksu M.*, Civil Litigation and Dispute Resolution in Turkey, Banka ve Ticaret Hukuru Arastirma Enstitusu, 2016, 275.

20 *Brown H., Marriott A.*, ADR Principles and Practice, Sweet & Maxwell, Thomson Reuters, 2011, 154.

and with the responsibility of the parties[21], or the concept of mediation is to let the parties to try and ensure dispute resolution[22] with the help[23] of mediator within the scope of structured conflict process. This is a technique[24] for conducting negotiations structurally aiming to achieve a certain result.

Mediation offers the parties flexible[25] alternative method of solving conflict in exchange of less time, less expenses as well as through reduction of overloading of trial proceedings. Positive side of mediation is that in case of disagreement between the parties in the process, they always are able to apply the court for dispute resolution[26]. Mediation is oriented on parties' interests more than on their legal rights, during which agreement achieved in mediation often more represents commercial compromise[27] of the parties than a decision taken in relation to legal rights; This is a process promoting negotiations[28].

Mediation is a good opportunity for the parties to define conflict between each other, to understand the concept of claims towards each other, find out actual reasons[29] of conflict, regulate conflict peacefully, manage it and to create so called win-win[30] situation, also, to prevent further initiation of conflict and maintain relationship[31]. In addition, the Christian doctrine also advises people to avoid[32] conflicts.

Mediation is a good way for self-determination by the parties[33] instead of judicial procedures where a judge has this function, or "mediation" helps the parties to decide their own affairs themselves, and the court and arbitration "interfere" in the parties' affairs[34] for resolving the dispute".

There are strong social and constitutional prerequisites[35] why disputing parties should have opportunity of trying to settle the dispute through a third neutral person, because a method similar to an alternative dispute resolution allows the parties to exhaust the conflict, which in turn serves the purpose of the rule of law. This form of dispute resolution helps the parties to have direct communication[36] with

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21 *Eidenmuller H., Wagner G.,* Mediationsrecht, Köln*,* 2015, 3.

22 *Duve Ch., Eidenmuller H., Hacke A*., Mediation in der Wirtschaft: Wege zum professionellen Konfliktmanagement, 2011, 83.

23 *Partridge M*., Alternative Dispute Resolution, Oxford University Press, Oxford, 2009, 89.

24 *Roberts M*., Mediation in Family Disputes, 4th ed., Ashgate, 2014, 8.

25 *Hopt J.K., Steffek F.,* Mediation Principles and Regulation in Comparative Perspective, Oxford University Press, Oxford, 2013, V.

26 *Lindblom H*., Progressive Procedure: The Role of Courts, Access to Justice, Group Actions, Complex Litigation and Alternative Dispute Resolution in Comparative Perspective: Twelve Essays 1985-2015, Iustus Förlag, 2017, 422.

27 *Kajkowska E*., Enforceability of Multi-Tiered Dispute Resolution Clauses, Hart Publishing, Oxford and Portland, 2017, 10.

28 *Stephen W*., Principles of Alternative Dispute Resolution, West Academic Publishing, 2016, 7.

29 *Kumar A*., Alternative Dispute Resolution System, K.K. Publications, New Delhi, 2016, 233.

30 Ibid.

31 *Englert K., Franke H., Grieger W.*, Streitlosung ohne Gericht – Schlichtung, Schiedsgericht und Mediation in Bausachen, Werner Verlag, 2006, 242.

32 *Roebuck D*., Mediation and Arbitration in the Middle Ages (England 1154-1558), Holo Books, The Arbitration Press Oxford, 2013, 51.

33 *Menkel-Meadow C.J., Love L.P., Schneider A. K., Sternlight J.R.,* Dispute Resolution Beyond the Adversarial Model, Wolters Kluwer Law & Business, Aspen Publishers Inc, 2011, 224.

34 *Meyer S.A*., Chairman, New York State Mediation Board, 1969, 164.

35 *Brand J., Steadman F., Todd C.,* Commercial Mediation, 2nd ed., Juta and Company, 2016, 13.

36 *Partridge M.*, Alternative Dispute Resolution, Oxford University Press, Oxford, 2009, 90.

each other, which usually does not take place during a trial and in mediation the parties have an opportunity to overcome the large margin of alienation that is characteristic to a conflict between them.

Mediation is impartial conduction[37] of negotiations on dispute resolution through involvement of third person in nonobligatory process, often called as "conflict resolutions process"[38]. In this process, the mediator has not a right[39] to solve conflict between the parties and make decision[40], and thus differs from the court[41] and alternative dispute resolution such as arbitration, and the mediator's authorities differ from arbitrator's authorities[42]. Mediation offers the parties the opportunity of conducting structured negotiations[43] in line with interests of the parties during which in contrast to the court and arbitration, parties themselves and not mediators[44], using the main principle of Mediation: Interests and not requests[45].

Mediation, in modern sense, is interpreted as a process in which the parties take self-determination[46] and make decision on the case itself. International practice has established a practice that the courts must exercise justice, but not "at all costs", and therefore on all cases where expenses can be saved the court advises[47] the parties to apply to mediate.

Adoption of the European Directive on Mediation[48] (2008/52/EC), implementation of which is mandatory for member states since 2011, has developed a new development perspective of mediation in Europe[49] in order to establish a unified framework of mediation standard and support cross-border mediation.

Establishment of Mediation Standard at an international level enforced member states to integrate the legislative act on mediation in their domestic legislation, which increased the requirement towards mediation as an effective dispute resolution technique as well as the need of its further development in non-European countries.

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37 *Buhring-Uhle C., Kirchhoff L., Scherer G.*, Arbitration and Mediation in International Business, Kluwer Law International, 2006, 176.

38 *Von Bargen J.M.*, Gerichtsinterne Mediation, Mohr Siebeck, 2008, 13.

39 Ibid, 15.

40 *Goldberg S. B., Sander F. E. A., Rogers N. H., Cole S. R.*, Dispute Resolution, Negotiation, Mediation, Arbitration, and other Processes, Wolters Kluwer Law & Business, 6th ed., Aspen Casebook Series, 2012, 121.

41 *Menkel-Meadow C. J., Love L. P., Schneider A. K., Sternlicht J. R.,* Dispute Resolution Beyond the Adversarial Model, Wolters Kluwer Law & Business, Aspen Publishers Inc, 2011, 31.

42 *Eidenmuller H., Wagner G.,* Mediationsrecht, Köln, 2015, 5.

43 *Schiffer J.*, Schiedsverfahren und Mediation, Carl-Heymanns Verlag, 2005, 6.

44 *von Schubert M., Haase M.* in *Schiffer J.*, Schiedsverfahren und Mediation, Carl-Heymanns Verlag, 2005, 249.

45 Ibid, 250.

46 *Boulle L., Field R.*, Australian Dispute Resolution, Lexis Nexis Butterworths, 2017, 58.

47 *Chern C.*, International Commercial Mediation, Informal London, 2008, 15.

48 Directive 2008/52/EC, of the European Parliament and of the Council, on Certain Aspects of Mediation in Civil and Commercial Matters, 21 May 2008, <http://eur-lex.europa.eu/legal-content/en/ALL/?uri=-CELEX:32008L0052>, [30/07/2015].

49 *Hopt J.K., Steffek F.,* Mediation Principles and Regulation in Comparative Perspective, Oxford University Press, Oxford, 2013, V.

In terms of definition of mediation, there is a difference in European countries, among the concepts given on the one hand at a level of law, and on the other hand, which are defined by the judges, but the positions on the theory given bellow are homogeneous and agreed that mediation is the process based on the volunteering of the parties in which the mediator solving the issue without legal form, implements the systematic facilitation of negotiations between the parties for the purpose to make the parties to assume responsibility for dispute resolution.

Everyone agrees that the required characteristic of this process should be the volunteering of the parties to be full participants of the process; only in small cases, the court can force parties to be involved in mediation[50], while in all other cases it is excluded[51].

They also agree that the third person involved in mediation process should not have any kind of right to make decision on the issue the essence of which lies in the fact that the parties are liable to take decisions on the issue[52]. The only variety of approaches to the question is observed in the issue whether a third neutral person should have ability to offer a solution in the form of its opinion to the parties[53] involved in the process or what are the limits of rights to act so for the third neutral person.

Consequently, the question about the duration of communication with the third neutral person, in number of cases remains the issue of internal regulations, professional codes and soft law of the country.

Accordingly, as a summary, we can say that from the concept of mediation, which uses a broad consensus[54], the following mandatory preconditions should be satisfied:

(1) There must be a dispute;

(2) Participation should be voluntary;

(3) Involvement of a third neutral person in the process should be ensured, who will communicate with the parties systematically; and

(4) Decision-making on the issue is the responsibility of the parties.

Finally, we should take into consideration that additional value of mediation is not the only thing that it reduces costs[55], the court and the judge's time, is less competitive than trial, but at least it is noteworthy that by using mediation, the parties are allowed to resolve their own problems, assume responsibility and control the progress of the process, during which they can reconnect and start to warm already damaged relations, or constructively to advance its business interests and personal life without stress and effort[56], during which the parties have a greater feeling of satisfaction towards the proceeding[57].

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[50] *Kulms R.*, Mediation in the USA in *Hopt J.K., Steffek F.,* Mediation Principles and Regulation in Comparative Perspective, Oxford University Press, Oxford, 2013, 1262.

[51] *Roth M., Gherdane D.*, Mediation in Austria in *Hopt J.K., Steffek F.,* Mediation Principles and Regulation in Comparative Perspective, Oxford University Press, Oxford, 2013, 260.

[52] *Hopt J.K., Steffek F.,* Mediation Principles and Regulation in Comparative Perspective, Oxford University Press, Oxford, 2013, 12.

[53] Chapter 13, C (2) (C). 729 (Netherlands), *Schmiedel L.,* Chapter 18, B (1) (c), 920 (Canada) *Ellger R.,* Chapter 22, A(2), pp.1138 et seq (Norway) Sperr A. in *Hopt J.K., Steffek F.,* Mediation Principles and Regulation in Comparative Perspective, Oxford University Press, Oxford, 2013.

[54] *Hopt J.K., Steffek F.,* Mediation Principles and Regulation in Comparative Perspective, Oxford University Press, Oxford, 2013, 13.

[55] *Brooker P.*, Mediation Law, Routledge Taylor & Francis Group, 2013, 9.

[56] *Brown H., Marriott A.*, ADR Principles and Practice, Sweet & Maxwell, Thomson Reuters, 2011, 107.

3. Innovative Direction of Dispute Resolution - Online Dispute Resolution

In parallel to establishing mediation as an effective alternative means of dispute resolution as well as the use of mediation as a form of international dispute resolution, another new innovation in the direction of mediation is being developed in European countries. This is so-called E-justice in mediation process, alternative online dispute resolution - ODR. Although, it should be mentioned that the United States is a real pioneer[58] in this field but as at today a similar form of mediation is already well implemented[59] in many European countries.

Over the years, information technology has being transformed into information communication technologies, which is available through wide range of technical skills of electronic communication. In addition, it should be noted that in parallel to development of e-commerce occurs a need of creation of an appropriate mechanism that will be formed as an electronic means of alternative dispute resolution[60].

Development of electronic technologies does not have a scale; therefore, ability to solve disputes in electronic space is being created and improved every day[61]. In this direction, one of the developed system operating is ODR program of WIPO[62] (World Intellectual Property Organization) arbitration and mediation center, which offers concerning parties online to solve intellectual property issues through mediation.

On 25 October 2011, the European Parliament adopted another resolution for supporting ADR, which indicates and references to large potential[63] of ODR development on small complaints[64] or cross-

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57 *Brooker P.*, Mediation Law, Routledge Taylor & Francis Group, 2013, 9.

58 *Bhatia V.K., Candin Ch., Gotti M.,* Discourse and Practice in International Commercial Abritration, 2012, 213.
So called "Online Mediation" was founded in July 1996 in state of Kansas, USA. In particular, a person interested in computers created a web-page which published local news, copied information from radio, television, newspapers and repeated texts of published in newspapers word by word, as a result of which the aditor of local print media connected him and accused in the gross violation of copyright. As a result the site was temporarily suspended but the person applied to legal advice, contacted online ombudsman's office, which was a few months-long project founded in Massachusetts Information Technology and Dispute Resolution Center (Amherst) by Jenet Rifkin and Ethan Katsh. In this particular case they fulfilled of function of a mediator by using electronic means (e-mail, Skype, etc.) and the parties has come to an agreement.

59 Development of ODR in Italy is connected to Milan Arbitration Chamber since 2003, <www.risolvionline.it>.

60 *Brown H., Marriott A.*, ADR Principles and Practice, Sweet & Maxwell, Thomson Reuters, 2011, 587.

61 Online mediation service Juripax (offers the mediators the opportunity to have online software for carrying out the process which means online forms, online platforms, proceeding program).

62 World Intellectual Property Organisation.

63 Civil Justice Council, ODR-report, 5 (Online Dispute Resolution is not Science Fiction).

64 *Cortés P.,* The Law of Consumer Redress in an Evolving Digital Market, Cambridge University Press, Cambridge University Press, 2017, 44.
(Pursuant to this Regulation theusers should be able to settle the dispute online, and accordingly ADR service providers must have ODR technique, since it will be difficult to solve small disputes throughout Europe, such as disputes among consumers, with less financial costs, especially when there are cross-border disputes between the parties).

border litigation[65], but this form of dispute resolution has critics who believe that the lack of regulation and high price of electronic technology itself is a challenge, which will interfere the establishment of an electronic form of dispute resolution and make it ineffective[66], on the other hand, they think that the problem of further development of online dispute resolution is concluded in increased use of this form, which will result overloading of online proceeding[67], which is supposed to become a problem for provider organizations. UNCITRAL in its ODR regulations predicts to fix several millions of cases[68] per year in the nearest future when ODR will be used, and in parallel to E-Commerce development, it can lead to hundreds of millions[69] of consumption.

The legislation of a number of countries may not directly include similar term, but nothing prohibits the use of such technical means in mediation[70].

The definition of ODR is different in literature[71], but commonly it deals with dispute resolution through the method which contains an electronic technology component, but the difference is even in this section. One thinks that the dispute should be solved using the electronic technology, but there is another opinion according to which "the dispute is solved by using the information technologies in the electronic environment.[72]

In both cases, technologies play an important role when the process and communication between the parties to the dispute are mostly implemented through online electronic communications tools[73].

Online dispute resolution (ODR) is perceived as an alternative tool of dispute resolution[74] that is implemented remotely using Internet technologies[75] that enables the parties to participate in mediation using electronic means, listen each other[76], send information online and save online information[77].

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65 *Susskind R*., Tomorrow's Lawyers: An Introduction to Your Future, Oxford University Press, 2013, Ch. 10.
66 *Cortes P.*, Online Dispute Resolution for Consumers in the European Union, 2010, 183.
67 *Heetkamp S.J.*, Online Dispute Resolution bei grenzuberschreitenden Verbrauchervertragen, V&R Unipress, Universitatsverlag Osnabruck, 2018, 54.
68 *Wahab M. A.*, *Katsh E., Rainey D.*, ODR: Theory and Practice, A Treatise on Technology and Dispute Resolution, 2011, 122.
69 *Rule C.*, Online Dispute Resolution for Business, Josseey-Bass Publishing, San Francisco, 2002, 173.
70 *Esplugues C*., Civil and Commercial Mediation in Europe, Intersentia,Vol. II, 2014 , 52-53.
71 *Heetkamp S.J*., Online Dispute Resolution bei grenzuberschreitenden Verbrauchervertragen, Universitatsverlag Osnabruck, 2018, 31.
72 *Duve Ch., Eidenmuller H., Hacke A*., Mediation in der Wirtschaft: Wege zum professionellen Konfliktmanagement, 2011, 209.
73 *Cortes P.,* The Law of Consumer Redress in an Evolving Digital Market, Cambridge University Press, Cambridge, 2018, 101.
74 In recent years, private service providers of online dispute resolution have been established on the international market: a) eBay's Dispute Resolution Center, which offers a dispute resolution platform in the area of transaction carried out within it; B) Modria - is a company of the former ODR director of eBay and Pay Pal - Colin Raul (2003; 2011), which has acquired online dispute resolution license from eBay and developed and developed its online software; C) The Rechtwijzer - in 2007 Dutch Legal Aid Service Board developed an online portal that aimed to assist the parties involved in the dispute to find a lawyer in electronic space, which in 2014 together with Hill (www.hiil.org/project/rechtwijzer) turned into online dispute resolution platform. D) Youstice - is also an online platform launched in 2014 which serves online resolution of small cost disputes; E) resolver -www. Resolver.co.uk - is a private platform that allows users to use the platform to regulate the dispute online.

During using online dispute resolution as an out-of-court mechanism, online form often is called[78] a fourth party to the dispute. Online dispute resolution forms are being developed and in a number of cases, it is possible to register and manage the claim online and this new direction takes the form of alternative dispute resolution mechanism[79].

The way and form of online dispute resolution becomes an innovative approach which creates additional comfort to the users. Especially is visible the development of practice of certain specific disputes in Europe and different states of the United States through this method, such as consumer[80] or small business disputes (e.g. between the small business companies, the company and its consumer and etc.). Often it is called a specific term ODR[81] (Online Dispute Resolution) in English-speaking community. Moreover, there are scientists who believe that ODR has potential and ability of solving complex high-priced disputes[82].

Online mediation proponents also pay attention to online integration of the principles of mediation, which is expressed in using electronic signature on the commitment of confidentiality in the agreement on a special form for the parties[83].

Online mediation[84] has all advantages that is characteristic to traditional forms of alternative dispute resolution, which in some cases may led to less time-consumption and financing costs[85].

Benefits of online mediation may be[86]:

• it is easy to plan, taking into account the work schedule of the parties and their representatives;

• The parties can be involved in mediation process without the need to leave their home and / or office;

• Online Medication should save costs, including those related to movement, which is especially important when conducting cross-border mediation.

• online space gives the parties more time and opportunity to give prepared answers in the course of mediation.

• online mediation gives opportunity to exchange documents between parties quickly and almost without any extra costs.

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75 The third UNCITRAL group has also worked on ODR concept, which determined technical criteria.

76 *Kumar A.*, Alternative Dispute Resolution System, K.K.Publications, New Delhi, 2016, 106.

77 *Cortes P.*, The Law of Consumer Redress in an Evolving Digital Market, Cambridge University Press, Cambridge, 2018, 44.

78 *Heetkamp S.J.*, Online Dispute Resolution bei grenzuberschreitenden Verbrauchervertragen, V&R Unipress, Universitatsverlag Osnabruck, 2018, 36-37.

79 Ibid, 38.

80 See the law of the Federal Republic of German of 19.02.2016 on regulation of disputes in consumer matters: Verbraucherstreitbeilegungsgesetz, BGBl, 2016, Teil I Nr.9 vom 25.02.2016, 254-274.

81 *Bhatia V.K., Candin Ch., Gotti M.,* Discourse and Practice in International Commercial Arbitration, 2012, 212.

82 *Susskind R.,* The End of Lawyers? Oxford University Press, Oxford, 2010, 220.

83 *Brown H., Marriott A.*, ADR Principles and Practice, Sweet & Maxwell, Thomson Reuters, 2011, 593.

84 *McLaren R. H., Sanderson J. P.*, Innovative Dispute Resolution: The Alternative, Thomson Carswell, 2006, 7.

85 *Galves F.*, Virtual Justice as Reality: Making the Resolution of E-commerce Disputes More Convenient, Legitimate, Efficient, and Secure, Journal of Law, Technology & Policy, 2009 (1).

86 *McLaren R. H., Sanderson J.P.*, Innovative Dispute Resolution: The Alternative, Thomson Carswell, 2006, 8.

On the other hand, it should be mentioned that at the first stage of establishment the main challenge of online mediation is a feature characteristic to mediation, such as the need of personal contact[87] (so-called face-to-face mediation / contact) between the parties to mediation which in a number of cases is mentioned as a main prerequisite for successful completion of mediation in the literature and practical examples also indicate this, however, when there is need and no alternatives, although the use of electronic means has no alternative.

However, it should be noted that, in a number of cases, during disputes between the parties progressing on emotional background[88], on the one hand mediation by using electronic means may calm down the parties and on the other hand, allow the mediator to carry out the process in a calm environment that will ultimately result in the outcome.

4. Conclusion

Mediation, as an alternative dispute resolution technique, has been rapidly getting a strong position in a daily usage as the most acceptable way for conflicting parties to come to a solution. Many European countries apply forms of mandatory use of mediation before initiating court proceedings in domestic jurisdictions, further promoting the alternative dispute resolution and increasing its affordability in the society.

For the purpose to save own finances and time this alternative form of dispute resolution has many users among conflicting parties. Different states also think and work on more innovative forms of using mediation, which will make this process more important and usable.

The main interest of the parties to dispute, of course is to solve dispute with less cost, less time and less stressful situation and thus growing popularization and development of mediation as an alternative dispute resolution technique is reasonable and logical.

And in consideration with the fact that seeking effective ways of international dispute resolution at international level, when the parties apply to mediation, is being increased, it is reasonable to apply online mediation mechanisms which will ultimately lead to its institutional development and establishment in practice.

In this direction, we should note the Georgian reality, when mediation, on the background of the absence of special law, as such, has been getting position today. Although the use of online mediation technology in institutional form is still remote perspective for the Georgian reality, but even at initial level of mediation, in our practice there was a need of using simple electronic techniques during mediation when the dispute involved a resident of a foreign country[89].

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87 *Esplugues C.,* Civil and Commercial Mediation in Europe, Intersentia, Vol. II, 2014, ISBN 978-1-78068-130-6, 52-53.

88 *Eidenmuller H., Wagner G.,* Mediationsrecht, Köln, 2015, 34.

89 Mediation under auspices of Tbilisi City Court mediation center between Ronald Willem Hordeik (representative: lawyer Irakli Kandashvili) and Violeta Gobozova/Hordeik in 2015, case #2/21878-14, reached mediation agreement.

There also were cases of using electronic technical means during carrying out mediation involving participation of the residents of Georgia. Irreversibility of growth of similar needs and our strive to come closer to European standards will endeavor to promote the practice of online dispute resolution in Georgia soon.

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For the Issue of the Company Director's Liability

Legal regulation of the Company Director's Responsibility is the concern not only of developed countries but also of less economically advanced states because they are trying to create an effective and stable business environment, successfully lodge on an international market. In this process, the issue of the company manager's liability is very important. There is a rich practice of the US court about this concern, for example, the Supreme Court of Delaware divided the management duties into three parts: diligence, loyalty, and good faith.[1] *According to the Principles of Corporate Governance of the American Institute of Law, the director should fulfill the obligations of the corporation in good faith; in the best interests of the corporation and with due diligence.*

In general, the awareness of a decision has a significant impact on the responsibility of the company director. During decision making, it is important to make a thorough examination of facts, get consultations, hear different opinions, learn the market situation, share the information by the directors and etc.[2]

It should be noted that in European countries the overall standards of the director's responsibility are mainly similar. However, diverse trends are identified due to the state's economy, size, and development level of the markets, which requires assessment and legal analysis.

Keywords: *Internal and External Responsibility, Indirect/De facto Director, Straight (So-called Vis-à-vis) Responsibility, Group Damage, Conflict of Interests, Person Influential on the Director, Objective Responsibility, Managerial misconduct, General Supervision, Insurance of the Director's Liability, The Best Corporate Interests, Full Consent, A shareholder with Legitimate Interest.*

1. Introduction

The issue of the Company Director's Liability is especially relevant today due to modern commercial trends, social responsibility of entrepreneurs, and the state, regional or international importance of stable entrepreneurship.

Responsibility is one of the tools of corporate governance. Liabilities of corporation heads are considered, in the context of corporate management, as one of the (but, not the only) means of providing responsible management.[3] It is evident that because of the issue's actuality, it is being constantly researched; new challenges, trends and efficient management measures are being identified. This, in its turn, evolves from the functional role of the enterprise manager; the scope of the latter's competence and

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[1] *Maisuradze D.,* Corporate-legal Defensive Measures During the Reorganization of Capitalist Societies (Comparative-legal Research Preferably on the Example of Delaware State and Georgian Corporate Law), Dissertation Thesis to Earn the Academic Degree of Doctor of Law, Ivane Javakhishvili Tbilisi State University, Faculty of Law, Tbilisi, 2014, 22 (in Georgian).

[2] *Maisuradze D.,* For Explanation of Business Judgment Rule, Journal of Law, №1-2, Tbilisi, 2010, 116, (in Georgian).

[3] *Chanturia L.,* Corporate Management and the Managers' Responsibility in Corporate Law, Tbilisi, 2006, 29, (in Georgian).

the legal-economic consequences produced by the director's decisions. The corporation manager has transferred the entity's property, accordingly, the director's primary and basic obligation is to protect this property and prevent any damage. In different circumstances, discharge of this obligation generates inner-corporative and external responsibilities for the manager. Since the director has a wide range of competencies in the management and representation of the enterprise, it is necessary to observe the duties of good faith and due diligence. At the same time, the director is obliged to carry out management activities in accordance with the interests of society.

The purpose of this work is to analyze one of the important affairs of corporate law, to inform readers about the modern challenges of the director's responsibility and to review individual aspects of liability regulation. To achieve this aim, some issues of the director's responsibility in various countries will be analyzed (by using the legal-comparative methodology), as well as the court practice (important decisions and explanations) and the author's summarized opinions will be represented.

2. Issues of the Company Director's Liability in Europe

In general, corporate management is actively working to ensure the operational stability of the company and increase its profits. In this process, the management often encounters situations in which preliminary identification of probable consequences is impossible. Whereas, exactly risky decisions may often produce additional benefits for the company. In order to ensure adequate independence of the management members (as well as to protect the interest of individuals related to the company), there is a need for effective existing rules and procedures. It is important that the current legislation and judicial practice should make clear explanations for the management and any Company Related Subjects, when and which kind of responsibility arises in different circumstances; (this is especially important towards the director). Generally, the responsibility of the corporate director is accurately defined by the national state laws to a certain extent, however, they cannot regulate all the relationships which originate during entrepreneurship, and on which the director will have to make decisions. Furthermore, this is not the purpose of law itself (hence it is impossible and unreasonable to create a comprehensive legal framework for restricting the director's every activity). Besides, the company director does not know all legal norms and measures regulating the employer company's business. Frequently these regulations and judicial practice have some flaws that bereave the director a chance to make a right and informed decision. In Georgia and in different European countries the standards of the director's responsibility are similar to some extent, however, due to differences in the economic and trading relationships of states, as well as the tendencies and peculiarities of entrepreneurial law, in practice outbreaks various approaches of the director's responsibility and sort of different regulations. In addition, the court explanations, decisions and judicial practice based on them are playing an important role in establishing more or less different standards of responsibility. Consequently, it is important and interesting to review aspects of the company director's responsibility in European states' companies.

2.1. Georgia

Georgian corporate law distinguishes two main forms of capital societies: Joint Stock Company and Limited Liability Company. Forms of entrepreneurial societies such as an Additional Liability Company or General Partnership combined with Joint Stock Company are unfamiliar to Georgian law.[4] In Georgian law, the rules governing the managerial responsibility of capitalist societies are given in the law On Entrepreneurs. The central norm is given in article 9.6 of the law, which states that the members of the Supervisory Board shall conduct the company's business in good faith. In particular, they shall take care as an ordinary person of sound mind in a similar capacity and under similar circumstances would care (acting in the faith that their action is in the best interests of the company). The regulations governing the responsibility of the director and supervisory board members of the Joint Stock Company is also included in article 56.4 of the Law on Entrepreneurs, which together with the Institute for Reversing the Burden of Proof, also envisages the right to lodge a complaint against the director of the entity. The provisions of article 49 of the Law further strengthen the norms of the director's liability.[5] It can be said that the responsibility of the company director in Georgia is largely regulated at the legislative level, but for more determination of the director's liability in Georgian companies, in the first place, it is crucial to delineate ownership and control rights, which is unfortunately misunderstood in the Georgian reality. This is reflected in the lack of balance; Company incorporators always have the leverage to coerce the manager, make decisions they desire (and not within the company's interests). The management and control functions of the enterprise should also be separated sharply. The supervisory board shall have effective control over the enterprise's management body and the control should not be formal by nature. At the same time, the control should not take any forms that will obstruct the enterprise activities. The powers that are organically administered to a particular body of management must not be allowed to be transmitted. It is significant that without the sharp separation of powers among management bodies, it is very difficult to talk about the responsibility of their members.[6] Besides, it is crucial that the Georgian judicial practice (towards the director's responsibility) is very poor, which negatively affects the implementation of the director's liability standards in practice. Unfortunately, the Supreme Court had to discuss only a few cases about this issue; the 2015 decision is one of the important judgments from them.[7] In particular, the court discussed the matter whether the company director and partners had direct responsibility (with all their personal assets) for the company's tax liabilities when it was proved that the company could not fulfill its obligation. The Supreme Court has examined whether or not (and by which legal grounds) could the Revenue Service request reimbursement of tax liabilities

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4 *Chanturia L.,* Corporate Management and the Managers' Responsibility in Corporate Law, Tbilisi, 2006, 103, (in Georgian).

5 Ibid, 193, 195.

6 *Kiria U.,* Management Bodies of Capital Societies and the Managers' Responsibility in Georgia, Ilia State University, Law Clinic, Tbilisi, 2017, <http://legalclinic.iliauni.edu.ge/kapitaluri-sazogadoebebis-marthvis-ogranoebi-da-khelmdzghvaneltha-pasukhismgeblobis-problemebi-saqarthveloshi/> [03.01.2018], (In Georgian).

7 The decision of the Chamber of Civil Cases of the Supreme Court of Georgia №11-1158-1104-2014, 6 May 2015, (in Georgian).

from the company's partners and the director. Regarding the director's liability of the LLC, the court noted that according to article 9, paragraph 6 of the Law of Georgia on Entrepreneurs, the company director has special obligations towards the company under which the director is obliged to lead the society's activities in good faith; Duty of such care also implies maximized reduction of the company's tax liabilities. The court explained that when the enterprise has a tax liability and it is not capable to pay off this obligation and when the remuneration is necessary to meet the state as a creditor, the company is obliged to claim compensation directly from the director. The court noted that the company partners and the director are responsible for both, the main amount of the unpaid tax, and the fines provided by the tax code. Their responsibility (on company obligations) to the state is subsidiary and solidary towards each other.

Obviously, by this decision, the court emphasized the identical aims of Georgian legislation and the court, which serve to protect creditors. It is clear that the direct claim to the company director, together with other advantages, guarantees implementation of the court proceedings (such as applying to carry out cautionary judgment procedure, according to article 198 of the Civil Procedure Code of Georgia). The creditor would not have made such a petition towards the director, if he or she had claimed against the company, because he/she would have been separated from the dispute, and until the company requests the director for compensation, the latter would freely sell the property within the law, which would exclude or complicate the compensation. The key issue of this decision was also the determination of the amount of monetary liability of the defendants when the court had to discourse on the civil and fiscal sanctions, define their relation, necessity or inadmissibility of their joint use. Finally, the court imposed the company director to pay the main debt and part of the penalty, which consistently points to the high-standard responsibility of the director.

Here it should be noted that the Georgian Law on Entrepreneurs has been operating for 24 years and despite this, the Supreme Court had to discuss only some cases about the company director's liability in recent years, which indicates to the passive interest in this issue by relevant subjects. Naturally, such a tendency is unfavorable, but the abovementioned decision of the Supreme Court lays the foundation of the director's responsibility, and this is a really good experience. Supposedly, looking through these decisions, entrepreneurs (acting in Georgia) should be more interested in the importance of the director's responsibility, and its consequences. Of course, this will be beneficial for the entrepreneurial relations and its more transparency. To sum up, this will ensure the stability of the Georgian market.

2.2. Estonia

Corporate regulations of Estonia are interesting for discussion, as the legal system and entrepreneurial sector of this country are very young, which causes flaws of its legislation and judicial practice. Consistently, this is a threat to entrepreneurs and to their managerial bodies. Estonia chose German variant for the director's responsibility and tries to follow this model,[8] i.e. the state efforts to

[8] *Madisson K.,* Duties and Liabilities of Company Directors under German and Estonian Law: a Comparative Analysis, RGSL Research Papers, № 7, Riga, 2012, 4.

develop similar norms, standards, and approaches, however, the problem of **Interest Conflict** still remains, as Estonian civil law does not include so-called **Self-Dealing Rule**.[9] Acting legislation does not oblige the company director to inform the shareholders or supervisory board during completing usual transactions. (Here is considered the company's purchases within market prices and etc., or in other words, all daily transactions which do not require additional confirmation).

Regulation of the corporate director's responsibility in Estonia is not limited to civil legislation, which means that the director may be subject to administrative and criminal liability also. In this state, the sources of law determining the director's responsibility are: Commercial Code,[10] which has been in force since 1995; General rules of corporate governance are also included in the General Part of the Civil Code Act[11] and in Law of Obligations Act of Estonia.[12] Members of the company's executive body which violate obligations will be responsible for the loss of the entity.[13] Besides it should be noted that the Estonian legislation, in contrast to a German one, does not provide the definitions of the **Real Director** and **De facto Director**, accordingly there is no relevant legal practice in the state. But since 2006, like in Germany, a **Person Influencing the Director** may be imposed responsibility as a De facto Director if it is not proved that he or she was fulfilling own duties with diligence.[14] The decision № 3-2-1-41-05; 11.05.2005[15] of the Supreme Court of Estonia is important, in which the court explains that a violation of the obligations towards the company (undertaken by the management body or by the director) is considered as a breach of a contractual obligation and not as a result of non-contractual relations. As for external responsibility, the director's liability in Estonia targets to protect the interests of the company, while the board members are mainly responsible for the company.

It becomes obvious that according to established practice, the director's responsibility in Estonia is considered to be a violation of the contractual obligations and not a non-contractual relationship; i.e. in determining the prerequisites, form or scope of their liability, the court shall be guided by the imperative norms of the law and the Director's Service Contract. It can be said that via this approach, the problem of

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[9] A Transaction with oneself (Self-Dealing) is a violation of loyalty, which implies the director's actions for personal gain and not for the benefit of the company. For example, to use the company's monetary fund as a personal loan, purchase of the company's stock by using "insider" information and so on.
See, Self-dealing (Definition), Legal Information Institute (LII), Cornell Law School, <https://www.law.cornell.edu/wex/self-dealing> [05.10.2017].

[10] Commercial Code of Estonia, Passed 15.02.1995, Entry into force 01.09.1995, Type: Act, Issuer: Riigikogu, (consolidated text of August 1, 2016), 26-28, 355, <http://www.wipo.int/wipolex/en/text.jsp?file_id=42-4794> [04.10.2017].

[11] General Part of the Civil Code Act of Estonia, Passed 27.03.2002, Entry into force 01.07.2002, Type: Act, Issuer: Riigikogu, 35, 216, < https://www.riigiteataja.ee/en/eli/530102013019/consolide> [04.10.2017].

[12] Law of Obligations Act of Estonia, Passed 26.09.2011, Entry into force 01.07.2002, Type: Act, Issuer: Riigikogu, 81, 487, <https://www.riigiteataja.ee/en/eli/506112013011/consolide> [05.10.2017].

[13] General Part of the Civil Code Act of Estonia, Passed 27.03.2002, Entry into force 01.07.2002, Type: Act, Issuer: Riigikogu, § 37(1), <https://www.riigiteataja.ee/en/eli/530102013019/consolide> [06.10.2017].

[14] Commercial Code of Estonia, Passed 15.02.1995, Entry into force 01.09.1995, Type: Act, Issuer: Riigikogu, (consolidated text of August 1, 2016), § 1671 and § 2892,
<http://www.wipo.int/wipolex/en/text.jsp?file_id=424794> [06.10.2017].

[15] Walko v. Kalle Pilt, 3-2-1-41-05 Judgment of the Civil Chamber of the Supreme Court of Estonia of 11 May 2005, RT III 2005, 17, 181, <https://www.riigiteataja.ee/akt/899418> [06.10.2017].

interpretation and usage of legal norms has been largely solved, but the impact of "Rough Legislative Framework" towards the responsibility still remains. Uniformly, the imperative rules of the law and the director's service contract cannot simply consider the whole basis, which evolves the company director's liability. So it is advisable for the legislator and the court to focus more on Tortious Relationships.

2.3. Germany

As for Germany, here legislative norms of corporate governance are spread in different normative acts, from which most notable are: Civil Code of Germany,[16] Commercial Code of Germany,[17] Private Limited Companies Act of Germany[18] and Stock Corporation Act of Germany.[19] It should be mentioned that unlike corporation law in the United States, in Germany a uniform corporation law does exist. The norms regulating the manager responsibility of the capitalist society are mainly collected in normative acts on Joint Stock Companies and Limited Liability Companies.[20]

The director may be personally liable for any damages and breach of own obligations. These liabilities may arise from the contract (the Charter, the Director's Service Contract) or from the law (Civil, Commercial, Criminal and Bankruptcy legislation). Also, special preconditions for the restriction of the director's responsibility exist, when the director is not deemed liable. One of these prerequisites was discussed by the German Federal Supreme Court on June 18, 2014, on the case I ZR 242/12. The court actually changed the early practice of the director's responsibility. Prior to this decision, the director was always personally liable for the violations carried out by the company on the basis of the Act of Unfair Competition, which resulted from the Principles of the Director's Common Liability for Business Operations. The Federal Court pointed to the present case that the director's responsibility should always depend on whether he/she was involved in an offense defined by the Unlawful Competition Act or had the director avoided such an offense or not. According to the court, the company director will be responsible under the new legislation, if the latter directly creates the kind of business model that will violate the Act of Unfair Competition.[21]

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16 Civil Code of Germany (BGB), Promulgated on 2 January 2002 (Federal Law Gazette [Bundesgesetzblatt] I page 42, 2909; 2003 I page 738), <https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.pdf> [07.10.2017].

17 Commercial Code of Germany (HGB), Commercial Code in the revised version published in the Bundesgesetzblatt (BGBl, Federal Law Gazette), <http://www.gesetze-im-internet.de/englisch_hgb/englisch_hgb.pdf> [07.10.2017].

18 Private Limited Companies Act of Germany (GmbHG), Act on Limited Liability Companies, as consolidated and published in the Federal Law Gazette III, Index No. 4123-1, <https://www.gesetze-im-internet.de/englisch_gmbhg/englisch_gmbhg.pdf> [07.10.2017].

19 Stock Corporation Act of Germany (AktG), Published on 6 September 1965 (Federal Law Gazette I, p. 1089), <https://www.gesetze-im-internet.de/englisch_aktg/englisch_aktg.pdf> [07.10.2017].

20 *Chanturia L.,* Corporate Management and the Managers' Responsibility in Corporate Law, Tbilisi, 2006, 181-182, (in Georgian).

21 German Federal Supreme Court limits the personal liability of company directors for violations of the Unfair Competition Act, Unfair Competition Law 8, September 2014, Decision of 18 June 2014 (Case ref: I

Violation of loyalty obligations is the most frequent in practice (failure to perform a service contract during directorate or after it; also to get an unauthorized gain).[22] The German legislation distinguishes the director's responsibility towards the company (Internal Liability) and against third parties (External Liability). In addition to that, the director may be subject to administrative and criminal liability. **Internal Liability** includes a violation of inner-corporate obligations. It is important that in Germany, **the Director**, **Shadow Director** and **De facto Director** (which is not appointed at the manager's position by documents) have the same responsibility as **De Jure Director**. At the case of 5 StR 407/12, in 2012 the Federal Court of Germany examined the issue of reviewing the de facto director as an addressee of fiduciary duty.

The court concluded that "de facto director" is subject to the same norms of responsibility, which diffuse to the ordinary director. Thus, the person's indication of not being appointed according to formal procedures does not free him or her from fiduciary duty.[23]

External liability means responsibility towards any subject, other than the company. It is noteworthy that external responsibility is rare, because third parties usually claim directly to the company and not to its manager; then the company straightly argues with the director.[24] There are many other obligations of the acting director, which are aimed to protect the interests of the company creditors, shareholders, contractors, customers, and the state (e.g. interests of Tax and Social Security Agencies).[25] It is important that in recent years, the director's responsibility towards third parties has become more decisive.[26] According to the Fiscal Code of Germany,[27] the managing director may be personally responsible during payment of company taxes; third parties may file a claim if the amount (paid to the shareholders) was transferred by a violation of Capital Management Rules. In this case, the manager may be obliged to pay the full sum and compensation (evolved from it).[28]

ZR 242/12) of the Federal Supreme Court of Germany, <http://bcl-ip.com/en/german-federal-supreme-court-limits-the-personal-liability-of-company-directors-for-violations-of-the-unfair-competition-act/> [26.12.2017].

22 *Sieg O.* (Consulting ed.), *Smerdon E.,* Directors' Liability and Indemnification: A Global Guide, Third Edition, Published by Globe Law and business Limited, London, 2016, 119.

23 *Ünsal D., Christopher J. Wright,* Legal Update Corporate, German Federal Supreme Court Revisits Managing Director Fiduciary Duties, GÖRG Partnerschaft von Rechtsanwälten, Berlin, 2013, 2.

24 Ibid, 124.

25 *Huber P., Trenkwalder J., Guyot C., Goffin J. F., Butts D., Famira G., Baček R., Rodwell H., Isnard J., Schepke J., Ormai G.,Cavasola P., Montijn R., Greszta D., Robinson T., Fitzpatrick J., Cranfield D., Petrikic R., Parker I., Szabo S., Lunder A., Kraljic B., Peña C., Albers M., Wille H., Comboeuf A., Knaul A., Mendelssohn M., Hearnden B.,* Duties and Responsibilities of Directors in Europe, CMS Legal Services EEIG, Frankfurt, 2008, 30.

26 *Baums T.,* Personal Liabilities of Company Directors in German Law, Speech at the Stratford-upon-Avon Conference of the British-German Jurists' Association, Düsseldorf, April 21, 1996, 14.

27 The Fiscal Code of Germany, Promulgated on 1 October 2002 (Federal Law Gazette [Bundesgesetzblatt] I p, § 69, <https://www.gesetze-im-internet.de/englisch_ao/englisch_ao.pdf> [28.12.2017].

28 Private Limited Companies Act of Germany (GmbHG), Published in the Federal Law Gazette III, Index No. 4123-1, §§ 30, 43, <https://www.gesetze-im-internet.de/englisch_gmbhg/englisch_gmbhg.pdf> [28.12.2017], Stock Corporation Act of Germany (AktG), Published on 6 September 1965 (Federal Law Gazette I, p. 1089), §§ 57, 93, <https://www.gesetze-im-internet.de/englisch_aktg/englisch_aktg.pdf> [07.10.2017].

As far as it turned out, German legislation is quite strict against the company director and gives less chance of maneuver, but it is important that the Supreme Court of Germany has neutralized this strict legislative regulation in some way, and the responsibility of director has been softened to some extent, by which it provides the director's stable activities, even creates the possibility of making risky decisions, which must be appreciated positively. It is generally known that in business instant and risky decisions are made by the director. If the manager is stuck in a strict legislative regulation, he/she will lose managerial independence, which negatively affects the business success.

2.4. Austria

According to the Austrian legislation, generally, the director and members of the Supervisory Board are not liable to any third party. The manager does not have any legal relations with third parties, and therefore the responsibility of diligence exists only towards the corporation. However, there are a number of exceptions from this general rule, when **Immediate (**so-called **„vis-à-vis"**) **Liability** to third parties can be held. This can happen for example by submitting derivative action against the director by third parties.[29] In Austria Private Limited Liability Companies[30] are governed by all the board directors, hence for breach of a duty of care, they are fully responsible to the company (not against the shareholders). In the case of bankruptcy proceedings, or failure to perform bankruptcy procedures, the director may be straightly obligated to the creditors. In Austria, the director's responsibility for private limited liability companies cannot be ruled out by the agreement. According to the general practice of the Austrian Supreme Court, it is prohibited between the director and the third party to agree on the exclusion of the right to claim compensation for misconduct. Limitation of liability on the basis of agreement between the company and the manager is considered illegal too.[31] It is also important that the private limited liability company can purchase **Insurance of Responsibility** in favor of the director.[32] The Austrian Supreme Court's position on the personal responsibility of the director should also be mentioned. In particular, in the judgment of January 30, 2017, Ob-84 /16w, the court discussed whether which form of the director's responsibility should be used during the offense of another employee. From the case facts, it turned out that the company ordered its subsidiary enterprise to evaluate and sell own real estate. The director of the management company was sued by a subsidiary company on the basis that he had sold the property of the company at an inappropriate low price. According to the director, one of

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29 *Martin K. S.,* Directors' and Officers' (D & O) Liability, Austrian Report, Johannes Kepler University Linz, Vienna, 28.03.2017, 6.

30 European Model Company Act (EMCA), Austria, School of Business and Social Sciences, Aarhus University, 22.02.2018, <http://law.au.dk/en/research/projects/european-model-company-act-emca/national-companies-acts-of-eu-member-states/austria/> [06.10.2017].

31 *Unanyants-Jackson E.*, *Wilson S. (ed.),* Directors' Liability Discharge Proposals: The Implications for Shareholders, Manifest Information Services Ltd, Witham (UK), 2008, 12.

32 *Huber P., Trenkwalder J., Guyot C., Goffin J. F., Salihovic-Whalen n., Rhodes R., Savov V., Bangachev A., Glück U., Famira G., Rodwell H., Isnard J., Schepke j., Kircsi A., Cavasola P., Leclère J., Lorente E., Tarlavski R., Ali Hyder A., Ewing B., Allbless E., Greszta D., Caldeira J., Popescu H., Engel I., Agayan E., Petrikic R., Gerrard F., Starkova P., Lunder A., Peña C., Albers M., Jenny D., Cagienard M., Fitzpatrick J., Yalçın D., Conlon G., O'Connor J., Hearnden B., Mendelssohn M.,* Duties & Responsibilities of Directors, CMS Legal Services EEIG, Third Edition, Frankfurt, 2015, 7, 8.

the employees of the company made mistakes (while assessing real estate) and the director should not be responsible for his mistakes; Besides, the main company employees were unable to detect and prevent this problem. However, during hearing the case the court denied both allegations. According to the court, the managing director was responsible for the effective supervision of the staff. The director should not be liable for the misconduct of staff members only if he/she receives all reasonable measures to reveal and supervise such employees. Though in this particular case, the managing director was a real estate expert, who personally acquainted with the property assessment process and could easily identify the erroneous mistake (namely, not considering the Lease Income Report). According to the court comment, when the director leads the company's audit process and has a full opportunity to reveal the mistake of the employees, the director is personally responsible for the consequences of this error, despite the fact of not completing the audit individually.[33]

It appears from the court's decision that it is attempted in Austria to widely establish more or less new institution for this country (so-called, **Business Judgment Rule**), which on the one hand, provides the manager's protection during entrepreneurial decision making (the director is separated from the liability), but on the other hand, business judgment rule sets the director's responsibility, while being aware of a particular field and having effective levers to control or change the company employees' actions, but does not act so. At this time, the manager is personally responsible towards the company for the breach of service contract obligations, which caused the damage. Hence the conclusion is derived that the court's judicial practice predominantly increases the standard of the director's responsibility, which is of course in the interest of creditors and market stability.

2.5. Belgium

The regulatory norms of the company director's responsibility in Belgium are found in the articles 527, 528, and 530 of the Companies Act of Belgium, according to which the director is responsible for: violation of managerial liability (527); violation of the company's charter (528); such a breach, which led the company to bankruptcy (530). Under the current legislation, the director is jointly and fully responsible through the company or third parties.[34] However, it should be said that article 527 of the Companies Act must not be interpreted as a general responsibility. On the contrary, from the essence of this norm it seems that the manager's responsibility is individual, i.e. the director shall be liable only for the misconduct committed by him/her; namely for own actions in group misconduct (when identifying the scope of the director's action is possible). To the individual responsibility also indicates the fact that, pursuant to article 527 of the Companies Act, the company has the right to bring a claim directly against the director.[35]

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33 *Hanschitz K.,* Liability of Managing Directors of a GmbH Reduced by Contributory Negligence of Staff?, Knoetzl, 2017, <http://www.knoetzl.com/news/liability-managing-directors-gmbh-reduced-contributory-negligence-staff/> [06.10.2017].

34 *Pierre Demolin P., Materne J., De Sart D.,* The Directors' Liability under Belgian Company Law and Financial Law, 19.07.2012, <http://www.dbblaw.eu/en/news/the-directors-liability-under-belgian-company-law-and-financ> [06.10.2017].

35 *Balfroid C.,* Liabilities of the Members of the Board of Directors of Capital Companies Under Turkish and Belgian Laws, ADMD Law Office, 2012, <http://www.admdlaw.com/liabilities-of-the-members-of-the-board-of-directors-of-capital-companies/#.W2lEfdIzaHs> [12.12.2017].

Generally, three main grounds for civil responsibility against the company director are allocated: 1. misconduct, 2. existing damage, 3. casual link between them. Besides, according to the acting legislation, it is permissible to disclose the corporation director's identification data, unlike the shareholder's data (whose disclosure is lawful only during annual report or drafting different notary documents).[36] Revealing the director's identification info, especially at a time when the company faces financial and managerial problems as a result of his/her actions, normally creates grounds for the director's liability. Data declaration has a preventive effect on the manager's decisions and actions; namely, the director is forced to strictly protect the fiduciary duty. Unless at least his or her weakened reputation will be known to the business sector, reliance and interest towards the director will be reduced (including, from present and future employers), that is connected to negative financial outcomes. As regards the court's dependence on the company director's responsibility, here the decision of the Belgian Supreme Court (Axtron Group NV v. Tax Administration of Belgium C.12.0445.N) is important, which shares the approach of the Belgian legislation in relation to the director's responsibilities. According to case circumstances, one of the Belgian company „Axtron Group NV" bankrupted in 2006, and its directors failed to pay the company's accumulated taxes during 30 months, despite the fact that the company continued its activities and provided salaries for the staff. The Belgian Tax Authority suited against the director based on article 530.§1 of the Companies Act. In 2012 the Belgian Court of Appeal satisfied the suit of the tax authority, which the company applied to the Belgian Supreme Court, but the Supreme Court has affirmed this decision. Following the respondent (the company directors' explanation), the claim of the tax authority should not be submitted directly against them (personally) but against the company. According to them, the tax authority tried to get the debt during the company's bankruptcy process, though it had to wait until all the company's assets and debt were identified. The directors explained that the tax authority could reimburse only after ending the company's bankruptcy proceedings. The Supreme Court rejected all the arguments of the directors and ordered them to pay the company's current debt to the tax authority. In regard to the directors' first argument, the court explained that the directors' constant denial caused an individual damage to the tax authority and, as far as creditor's **group damage** did not exist, the tax authority (as an individual creditor) was granted the right to appeal to the court against the directors.[37]

Consequently, it becomes clear that the appellate and supreme courts' such position strengthens a concrete approach in Belgium; which means that the director of limited liability company is personally and fully responsible for all the company's unpaid tax arrears, and at the same time, debt towards the tax authority may be paid even during the bankruptcy procedure.

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36 Guide to Going Global Corporate, Full handbook, DLA Piper, Belgium, 2017, 64, <www.dlapiperintelligence.com/goingglobal> [12.12.2017].

37 *Bonne M., Swinnen T.,* Piercing Corporate Veil: Directors Personally and Fully Liable For Unpaid Corporate Withholding Taxes While Bankruptcy Procedures Not Yet Final, LexGo Network, 25/11/2013, <https://www.lexgo.be/en/papers/commercial-company-law/corporate-law/piercing-corporate-veil-directors-personally-and-fully-liable-for-unpaid-corporate-withholding-taxes-while-bankruptcy-procedures-not-yet-final,83398.html> [12.12.2017].

2.6. The Czech Republic

The company director in the Czech Republic has exclusive competences on the company's business decisions. As a rule, the director is responsible to the company straightly, but in some cases, the manager is also liable towards creditors and investors. In the Czech Republic acting regulation is similar to German legislation, according to which the shadow director, i.e. person who has a substantial effect on the company (based on the agreement, on separate interests or other grounds), is responsible with the same volume as the company director.[38] The manager is liable to creditors in cases when the registered capital of the company changes (for example, for misconducts made during the changing of the company's organizational-legal form or during company merger).[39] The regulatory legislation on the corporate director's responsibility in the Czech Republic has modified significantly since January 1, 2014, when the Act on Entrepreneurial Corporations came into effect. This transformation, along with others, has affected the internal structure of corporations, also the rights and duties of the board members (including the director's duties). The manager's obligations are, as well, defined by a number of statutory acts, according to which the director should act in accordance with the company's best interests, and in case of breach of the obligation, should bear the burden of proof (that he or she has acted in favor of the company). The director is responsible for the breach of contractual obligations, which is called an **Objective Responsibility**. Under the Czech tax legislation, the company head is responsible for timely registration of the company taxes, completing and accurately submitting the declaration.[40] Generally, the company manager is not required to be an expert in all fields, but the director's **duty of care** also means to identify the problem quickly and determine which specialist is needed to settle this problem. The Supreme Court of the Czech Republic shared this standpoint during one of the cases. The court explained that a member of the board of the joint stock company is not required to own a variety of technical education, but members must have a fundamental knowledge to predict the expected threat and exclude its impact on the company. According to the court, the obligation of **diligence** also includes the board member's duty to reveal when is necessary to obtain technical assistance from the qualified person and use this assistance.[41]

Obviously, after substantial changes of corporate law in the Czech Republic in 2014, regulations on the director's responsibility has further expanded, refined and even toughened, which could partly be

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38 *Allen & Overy,* Corporate Governance in Central and Eastern Europe, Allen & Overy LLP, Bratislava., 2010, 28, <http://www.allenovery.com/SiteCollectionDocuments/Corporate%20governance%20in%20CEE.pdf> [14.12.2017].

39 Ibid 29.

40 *Huber P., Trenkwalder J., Guyot C., Goffin J. F., Salihovic-Whalen n., Rhodes R., Savov V., Bangachev A., Glück U., Famira G., Rodwell H., Isnard J., Schepke j., Kircsi A., Cavasola P., Leclère J., Lorente E., Tarlavski R., Ali Hyder A., Ewing B., Allbless E., Greszta D., Caldeira J., Popescu H., Engel I., Agayan E., Petrikic R., Gerrard F., Starkova P., Lunder A., Peña C., Albers M., Jenny D., Cagienard M., Fitzpatrick J., Yalçın D., Conlon G., O'Connor J., Hearnden B., Mendelssohn M.,* Duties & Responsibilities of Directors, CMS Legal Services EEIG, 3rd Edition, Frankfurt, 2015, 38.

41 R. N. against the Judgment of the High Court in Prague dated 29 June 2006, 4 To 41/2006, Decision of the Supreme Court of the CR, Tdo 1224/2006, <http://kraken.slv.cz/5Tdo1224/2006> [29.12.2017].

linked to the court's decision taken eight years before the reform. I.e. it can be said that this decision is one of the preconditions of the mentioned reform. Herewith it should be noted that today in determining the director's responsibility, dispositive norms are still important, which are essential for effective business decisions.

2.7. Great Britain

In Europe, together with regulatory severity, another trend has also spread, which implies increased international cooperation of supervisory institutions. For many companies and their directors, **Foreign Regulations** are risky, i.e. defining their liability standards not by intra-national norms, but by international rules, that are actively used on the market.[42] It is obvious that such an approach of the companies is a part of their defensive activities, which in relation to the foreign regulation, gives preference to national legislative norms (to legislation better known). Many legal systems, including English one, recognize so-called **Blue Sky Defense**, which means specifying the director's responsibility. In particular, if the director believes (and asserts) that he/she has acted in favor of the company interests, which has enabled him or her to increase earnings, the director may not be liable even in case of some damages. The responsibility will occur only if the director knew clearly that the company was insolvent, which resulted in its liquidation. In 2013, the Department for Business, Innovation & Skills (BIS) developed recommendations for more transparency of British companies, but these recommendations were abolished in 2014, as they provided to increase the director's personal responsibility. Hereby it is also noteworthy that the director has an obligation of loyalty towards the company only and not to the shareholders.

In Britain, such an approach has been widely promoted by the Supreme Court's decision in the case of Percival vs. Wright, [1902] 2C 421. According to the case circumstances, Mr. Percival owned a £ 10 value of shares that were not transferred to the stock market and could be sold only with the consent of the company director. He offered the company shareholders to buy shares for 12 Euros (the price determined by an independent expert). The company director-Mr. Wright together with two other directors, bought the shares at the same price, after which Mr. Percival learned that the new owners of the shares were negotiating with others and intended to sell the shares of the company at price higher than 12 Euros. Because of this, Mr. Percival (who was arguing of breaching the fiduciary duty) filed a lawsuit in the court. According to the court, in this case, there was no unfair deal, as the shareholder addressed the director and offered to buy the share at the desired price, which was in fact implemented. The fiduciary duty was not violated, and at the same time, the director was obliged directly to the company and not towards the individual shareholders. The judge also did not accept the plaintiff's position (as if the transaction had an additional negative impact on the company in a relationship with third parties).[43] This decision later had its

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[42] *Barker R., Barlow N., Ben Salah H., Durand-Barthez P., Goutière P., Hebblethwaite R., Mattsson L., Merrill G., Pryce M., Richez-Baum B.,* Guide to Directors' Duties and Liabilities, The European Voice of Directors (ECODA), AIG, Brussels, 2015, 13.

[43] Percival v. Wright, [1902] 2 Ch 401, Directors' Duties in the United Kingdom, High Court of Justice Cases, United Kingdom Company Case Law, World Heritage Encyclopedia, <http://www.worldlibrary.org/articles/eng/percival_v_wright> [04.12.2017].

own expression in English legislation, namely, in article 170 of the Companies Act of 2006, where the special term was recorded[44] (which has confirmed the court's decision).

Hence, it is understood that in the determination of the director's responsibility, the British Corporate Law has been cautious and keeps prudence. On the one hand, it tries to protect the interests of the company creditors and create effective means to support them, while on the other hand, (when determining the director's responsibility), the Law denies rigid approach and prefers more special adjustment. Surely, the court's abovementioned decision is a good example of this trend.

2.8. France

In France, the company director should act in the best interests of the company. While discussing the manager's responsibility in the French courts, it is usually acclaimed that the director should lead the company's activities properly, with due diligence, also the head must follow the norms of conflict of interest. Like the UK, Austria, Estonia and the Czech Republic, the corporate director in France is liable forward the company (and not to individual shareholders), except some minor cases. In the event of violations of liabilities, the director shall carry the civil liability within the scope of the damage. All members of the board in Joint Stock Company jointly and severally bear the responsibility for damages. The responsibility of the director may be raised by the company's representatives (on behalf of the company); in special cases, by the shareholder (who has suffered a personal loss), and by the third persons too, who were directly damaged by the manager's actions. In the case of setting collective liability, the responsibility of a particular director may be excluded when proving that he/she opposed to a joint decision. This position was reflected in the decision of the Supreme Court of France in 2010, where the court summarized the director's responsibility and noted that the decision made jointly by the board of the Public Limited Company, is essentially an individual misdemeanor of the director, who straightly participated in decision making. At this time, all members of the board are responsible, if any of them does not prove that he/she was acting in a cautious manner and opposed to such a decision.[45] It is also noteworthy that under the current legislation, the French companies are entitled to ensure the director's responsibility towards third parties for the actions performed during official activities.[46] Ordinarily, in France, the director's personal liability is a common practice.[47]

The French corporate legislation and court approach towards the joint liability of the director are progressive, as the manager will not immediately be responsible for the board's joint decision (i.e. for the decision of others). The company head has an opportunity to prove, that he/she was distanced from and

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[44] Companies Act 2006 of the United Kingdom, (C.46), Part 10, Chapter 2, Section 170, The National Archives, <https://www.legislation.gov.uk/ukpga/2006/46/section/170> [04.12.2017].

[45] The Deposit Guarantee Fund (FGD) v. Caribbean Society of Consulting and Auditing, Judgment № 405 of 30 March 2010 (08-17.841), Court of Cassation of France, Commercial, Financial and Economic Chamber, 304.

[46] A Cross-border Guide for Group Company Directors, Linklaters, 2017, 17, 18, <https://www.linklaters.-com/en/insights/publications/2017/may/cross-border-guide-for-group-company-directors> [04.12.2017].

[47] Barker R., Barlow N., Ben Salah H., Durand-Barthez P., Goutière P., Hebblethwaite R., Mattsson L., Merrill G., Pryce M., Richez-Baum B., Guide to Directors' Duties and Liabilities, The European Voice of Directors (ECODA), AIG, Brussels, 2015, 20.

opposed the decision, which led to the company's damage. It should be specified, that a term ”Dissociate“ includes both passive and active actions (for example, providing the audit committee of the company with proper information, addressing the tax authorities, initiating the general meeting, etc; in other words, taking all the measures which could suspend or exclude the director's decision damaging the company). Of course, this standard does not provide the director with a chance to escape from the responsibility, if not proving suitably that he or she has really separated from such decision.

2.9. Italy

In Italy, a general standard is also established, by which the company chief should act diligently in the best interests of the company. Here according to the widespread norm, if the board exists, one of the directors cannot make independent decisions and needs the **Full Consent** from the board. The manager's obligations are differed according to addresses, which means, that the Italian legislation separately regulates the director's duties towards the company creditors, individual shareholders, and third parties. Like the French model, the managers in Italy are jointly responsible for the obligations. The director's responsibility shall arise only during the violation of the legislation and the statute if it causes specific damage.[48] The public companies do not have the right to restrict the director's responsibility when this latter is the personal recipient of this responsibility; also the minority shareholders' veto cannot be used to solve this question (in accordance with article 2392 of the Civil Code of Italy).[49] By the article 1891 of the Civil Code, the company may pay an insurance premium to cover the risk of violation of the director's fiduciary duty; although in practice insurance is rarely used when suing the company. Insurance of the manager's liability is more commonly used when creditors or individual shareholders sue straight against the director.[50] The companies can have funds for the director's responsibility insurance. After satisfying third parties, the fund must be supplemented by the head, whose guilt has been proved to be damaging.[51]

In 2016 the Supreme Court of Italy discussed the basis of the director's responsibility and explained that according to Corporative Reform of 2003, and from the articles 2381 and 2932 of the Civil Code of Italy, the manager (without special executive authority) cannot indicate on liability restriction, if he or she had limited competence. Following to the Court, when the director has no special education in a specific field and makes managerial decisions according to information given by other specialists or hired outsources, the director should check the accuracy, quality, and reliability of the provided information. If the manager does not behave this way, his/her action is considered to be a breach of fiduciary duty and leads to responsibility. This concrete case concerned the dispute between a

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[48] Civil Code of Italy, (approved by Royal Decree of March 16, 1942, No. 262, and as amended by Decree No. 7 December 2016, No. 291), Articles 2381, 2392, <http://www.wipo.int/wipolex/en/text.jsp?file_id=-430550> [04.12.2017].

[49] *Tina A.,* The exoneration of the responsibility of the administrators of S.P.A., Giuffrè, University of Milan, Faculty of Law, Studies of private law, Milan, 2008, 87.

[50] *Gerner-Beurele C., Peach P., Philipp Schuster E.,* Study on Directors' Duties and Liability, Prepared for the European Commission DG Market, (Department of Law, The London School of Economics and Political Science), London, 2014, 475.

[51] A Cross-border Guide for Group Company Directors, Linklaters, 2017, 37-38, <https://www.linklaters-.com/en/insights/publications/2017/may/cross-border-guide-for-group-company-directors> [04.12.2017].

bankrupt company and its directors. The entity considered that its bankruptcy has been caused by a transaction related to stock capital, which contravened the economic value of the shares and which was a consequence of the directors' decision. JSC's heads argued that the entity's full management was delegated to the chairman of the board and, despite own supervisory activities, they failed to stop the transaction because they had no delegated powers. The decisions of the first and the appellate courts were made in favor of the entity; the court considered the defensive discussion of the directors as "Acknowledging the Offense." The court examined that they acted together with the Chairman of the board. The court slightly reduced the compensation amount required by the company and imposed it on the directors. The Italian Supreme Court shared the directors' position on re-examining the case and abolished the decision of the Appellate Court. The Supreme Court has pointed out that the non-executive director's responsibility cannot be based on the general violation of the supervision duties and can not be considered as an objective responsibility. The court relied its decision on 2381.§6 and 2932.§2 of the Civil Code of Italy, according to which the non-executive director is responsible for the unlawful actions of another manager (namely, the Acting Director) only if he/she knew the fact, which needed intervention and would allow the non-executive director to make an informed decision. According to the court, by setting a different approach, the general obligation of supervision would have been carried out, which had already been annulled by the 2003 reform. In other words, it would contradict to current legislation.[52]

This decision of the court relates to the Corporation Reform of 2003, after which the standards of the director's liability have significantly changed. Before the reform, according to article 2932.§2 of the Civil Code of Italy, all heads (including a director with no delegated powers) were obliged to exercise general supervision (by which they were jointly responsible for the company damage, caused by unsuccessful control). After the reform of 2003, these directors have imposed only the duty of making informed decisions. Although this reform can be considered as partially weakening the director's responsibility, it should still be noted that according to the new edition of the 2381st article of the Civil Code of Italy, the manager should personally get the necessary information, as well as wait for appropriate data from the third parties. The main essence of the 2003 reform through the non-executive director is to alleviate his/her liability, but not exclude it. Finally, it turns out that due to acting legislation the director does not remain passive.

2.10. Luxembourg

The company director in Luxembourg must implement full and efficient control of the enterprise through a daily examination of its activities. The head within its competence is responsible for the company's long-term strategy, its implementation, and supervision, also for informing the shareholders. The manager has a duty of care, which means that he/she must have sufficient knowledge and experience of management, should take into account the consequences of own decisions and the **Best Corporate**

[52] *Lombardini L.,* Italy: The Liability of Non-Executive Directors, Nctm Studio Legale, Last Updated 26.01.2018, http://www.mondaq.com/italy/x/657412/Directors+Officers/The+Liability+Of+NonExecutive-+Directors> [03.01.2018].

Interests of the company. However, it is noteworthy that the legislation of Luxembourg is silent and does not specify what can be considered as the best corporate interests.[53] This legislative vacuum has been partially filled by the Regional Court of Luxembourg by a decision of 2015 when the court discussed this concern and clarified that the best corporate interest is a variable concept; its exact definition depends on the nature and activities of the particular company. For some companies, the best corporate interest coincides with the shareholders' interests of the same company; while for other entities this notion includes the interest of the juridical person, also the interests of the shareholders, even the interests of the employers and creditors.[54] So it seems that this concept is individually defined each time. It is also important that the manager of the companies (operating on the Luxembourg Stock Exchange), are bound by specific restrictions of **Act on Transparency**, **Act on Prohibition of Market Power Abuse**, as well as on the basis of the **Stock Exchange Regulations and Principles of Luxembourg.** According to the second principle of the Stock Exchange, the **Listing Company's** board is bound to a fiduciary duty towards the company shareholders and should act on their best interests.[55] In Luxembourg, as well as in other countries, the directors jointly and severally bear the responsibility for the damage and **Managerial Misconduct.** The head may be subjected to civil, as well as to criminal liability. Like French and Italian legislation, corporate legislation of Luxembourg also provides insurance of the director's liability.[56] The Company just like third parties (including a **Shareholder with Legitimate Interest** and the creditor) can file a suit against the director. It should be considered that in the legislation of Luxembourg the preconditions of minority shareholders' suits against the director have increased recently.

It is evident that the best corporate interest is often connected to the company director; and broad, narrow or other irrelevant explanation of this concept puts the manager's responsibility on the agenda. It should be mentioned that the court's approach to the need for individual explanation of the term is timely and right, but it would be more appropriate to clarify this concept in the legislation as far as possible, thus avoiding quick appeals to the court (because as it seems arguing parties are satisfied only with the court's definition of this notion). Appeal to the court (even through **Indisputable Trial**, demanding only the interpretation of the term itself) is usually associated with additional costs, time and sometimes damages the company director because the company head is baselessly deprived of confidence, thus humiliating reputation; surely, this can actually cause a separate dispute. Considering this, it should be underlined that the legislator must maximally reduce the preconditions of the dispute based on abstract definitions, especially towards the director's responsibility in the company.

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[53] *Calkoen W. J. L.,* The Corporate Governance Review, Seventh Edition, The Law Reviews, Law Business Research Ltd, London, 2017, 257.

[54] Hellas Telecommunications (Luxembourg) II S.C.A. v. Hellas Telecommunications s.à r.l, Commercial Ruling XV №1648 / 2015, The Fifteenth Division of The District Court Of Luxembourg, 34.

[55] *Calkoen W. J. L.,* The Corporate Governance Review, 7th Edition, The Law Reviews, Law Business Research Ltd, London, 2017, 259.

[56] A Cross-border Guide for Group Company Directors, Linklaters, 2017, 45, 56, <https://www.linklaters.com/en/insights/publications/2017/may/cross-border-guide-for-group-company-directors> [04.12.2017].

3. Conclusion

Again must be said that the company director's responsibility is a fundamental element of enterprise management that ensures not only their successful operation in different spheres but also favors the economic strengths of the states. To illustrate this standpoint, some indicators of the above-discussed countries can be brought in various international research and ratings. In particular, according to **2015 data of the World Economic Forum,** Germany, Great Britain and Luxembourg were among the states with the most competitive economies in Europe that year.[57] The leadership of Germany, along with many other preconditions, has been caused by the strict liability of the director and relatively "Soft" judicial practice, which balance each other and contribute to the development of entrepreneurship.

One of the conditions for the economic success of the UK is, of course, a flexible corporate law that restricts entrepreneurs to a lesser extent, but maintains effective standards of the company manager's responsibility. The economic strength of Luxembourg is directly connected to "Rational Arrangement" of the director's liability which gives them greater freedom of acting and taking risks. (Here is implied, the general norms of corporate legislation of Luxembourg towards the director's liability, which leave a wide area for interpretation). However, it must be said that the uniform practice of the court should be a strong regulatory framework for soft legislative adjustment, which directly reflects the stability of entrepreneurship.

According to the **2017 data of the Economic Freedom Index**, firmness and stability of the French economy are caused by strengthening entrepreneurial activity, protection of property rights and effective regulations. Import-Export of France accounts for 61% of GDP of the country.[58] For such results, the French economy is also grateful to corporate legislation. In its turn, the court's role in determining the manager's liability is very important, for example, a decision of the Supreme Court of France of 2010 which set the basis for the responsibility dismissal, defined preconditions for the reasoning of "Rightness" and strengthened the positions of the director.

By **the Official Report of the EU Commission for Estonia of 2017**, the economic growth of this state stopped by 1.4 % in 2015 and by 1.1% in 2016, although Estonia had some progress in implementing the strategy of entrepreneurship growth. According to the financial soundness indicators, the banking sector of Estonia is stable; the state's capital market has a significant potential for development; despite a little potential of external financing of small and medium enterprises,[59] access to

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[57] *Galvan C.,* The Top 10 Most Competitive Eonomies in Europe, World Economic Forum, 30.09.2015, <https://www.weforum.org/agenda/2015/09/the-top-10-most-competitive-economies-in-europe/> [05.01.2018].

[58] Miller *T., Kim A. B.,* 2017 Index of Economic Freedom, Institute for Economic Freedom, The Heritage Foundation, Washington DC, 2017, 232, 233.

[59] According to the official definition of the Euro Commission, **Small and Medium-sized Enterprises (SMEs**) are the main part of the EU business.
See, Internal Market, Industry, Entrepreneurship and SMEs, European Commission, <http://ec.europa.eu/growth/smes/business-friendly-environment/sme-definition_en> [05.01.2018].

finance is still good in the state.[60] As it was said earlier, entrepreneurial sector of Estonia is developing and the German version of the director's responsibility is being adopted, but gaps of corporate norms (related to the liability) are still problematic in a transitional period. Accordingly, this problem needs a consistent solution (by making legislative amendments and by implementing proper judicial practice), which is a matter of time.

According to the **2017 World Entrepreneur Index**, Italy successfully manufactures innovative products, in which it outruns one of the leading countries (Sweden); However, Italy has some difficulties in Human Resources and Manufacturing Growth indicators. For example, in the Global Entrepreneurship Index of 2008, rating score of Italy has decreased by 20 units.[61] As it was previously mentioned, in Italy regulating norms of the director's liability has weakened by the corporate law reform of 2003. This caused individual risks against the stability of the companies. It is good that the court practice balances this legislative deficiency, though only when the dispute is heard by the court. Sadly, this is not enough, as if arbitrator discusses the dispute, frailty of the manager's liability may be approved by procedural norms and negative practice may start. This is quite realistic, because in the arbitration, parties choose which law to apply, and they may use inconsistent corporative rules for dispute resolution. Such agreement of the parties shall be bounding for the arbitrator, which shall determine the form of the head's responsibility based on the defective law.

Respectively to **the Overview of Austria by the Organization for Economic Cooperation and Development (OECD) in 2017**, this state has a stable and rich economy, which is resulted from the 2016 Tax Reform. Nevertheless, it is desirable to rationalize the financial sector.[62] Such condition of the economy is, of course, resulted from the renewal of corporate legislation, within which the business judgment rule was introduced and it gave the company director a wide range of actions; also, the manager was freed from the extra-legal framework, which hindered the profit of the company.

Following to **2017 data of Eurostat,** France has the highest value index in a microenterprise; the Netherlands has the same indicator-in small enterprise, while Belgium owns this mark in middle and large enterprises together.[63] **According to OECD information** of the same year, 9 members of this organization were observed in the growing trend of incorporation, including Belgium.[64] The success of Belgium in these indicators is closely linked to the stability of the Companies Act and tax legislation, as well as to the improvement of the director's liability standard.

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60 Country Report: Estonia 2017, European Commission, Commission Staff Working Document, 2017 European Semester: Assessment of Progress on Structural Reforms, Prevention, and Correction of Macroeconomic Imbalances, and Results of In-depth Reviews under Regulation (EU) No 1176/2011, Brussels, 2017, 6, 16-17.

61 *Ács Z. J., Szerb L., Autio E., Lloyd A.,* The Global Entrepreneurship Index 2017, The Global Entrepreneurship and Development Institute (GEDI), Washington DC, 2017, 132, 142.

62 OECD Economic Surveys, Austria, Overview, The Survey is published on the responsibility of the Economic and Development Review Committee (EDRC) of the OECD, Vienna, 2017, 1, 23.

63 Entrepreneurship - statistical indicators, Eurostat, Data extracted in June 2017, <http://ec.europa.eu/eurostat/statistics-explained/index.php/Entrepreneurship_-_statistical_indicators> [08.01.2018].

64 OECD Data show a pick-up in Entrepreneurial Activity, OECD, <http://www.oecd.org/newsroom/oecd-data-show-pick-up-in-entrepreneurial-activity.htm> [08.01.2018]

By the **data of Economic Freedom Index in 2017**, rationalization of Business Start-ups and various reforms in the Czech Republic have contributed to the growth of entrepreneurship, the openness of the state to the international market, attraction of investments and better international trade. The financial sector is stable, banks have a good capitalization.[65] It is necessary to note that the Corporate Law Reform of the Czech Republic in 2014, also improvement of the company manager's responsibility, has developed the economy and as far as it seems, these efforts are most successful in the banking and financial sectors.

According to **official data of the National Statistics Office of Georgia (Geostat),** in the third quarter of 2017, the Direct Foreign Investments in Georgia amounted to 594 million US dollars, which is second highest indicator since 2005 (as in 2014 foreign investments compiled top amount-729.4 million dollars).[66] At first glance, an increase of investments should indicate entrepreneurial stability of the Georgian business environment, and confidence towards it, but here it is essential to clarify, how proportionally are these investments divided between large, medium and small enterprises. Unfortunately, the benefits of some large investments[67] in Georgia have not spread to small and medium-sized businesses and such enterprises are mostly using national financial aids (though, with limitations). As for the connection of the director's liability to this process, it is obvious by itself. In Georgia practical standards of the manager selection, appointment, activities, and supervision in large companies are significantly higher, than in small-sized companies. Of course, large enterprises also have difficulties with the manager's responsibility, but as some of them are well known on the market, they try to establish effective management standards, or at least to hide managerial flaws. While in small companies, the director is often in conflicts of interest with the entity, gets wide competences, which arises his/her personal responsibility; although the cases of appealing to court are very few.

Consequently, in order to improve the director's responsibility in Georgian companies, it is necessary for these firms to focus more on the managerial activities. Of course, the Law on Entrepreneurs also needs improvement, (its new project has already been drafted and must be passed to the parliamentary discussion). However, it is obvious, that the legislative amendments are the role of the parliament, which cannot be enough to fully improve the director's responsibility standard and to implement it in practice. In order to achieve this goal, there is a need for more activity of entrepreneurs and other interested persons, without which judicial practice will not develop.

[65] Miller *T., Kim A. B.,* 2017 Index of Economic Freedom, Institute for Economic Freedom, The Heritage Foundation, Washington DC, 2017, 224, 225.

[66] Direct Foreign Investments In 2005-2017, National Statistics Office of Georgia (Geostat), <http://www.-geostat.ge/?action=page&p_id=2230&lang=geo> [08.01.2018].

[67] This is confirmed by the 2017 statistics of the National Statistics Office of Georgia regarding Direct Foreign Investments. From the data it becomes clear that the main recipients of these investments are large-scale enterprises, which are well known on the Georgian market (In particular, Joint Stock Companies: Energo Pro Georgia, Nenskra Hydro, BJO Group, Metro Avrasia Georgia; Limited Liability Companies: Geocell, Magticom, Silknet, Caucasus Online, IDS Borjomi Georgia, Alma, RMG Gold, Georgian Manganese, Toyota Caucasus and others.).,
See, Top 50 Companies in 2017 According to the Direct Foreign Investments, National Statistics Office of Georgia (Geostat), <http://geostat.ge/cms/site_images/_files/georgian/top%2050%20companies%20by%-20FDI.pdf> [10.08.2018].

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Normative and Accessory Grounds for the Non-Execution of the European Arrest Warrant

The Tampere European Council supported the initiative on abolition formal, complex extradition procedure among the Member States of the European Union and replacement it by the simplified surrender procedure, which would be based on the principle of mutual trust and principle of mutual recognition of criminal decisions. For this purpose, the Council of the European Union adopted framework decision on the European arrest warrant and the surrender procedures between Member States, in 2002. Quasi-European extradition system has substantially changed surrender procedures between the EU member states, abolished restrictions regarding political offences, military offences, extradition of national, established extradition period and etc. Currently surrender procedures among the member states of the EU are carried out on the basis of the European arrest warrant. It t is a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order. However, abolishment of restrictions in this areas is not absolute, the European arrest warrant should not be executed in some cases.

The article considers normative and accessory grounds for the non-execution of the European arrest warrant. Discussion on normative grounds based on the framework decision on the European arrest warrant and the surrender procedures between Member States. The consideration of accessory conditions relies on relevant practice of the European Court of Justice, which is developed within the framework of preliminary ruling procedure. The article also considers the essence and characteristics of the Quasi-European extradition system, the principles of mutual trust and mutual recognition and elements, which are integral part of the Quasi-European extradition system.

Keywords: *European Arrest Warrant, Extradition, Principle of Mutual Trust, Principle of Mutual Recognition, the European Court of Justice.*

1. Introduction

The quasi-European system of extradition is the most effective and apolitical mechanism for surrender at a global level. Although similar model of the mechanism applicable in the European Union exists in bilateral inter-state relations or regional formats (e.g. in the scandinavian area of extradition), quasi-European system of extradition has special nature and inherent characteristics. At the same time it is a legal mechanism for cooperation in the field of extradition, as well as a normative instrument for human rights protection. Unlike other models of extradition, the quasi-European regime of surrender stipulates participation of only not the national courts, but also a supranational body equipped with

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ambivalent functions - the European Court of Justice. Although functioning of the quasi-European system of extradition is more efficient than other large-scale models, it is not a supranational field of cooperation and is constantly experiencing material modernization through incorrect realization by the Member States or through the authentic interpretation of the European Court of Justice. Therefore, the European Arrest Warrant is not always implemented within the quasi-European system of extradition. Furthermore, the EU Law can be violated not only by the non-execution of the European Arrest Warrant, but also by its execution. Thus, it is important to identify and analyze the cases, that are not directly referred to in the EU Law, but have been developed for protection and improvement of the European standards of human rights by the European Court of Justice. Consequently, the present article aims to consider the accessory grounds for the non-execution of the European Arrest Warrant on the basis of the relevant practices of the European Court of Justice and to demonstrate its influence on the European standards of human rights. Consequently, there is also an overview of the absolute and optional normative criteria for refusal to implement the European Arrest Warrant. The article does not assess the consistency of approach, activism and policy of the European Court of Justice in relation to the European Arrest Warrant. Based on the objectives set out in the article, the study is largely based not only on the legal acts of the Union, the academic works of the field, but the modern approaches of the European Court of Justice and the actual practice in relation to the European Arrest Warrant.

Analytical and logical methods of the study is applied in the article, analyzing the innate elements of the quasi-European system of extradition, the fundamental principles of cooperation in the criminal field, statutory and additional conditions for the non-execution of the European Arrest Warrant, the practice of the European Court of Justice to this direction. In addition, the accessory grounds for the non-execution of the European Arrest Warrant developed by the practice of the Union Court is assessed by the synthetic method, which is now the Litmus Test in the terms of assessment of the standards of the basic fundamental rights of extradition within the Union.

The article is dedicated to the nature and characteristics of the quasi-European system of extradition. It deals with the principles of fundamental and constitutional importance in the EU Law - mutual trust and mutual recognition, on which the quasi-European regime of extradition is based. In addition, the discussion is carried out on the elements that are indispensable to the quasi-European system of surrender. The article discusses the normative grounds provided in the quasi-European instrument of extradition, which constitute absolute and voluntary circumstances for refusal to surrender. It examines the additional grounds for the non-execution of the European Arrest Warrant, which was developed by the European Court of Justice within the framework of the preliminary ruling procedure.

2. Nature and Characteristics of the Quasi-European System of Extradition

In 1999 at the Tampere European Council, the European Council has supported the initiative of replacement of the complicated, long-term procedures of extradition applicable within the European Council among the EU Member States with simplified, rapid mechanism[1], which would be based upon

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Presidency Conclusions at Tampere European Council 15 and 16 October 1999, <http://www.europarl.europa.eu/summits/tam_en.htm#union>, [18.12.2017].

the principle of mutual trust[2] among the EU Member States and mutual recognition of the decision of the court of one EU Member State by other EU Member State.[3] Formation of this system is provided from the objective of the European integration – the area of freedom, security and justice shall be formed within the framework of the Union, where really free movement of a person in the territory of the Union will be ensured and the high standards of safety will be developed and established, that will make the struggle of the Union against the organized crime, xenophobia, racism more effective and efficient.[4] Its foundation was carried out by the Framework Decision "On the European Arrest Warrant and the Surrender Procedures", adopted by the Council of the European Union[5] (hereinafter – the Framework Decision). It should be noted that, unlike the regulation, the directive and decision of the Union, the Framework Decision was not a legislative act of the Union. It was a legal instrument that was adopted by the EU Council in the field of cooperation in criminal cases. After entry of the Lisbon Treaty into force, the treaties establishing the European Union does not envisage adoption of the Framework Decision. Its aim was to ensure the approximation and harmonization of the criminal legislation of the EU Member States. It was binding for the purpose of achieving the objectives provided in it. The Framework Decision was not of directly applicable and usable nature, as in the Directive, it required transposition of this objective in its national law. However, in accordance with the decision of the European Court of Justice on *Pupino Case*, the national institutes and/or the body was obliged to interpret the implementing act in the national law in accordance with the Framework Decision[6]. It is noteworthy, that normative realization of the principle of mutual recognition of the court decision on the criminal cases was adopted for the first time.[7]

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[2] Decision of the European Court of Justice on the Case: Aranyosi and Căldăraru, [C-404/15 and C-659/15 PPU], Paragraph 75, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=175547&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=302286>, [18.12.2017].

[3] *Mirianashvili G.,* The Scope of Cooperation on the Criminal Matters among the Member States of the European Union and the Courts of Georgia according to the Association Agreement, the Georgian-German Criminal Magazine, №2, 2017, 40-41, <http://www.dgstz.de/storage/documents/g07F05BliIKewiUBDBntciLjv3rObm359YmWuTVF.pdf>, [18.12.2017].

[4] *Mirianashvili G.,* European Union Law Guide, 2015, 77.

[5] Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the Surrender Procedures between Member States, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32002F0584>, [18.12.2017]. Council Framework Decision of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2009.081.01.0024.01.ENG>, [18.12.2017].

[6] See: Decision of the European Court of Justice on the Case: Maria Pupino [C-105/03], Paragraph 47, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=59363&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=316678>, [18.12.2017].

[7] Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the Surrender Procedures between Member States, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32002F0584>, [18.12.2017].

2.1. Mutual Trust and Mutual Recognition - the Principles of Constitutional Nature of the Union

The principles of mutual trust and mutual recognition in the EU Law are of fundamental importance and constitutional nature.[8] They are developed in the format of integration of the European Court of Justice with various stages, for enhancement of cooperation in the field.[9] They have interconnection[10], however different content.[11] Through these principles it is possible to create and maintain such a space, which will not have national boundaries,[12] where there will be a presumption of protection in accordance with the law of human rights and freedoms in all Member States[13] and application of the national standard of human rights protection shall not endanger the efficient realization of the instrument of cooperation on criminal cases formed at the level of the Union.[14]

The principle of mutual trust requires that in relation to the area of freedom, security and justice, a EU Member State, except for the urgent, exceptional cases, considered the actions of the other Member States as *a priori* in accordance with the fundamental human rights and freedoms recognized by the EU Law.[15] Within the principle of mutual recognition, one EU Member State is obliged to provide maximum

[8] Decision of the European Court of Justice on the Case: N.S. [C-411/10 and C-493/10], Paragraph 83, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=117187&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=303874>, [18.12.2017]; *Prechal, S.:* Mutual Trust Before the Court of Justice of the European Union, European Papers, Vol. 2, 2017, No 1,76.

[9] *Emaus J.,* The Interaction Between Mutual Trust, Mutual Recognition and Fundamental Rights in Private International Law in Relation to the EU's Aspirations Relating to Contractual Relations, European Papers, Vol. 2, 2017, No 1, 117-140.

[10] *Marin L.,* "Only You": The Emergence of a Temperate Mutual Trust in the Area of Freedom, Security and Justice and Its Underpinning in the European Composite Constitutional Order, European Papers, Vol. 2, 2017, No 1, 142.

[11] *Cambien N.,* Mutual Recognition and Mutual Trust in the Internal Market, European Papers, Vol. 2, 2017, No 1, 94.

[12] Decision of the European Court of Justice on the Case: Ruslanas Kovalkovas, [C-477/16], Paragraph 27, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=185243&doclang=EN>, [18.12.2017]; Decision of the European Court of Justice on the Case: Opinion 2/13 pursuant to Article 218 (11) TFEU — Draft international agreement — Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms — Compatibility of the draft agreement with the EU and FEU Treaties, [2014], Paragraph 191, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=160882&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=304567>, [18.12.2017].

[13] Decision of the European Court of Justice on the Case: N.S. [C-411/10 and C-493/10], Paragraphs 78-80, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=117187&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=303874>, [18.12.2017].

[14] Decision of the European Court of Justice on the Case: Stefano Melloni, [C-399/11], Paragraph 60, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=135894&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=304986>, [18.12.2017].

[15] Decision of the European Court of Justice on the Case: Aranyosi and Căldăraru, [C-404/15 and C-659/15 PPU], Paragraph 78, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=175547&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=302286>, [18.12.2017].

legal assistance regarding the criminal case to other EU Member State[16]. However, in this process it ensures inviolability of the substantive part of the criminal system of the EU Member States. On the one hand, the principle of mutual recognition establishes mutual trust between the national courts and on the other hand imposes obligation of loyal cooperation.[17]

The principle of mutual recognition imposes a EU Member State the obligation to recognize the decision of the court of another Member State in relation to the criminal case as relevant and to carry out the appropriate actions for its execution. At the same time, the Member State shall refrain from formation and modernization of the national legislation as such which threatens execution of the decision of the court of another Member State.

2.2. Characteristics of Quasi-European System of Extradition

The quasi-European system of extradition is a special example of multilateral cooperation. It is a special part of the EU Law. There is no similar model in the multi-subject format. The quasi-European mechanism of surrender is unique, as it is based on formal and material elements, according to which extradition is only a legal process and is not connected to the political dimension.[18]

In the process of extradition within the European Union, decisions are made only by the courts. The European Arrest Warrant should be filled in and issued for surrender. On the one hand, the relevant court of the extradition requesting State shall issue it and, on the other hand, the court of the extradition requested State shall take a decision on the surrender. In the process of extradition, central and executive bodies have a technical and administrative function only.[19]

In the quasi-European system of extradition, surrender is carried out by a European Arrest Warrant. It is a decision of the judicial body of the EU Member State, which requests the addressee State to arrest and surrender. The arrest warrant is issued if a criminal prosecution is carried out in a requesting state or for execution of a verdict on imprisonment or restriction of freedom. At the same time, the court

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16 *Borgers M.J.,* Mutual recognition and the European Court of Justice, European Journal of Crime, Criminal Law and Criminology, 2010, 01, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1593463>, [18.12.2017].

17 *Larsen L. B.,* 'Some Reflections on Mutual Recognition in the Area of Freedom, Security and Justice', in the collection of articles: *Cardonnel P., Rosas A., Wahl N., [eds.],* Constitutionalising the EU Judicial System: Essays in Honour of Pernilla Lindh, Oxford: Hart Publishing, 2012, 148.

18 For quasi-European system of extradition, see: *Alegre S., Leaf M.,* Mutual Recognition in Europe Judicial Cooperation -- a Step Too Far Too Soon? Case study: the European Arrest Warrant, European Law Journal: Review of European Law in Context, 2004, 200-217; *Amicis G.,* Initial Views of the Court of Justice on the European Arrest Warrant: Towards a Uniform Pan-European Interpretation? European Criminal Law review, 2012, 47-60; *Blekxtoon R., Ballegooij W.,* Handbook on the European Arrest Warrant, 2004; *Fichera M.,* The Implementation of the European Arrest Warrant in the European Union: Law, Policy and Practice, 2009; *Plachta M.,* European Arrest Warrant: Revolution in Extradition? European Journal of Crime, Criminal Law and Criminal Justice, 2003, 178-194; *Spencer J. R.,* Implementing the European Arrest Warrant: A Tale of How Not to Do It, Statute Law Review, 2009, 184-202.

19 Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the Surrender Procedures between Member States, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32002F0584>, [18.12.2017], indent 9.

issuing the European Arrest Warrant shall have the authority to issue its promulgation under the national legislation. The European Arrest Warrant shall be sent to the authority specified by the legislation of the addressee State, having the authority to execute the order. Issuance of the European Arrest Warrant is permitted in the following cases:

- Offenses stipulated by the Framework Directive of the EU Council, dated June 13, 2002[20]; or
- If the legislation of the requesting State for the action committed stipulates restriction of freedom or imprisonment for at least 12 months or if the person has already been sentenced and he/she was sentenced to imprisonment or restriction of freedom for at least 4 months.

The maximum term for making the final decision on surrender is defined in the quasi-European system of extradition. When a person consents to surrender, a final decision on extradition shall be made within 10 days after acceptance of such consent.[21] In other case, the final decision on execution of the European Arrest Warrant shall be taken within 60 days after the person being subjected to extradition.[22] If in a specific case it is impossible to fulfill the European arrest warrant in the above-mentioned terms, the court of the extradition requested State shall immediately notify the court issuing an order to postpone the surrender. Execution of the European Arrest Warrant can be postponed for another 30 days.[23]

3. Normative Grounds for Refusal to the Execution of the European Arrest Warrant

Execution of the European Arrest Warrant by the EU Member States, as indicated above, is mandatory due to the principles of mutual trust and mutual recognition. However, the exception is the

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[20] The Framework-Decision stipulates 32 categories of offences: participation in a criminal organization; terrorism; trafficking in human beings; sexual exploitation of children and child pornography; illicit trafficking in narcotic drugs and psychotropic substances; illicit trafficking in weapons, munitions and explosives; corruption; fraud (including that affecting the financial interests of the EC within the meaning of the Convention on the Protection of the European Community's Financial Interest, dated July 26, 1995); legalization of illicit income (money laundering); counterfeiting of currency, including EURO; computer-related crimes; environmental crime, including illicit trafficking in endangered animal species and in endangered plant species and varieties; facilitation of unauthorized entry and residence; murder, grievous bodily injury; illicit trade in human organs and tissues; kidnapping, illegal restraint and hostage-taking; racism and xenophobia; organized or armed robbery; illicit trafficking in cultural goods, including antiques and works of art, racketeering and extortion; counterfeiting and privacy of products; forgery of administrative documents and trading; forgery of means of payment; illicit trafficking in hormonal substances and other growth promoters; illicit trafficking in nuclear or radioactive materials; trafficking in stolen vehicles; rape; arson; crimes within the jurisdiction of the International Criminal Court; unlawful seizure or aircraft/ships and sabotage.

[21] Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the Surrender procedures between Member States, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32002F0584>, [18.12.2017], Article 17, Paragraph 2.

[22] Ibid, Paragraph 3.

[23] If execution of the European Arrest Warrant can not be completed even within 30 days, the extradition requested State shall notify the European lawyer with the specific objective reasons. At the same time, if the Member State fails to execute the European Arrest Warrant at least twice, the EU Council will assess the process of execution of the Framework Decision by that State at the national level.

individual cases (criminal case), that are regulated by the Framework Decision. It is also important to mention, that it also contains special grounds for suspension and prohibition of the extradition process, that is related to the political and legal dimensions of human rights, on its side. In addition, there is an absolute and voluntary case of refusal to surrender in the quasi-European system of extradition. Such grounds will be discussed below.

3.1. Prohibition of Surrender for the Purpose of Protection of the Fundamental Rights

Within the European arrest warrant, the court of the EU Member State shall not surrender when:

- The EU Council determines the hazard of serious and permanent violation of the fundamental rights, freedoms and principles envisaged by the Charter in this Member State *(political dimension)*.[24] In such a case, the national court is bound by the decision of the EU Council and execution of the European Arrest Warrant prior to invalidation of such a decision will cause violation of the Charter of the Fundamental Rights of the European Union and the Treaty on European Union;
- There is a serious risk that a person faces death penalty, torture, inhuman, cruel or degrading treatment and use of punishment *(legal dimension);*
- The purpose of the request for extradition of a person is not to impose liability for the offense, but persecution, detention or imprisonment on sex, race, religion, ethnic origin, citizenship, linguistic, political opinion or sexual orientation or other subjective grounds *(legal dimension).*

The unified rules and formal requirements are defined for issuance of the European Arrest Warrant. The Framework Decision determines the content and form of the European Arrest Warrant, inadequate filling of which will create the grounds for refusal to surrender.[25]

3.2. Absolute Grounds

In case of absolute grounds, the court of the EU Member State is obliged to refuse execution of the European Arrest Warrant, when:

- A crime, on which the European Arrest Warrant is based, is amnestied in the extradition requested State. It is also necessary that this State has jurisdiction over the same crime, jurisdiction over criminal persecution of the same offense under the national law;
- The court of the extradition requested State has been informed that the final decision is already made by the court in the extradition requested State regarding the person subjected to surrender for the action, for which his/her extradition is requested. If in such a case, a person has been sentenced to a penalty, it is necessary that the execution of the sentencing process shall be pending or its execution shall

[24] Regarding the procedure for determination of the risk of serious and permanent violation of fundamental rights, freedoms and principles, see: *Mirianashvili G.,* European Union Law Guide, 2015, 173-174.

[25] For example, see: Decision of the European Court of Justice on the Case: Niculaie Aurel Bob-Dogi [C-241/15], Paragraph 67, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=179221&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=307411>, [18.12.2017].

be completed or the execution of such a sentence can not be carried out by the law of the extradition requested State;

- A person subjected to surrender is incapable of guilt due to his/her own age in the extradition requested State.[26]

3.3. Optional Grounds

The Framework Decision is more widely cited in the cases, when the European Arrest Warrant can not be executed. A court of a Member State has the right not to execute the European Arrest Warrant if:[27]

- Any offense envisaged by the Framework Decision, on which the the European Arrest Warrant is based, is not a crime in the extradition requested State;
- Criminal prosecution is pending in the extradition requested State towards a person subjected to surrender, which was based on issuance of the European Arrest Warrant;
- The judicial body the extradition requested State has made a decision not to carry out a criminal prosecution for the action, which was based on issuance of the European Arrest Warrant, if with such decision the proceedings have been terminated, or the court has taken such final decision in relation to the same action against the same person and has prohibited continuation of the proceedings;
- The criminal prosecution or conviction of a person subjected to surrender is prohibited by the law in the extradition requested State and such acts are considered as part of the criminal jurisdiction of that country;
- The court of the extradition requested State has been informed that a final decision is made in the third State in respect of a person subjected to surrender for the action, for which his/her extradition is requested. If in that case the person has been sentenced, it is necessary that the execution process of the sentence be pending or its execution be completed or execution of such sentence can not be effected by the law of a third State;
- The person, to whom it is issued for execution of the arrest warrant or sentence regarding imprisonment, is a citizen of the extradition requested State, a person with a residence permit and this State undertakes to execute the arrest warrant or imprisonment order in accordance with domestic law;
- It is related to the offence, that:
  - The law of the extradition requested State deems to be committed in whole or in part in the territory of that State (or on a place with such status); or
  - Is committed beyond the territory of the extradition requesting State and the law of the extradition requested State does not permit the criminal prosecution of the same offenses, when they are committed outside its territory.

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[26] Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the Surrender Procedures between Member States, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A-32002F0584>, [18.12.2017], Article 3.

[27] Ibid, Article 4.

1. It is issued for enforcement of such arrest warrant or detention order, in the trial process of which the person subjected surrender has not took part, however in such a case it is necessary that the procedural warranties envisaged by the law of the extradition requesting State are not indicated[28] (e.g. the right to appeal the default judgment, etc.).[29]

In addition to the above-mentioned case, the non-execution of the European Arrest Warrant with other grounds is a violation of the Framework Decision.[30]

4. Accessory Grounds for the Non-Execution of the European Arrest Warrant according to the Practice of the European Court of Justice

It is evident in the above-mentioned cases that in the quasi-European system of extradition, the court of the extradition requested State has special function in protection of the human rights. However, only reference to human rights within the legal act, as well as declaration of such norms and allocation of the mechanisms at the national level (e.g. the court) are not sufficient to protect the rights and freedoms effectively. In any legal system there must be an independent, separatist mechanism that will supervise implementation of human rights standards.[31] The European Court of Justice carries out supervision over human rights in the quasi-European system of extradition together with the national court. It is entitled to consider, on the one hand, the national court's questions regarding interpretation and validity of the Framework-Decision (with the European Union's Charter of Fundamental Rights, the treaties establishing the European Union) within the preliminary ruling procedure[32], and on the other hand, the

[28] Council Framework Decision of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2009.081.01.0024.01.ENG>, [18.12.2017], Article 1.

[29] It is noteworthy that the Constitutional Court of the Federal Republic of Germany has developed so called the concept of constitutional identity in the case related to the European Arrest Warrant, which grants the opportunity to the Federal Constitutional Court of Germany to assess the compliance of the European Arrest Warrant, as well as the protocols of the Union in general with the Right of Dignity recognized by the Fundamental Law of Germany. For more details see: <http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2015/12/rs20151215_2bvr273514en.html;jsessionid=8C76433FF1384ABF38F047A3F8583A4E.1_cid370>, [18.12.2017].

[30] Decision of the European Court of Justice on the Case: Stefano Melloni, [C-399/11], Paragraph 63, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=135894&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=304986>, [18.12.2017].

[31] For more details see: Decision of the European Court of Justice on the Case: Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union, and Commission of the European Communities [C-402/05 P and C-415/05 P], Paragraph 286, <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62005CJ0402&from=EN>, [18.12.2017].

[32] *Preliminary ruling procedure* - The national court is obliged to ensure proper use of the EU Law in the order of the EU Member State. If in the process of examining the case the national court has reasonable doubts regarding the action or purposeful interpretation of the EU Law, and it shall be authorized and even obliged in some cases to apply to the European Court of Justice with the questions. The decision made by the European Court of Justice in the preliminary ruling procedure is of binding nature regarding the case

individual lawsuits regarding compliance of the Framework Decision with the Charter of Fundamental Rights of the European Union, the treaties establishing the European Union.[33]

Analysis of the practices of the European Court of Justice shows that in the basic case, the proceedings in relation to the quasi-European mechanism of extradition are carried out in the form of the preliminary ruling procedure. This mechanism is a procedural instrument for development (or interruption[34]) of human rights standards to this direction in the field of communication. Consequently, the accessory grounds for the non-execution of the European Access Warrant are developed by the European Court of Justice in the framework of the said procedure.

4.1. Justice Nature of the European Arrest Warrant

The European Court of Justice unequivocally ruled out the issuance of the European Arrest Warrant in the case – *Ruslanas Kovalkovas [C-477/16]* by the body, that carried out justice. In this case, the European Arrest Warrant was issued by the Ministry of Justice of Lithuania[35], which demanded arrest and surrender of a citizen of Lithuania - Kovalkovas from the Kingdom of the Netherlands to execute the sentence imposed due to severe body injury.[36] Lithuania believed that in the term "authority of justice" referred to in the Framework Decision, the Member State defines the appropriate body, at its own discretion, and imposes it rights and obligations under the national law.[37] According to the European Court of Justice, the Member State does not have the competence to define the content and scale of this term.[38] It has an autonomous nature in the EU Law.[39] It implies a body, which exercises justice and is depoliticized and independent. Consequently, the Member State is obliged to take the context and purpose into consideration in the process of transposition, interpretation and implementation of the EU legal acts, including the Framework Decision in the national law.[40] In addition, the European Court of Justice noted that the Ministry of Justice of Lithuania is the executive body, whose European

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concerned. It is necessary to take it into account even in the process of consideration of other cases. The mentioned procedure plays a fundamental role in development of the EU Law. See: Article 267 of the Treaty on European Union. For more details see: *Kaczorowska A.,* European Union Law, 2011, 256-290;

[33] 1992 Treaty on European Union, Article 269.

[34] For interruption of development of the standards of human rights protection by the European Court of Justice, please see: Decision of the European Court of Justice on the Case: Stefano Melloni, [C-399/11], Paragraph 60, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=135894&pageIndex=0&-doclang=EN&mode=req&dir=&occ=first&part=1&cid=304986>, [18.12.2017].

[35] It is noteworthy that the present case was not the first, when the Ministry of Justice of Lithuania issued the European Arrest Warrant. For example see: Evaluation report of the Council of 14 December 2007 concerning national practices relating to the European arrest warrant [Evaluation report on the fourth round of mutual evaluations 'the practical application of the European arrest warrant and corresponding surrender procedures between Member States': Report on Lithuania [12399/2/07 REV 2].

[36] Decision of the European Court of Justice on the Case: Ruslanas Kovalkovas, [C-477/16], Paragraphs 10-12, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=185243&doclang=EN>, [18.12.2017].

[37] Ibid.

[38] Ibid, Paragraph 32.

[39] Ibid.

[40] Ibid.

Arrest Warrants do not subject to judicial control.[41] Consequently, such a warrant is not enough for establishment and existence of high confidence among the Member States.[42] It should be said, that the purpose of formation of the quasi-European system of extradition was complete depoliticization and de-bureaucratization of this process, and definition of an exact margin among legal and political authorities. The quasi-European system of extradition, unlike the European model, is based on cooperation on surrender only among the courts. Thus, the material participation of the executive authority in the process of issuance of the European Arrest Warrant is contrary to the purpose and context of the Framework Decision.

4.2. Formal Legality of the European Arrest Warrant

According to the European Court of Justice, on the one hand, the formal-legal criteria for filling shall be ensured during issuance of the European Arrest Warrant, and on the other hand, the grounds for issuance of the European Arrest Warrant shall be provided as a separate national act, such as a national arrest warrant. According to the annex approved by the Framework Decision, issuance of the European Arrest Warrant shall be based on evidence of execution of a judgment, the arrest warrant or other court decision with similar effect.[43] In the case - *Niculaie Aurel Bob-Dogi [C-241/15],* the European Arrest Warrant was issued regarding surrender of a Romanian citizen Bob-Dogi, who was accused for severe injury of health of a Hungarian citizen due to driving the truck with excess speed in Hungary. It is important, that the European Arrest Warrant was indicated in the grounds of the European Arrest Warrant against Bob-Dogi. Based on the systematic, teleological and grammatical methods of the Framework Decision, the European Court of Justice clearly stated that the general term referred to in the Annex to the Framework Decision implies the national arrest warrant, correspondingly in its general sense the definition contradicts the nature of the European Arrest Warrant[44]. Thus, at least the formal requirements set by the Framework Decision should be considered for validation of the European Arrest Warrant.[45] The court of the extradition requested State is obliged to evaluate not only the content, but also the formal side of the European Arrest warrant, only in such case the procedural and fundamental rights of the person subjected to surrender will be protected (so called "*dual protection level*").[46] Consequently, if the European Arrest Warrant is not based on the separate national act, such as the national arrest warrant, it is not deemed to be valid, legal and legally enforceable.[47]

[41] Decision of the European Court of Justice on the Case: Ruslanas Kovalkovas, [C-477/16], Paragraph 44. <http://curia.europa.eu/juris/document/document.jsf?text=&docid=185243&doclang=EN>, [18.12.2017].
[42] Ibid.
[43] Ibid, Paragraph 68.
[44] Ibid, Paragraphs 43-47.
[45] Ibid, Paragraph 53.
[46] Ibid, Paragraph 56.
[47] Ibid, Paragraph 66.

4.3. Limitation of Surrender of a EU Citizen to the Third State

According to the European Court of Justice, when a EU Member State receives extradition request from a third State regarding surrender of a citizen of another Member State, it shall be obliged to make the decision on extradition of such person to the third State, on the one hand, in accordance with the Charter of the Fundamental Rights of the European Union, and on the other hand to inform the EU Member State about such request, whose citizen is a person to be surrendered and will surrender him/her on the basis of the Framework Decision. However, the European Arrest Warrant issued by this Member State shall not be executed, when the EU Member State, following to its domestic law, does not have the competence to punish its citizen for offenses committed beyond the national territory.

In the case of *Aleksei Petruhhin [C-182.15],* the Russian Federation demanded surrender of Estonian citizen Aleksei Petruhhin from Latvia, who had been charged in Russia for selling of large quantities of narcotic drugs.[48] It is noteworthy, that Latvia did not own jurisdiction over criminal persecution of Petruhhin, because he was not its citizen and at the same time Petruhhin committed a crime in the third State. Thus, with refusal to extradition of Petruhhin, the essence of the extradition was neglected (*punish or surrender*). In addition, with the extradition of Petruhhin in the Russian Federation, the principle of prohibition of discrimination on the grounds of citizenship under the Articles 18 - 20 of the Treaty on functioning of the European Union would be violated, which obliges the EU Member State to treat the citizen of another Member State like its own one.[49] It is important that in accordance with the Article 62 of the International Treaty signed between Latvia and the Russian Federation in 1993, the citizens of the parties shall not be extradited to another State. Consequently, with direct surrender of Petruhhin, the Primerian Law of the EU would be violated. The European Court of Justice was facing a complicated legal dilemma. However, the decision made by it was optimal, since protection of human rights as well as effective transnational cooperation against crime was provided. On the basis of a so called frank cooperation principle, the European Court of Justice declared that when a third State requests surrender of a EU citizen, the extradition requested State is obliged to notify the EU Member State about extradition of its citizen and to surrender him/her to the same State in accordance with the Framework Decision.[50] According to the motivation of the European Court of Justice, it is assumed that if a parent State does not have a jurisdiction of criminal prosecution against its citizen, the European Arrest Warrant shall not be executed and the EU Member State shall be authorized to surrender the EU citizen to a third State in order the offence not to remain unpunished. However, it is obliged to assess whether there is a serious risk of violation of fundamental rights and freedoms in the extradition

[48] Decision of the European Court of Justice on the Case: Aleksei Petruhhin [C-182/15], Paragraphs 10-14, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=183097&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=315242>, [18.12.2017].

[49] For prohibition of discrimination against a EU citizen in the context of the case of Aleksei Petruhhin, see: *Pozdnakova A.,* Aleksei Petruhhin: Extradition of EU Citizens to Third States, European Papers, Vol. 2, 2017, No 1, 209-222.

[50] Ibid, Paragraphs 42-43.

requesting State.[51] *Inter alia,* such assessment shall be based on the assessments, reports, opinions and decisions made by the bodies created within the framework of authoritative regional or/and universal international treaties on the standards, condition of human rights protection in the extradition requesting State.[52]

With the activation of the European Court of Justice it is evident that it creates the policy, development directions for the quasi-European system of extradition and cares not only for effectiveness, primacy and autonomy of justice, but also for raising of the human rights standards.

5. Conclusion

Regardless of its scale, the quasi-European system of extradition is the most effective tool for the surrender procedure. According to the opinions provided in the article hereof, it has been confirmed that it is simultaneously a legal mechanism for cooperation in the field of extradition, as well as a normative instrument for human rights protection. The quasi-European system of extradition has inherent characteristics, which are related to maximum period of the surrender procedure, conceptual and formal justification of the European Arrest Warrant, validity, issuance by the appropriate authority, depoliticization, technical and administrative functions of the executive authority in the extradition process, etc. Furthermore, only quasi-European model of extradition is characterized by the fact that compliance of the extradition process with the procedural and fundamental rights of a person to be surrendered can be judged by a judicial triad consisting of the national courts and the European Court of Justice. Consequently, the quasi-European regime of extradition is in a permanent process of renewal by the EU Supreme Court, in non-legislative manner. Along with the normally established grounds for the non-execution of the European Arrest Warrant, the accessory cases are formed as a result of activism of the European Court of Justice, when execution of the European Arrest Warrant is prohibited for protection of the rights of the person to be surrendered. According to the European Court of Justice, it is prohibited to execute the European Arrest Warrant if it is issued by a body, which does not carry out justice. According to the Court, the European Arrest Warrant shall not be executed if there are no formal legal criteria for its filling and there is no independent national act for its publication.

It is important that the EU Law defines the scope of surrender of the EU citizen to other State. Where a third State requests surrender of the EU citizen, the extradition requested State is obliged to send a notification to the EU Member State about the request of extradition of its citizen and, if requested, to surrender according with the Framework Decision of the same State, if the Parent State has the jurisdiction of criminal prosecution of its own citizen. However, a EU Member State is obliged to assess whether there is a serious risk of violation of fundamental rights and freedoms in the extradition requesting State. Along with other objective information, such assessment shall be based on the

[51] Decision of the European Court of Justice on the Case: Aleksei Petruhhin [C-182/15], Paragraph 58, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=183097&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=315242>, [18.12.2017].

[52] Ibid, Paragraph 59.

assessments, reports, opinions and decisions made by the institutes created within the framework of the authoritative regional and / or universal international treaties on the standards, conditions of human rights protection.

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Levan Kharanauli[*]

Evolution of Negligence from Classical Theory of Crime to Modern System (Dogmatic-Systemic Analysis)

The article reviews specific features of development of the crime of negligence in the light of dogmatic-systemic analysis, demonstrating the nature of negligence and its place in classical, neoclassical and finalist doctrines. The paper discusses various aspects of negligence from this very view-point, with due consideration of the trends of its development.

Keywords: *Evolution of the Clime of Negligence Classical, Neoclassical and Finalist Doctrines of Crime, Psychological, Psychological-Normative and Purely Normative Theories of Guilt.*

1. Introduction

This paper focuses on the history of development of crime system, specifically, on dogmatic-systemic analysis of negligence within crime system, where worth mentioning are the established judgments about negligence. All the foregoing is based on scholarly justified, although sometimes disputable arguments. It should be said, that *the problems of negligence became grounds for substitution of one crime system with the other and the "Achilles' heel" in the course of development of the uniform crime system.* For this reason the researchers of criminal law have their hearts set on determination the place of crime of negligence within uniform crime system through revealing its nature.

The problems of negligence has quite a complex nature, when it is necessary to make a recourse to various doctrines, *inter alia* to the system of philosophy. In this regard, particular mention should be made of *Kant's* philosophical doctrine of idealism,[1] also of *Hegel's* judgments[2] and neo-Kantian schools.

Insofar as the above theme covers quite a wide range of issues and it is impossible to thoroughly analyse them it in a single article, this time the paper offers the discussion of the peculiarities of the development of the crime of negligence starting from **traditional system** and ending up with **modern systems**.

Criminal negligence went through the following steps of development of the concept of crime: classical, neoclassical, finalist[3] and neo-finalist (modern) systems, where, based on psychological and normative doctrines, criminal negligence is described as a type of guilt, consequently, as a form of guilt and in other systems negligence, as a specific type of punishable action, employs double scope of assessment (dominating opinion)[4].

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[1] See: *Vormbaum T.*, Einführung in die moderne Strafrechtsgeschichte, 3. Auf., 2013, 47. *Amelung* wrote about these influences, that German doctrine and criminal dogmatics are of social-spiritualistic nature. See *Amelung K.*, Rechtsgüterschutz und Schutz der Gesellschaft, 1972, 32.

[2] *Kutalia L-G.,* Guilt in Criminal Law, Genesis of Guilt, Vol. 1, 2000, 222 (in Georgian).

[3] *Jescheck H-H.*, Thomas Weigend, Lehrbuch des Srafrechts, Allgemeiner Teil, 1996, 199.

[4] *Jescheck H-H.*, Beiträge zum Strafrecht 1980-1998, Berlin, 1998, 114.

2. The Notion of Negligence according to Psychological Theory in Classical[5] Doctrine of Crime

The general system of crime is the core and the basis of criminal dogmas, where the general model of the concept of crime is developed - the so-called wide concepts establishing categories[6], and the process of working out of these concepts has proved to be quite lengthy and the enhancement of these concepts is conditioned by the influence of philosophical thinking. Specifically, the philosophical schools underlay the *development of the doctrines of crime,* ***classical doctrine*** *being the first to mention among them. Anselm von Feuerbach is regarded as the founder of classical school,* the origins of whose criminal doctrine are based on Kant's judgments about law[7]. According to Feuerbach the conditions of criminality were: mind - for understanding of law, reasoning ability - for acting in accordance with law, and focus of willpower - on the breach of law. He tried to equally apply these conditions when proving intention, as well as negligence[8]. Using this concept Feuerbach built negligence on the notion of intention and thus created the strange construction of "intentional negligence"[9]. He would link negligence (intention) with the breach of obligation, however he believed that it was impossible to breach prudence obligation negligently[10].

The three-point division of crime is based on the system of *Liszt* and *Beling*, according to which a crime was regarded as an unlawful and culpable action (or tort)[11.] Liszt[12] would equate negligence with guilt and state that unlike intention negligence was itself guilt. In his opinion the only thing that linked guilt with its types was the function punishable under panel law. Liszt presented guilt in subjective-psychological light. He would define guild as perpetrator's subjective link with consequence, which was associated with criminal liability. Liszt would limit the concept of guilt only to intent and negligence. Hence, based on his judgements, Liszt created theory which these days is known as "psychological theory of guilt". As the psychological theory of guilt proved to be insufficient to solve the problem of

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5 The period of classical system is called the epoch of scientific positivism. See *Jescheck H-H.*, Strafrecht im Dienste der Gemeinschaft, Ausgewählte Beitragäge, Berlin, 1980, 162; *Jescheck H-H.*, *Weigend T.*, Lehrbuch des Srafrechts, Allgemeiner Teil, 1996, 203.

6 *Leipziger kommentar*, Band I, Auflage 12, 707.

7 However, this idea should not be understood as if Feuerbach was Kant's blind follower - in fact they had different opinions about various aspects. See *Vormbaum T.*, Einführung in die moderne Strafrechtsge-schichte, Auflage 3, 2013, 42; *Vacheishvili Al.*, Mens rea in Soviet Criminal Law, 1957, 112 (in Georgian).

8 *Vacheishvili Al., Mens rea* in Soviet Criminal Law, 1957, 105 (in Georgian).

9 Ibid, 108. *Feuerbach* is regarded as the father of German panel law. He reviewed the basic concepts of panel law on the basis of strongly abided by dogmatic method and embodied his concept in the Penal Law Code of the Kingdom of Bavaria (1813).

10 *Kutalia, L-G.,* Guilt in Criminal Law, Genesis of Guilt, vol. 1, 2000, 133 (in Georgian).

11 However, the foundations of the contemporary model of crime were laid by Stübel at the beginning of the nineteenth century and later by Luden, See *Jescheck H-H.*, Strafrecht im Dienste der Gemeinschaft, Ausgewählte Beitragäge, Berlin, 1980, 163.

12 Binding criticises Liszt because of his action doctrine, as he views an action only from the naturalistic point of view, i.e. is oriented on bodily movements and changes in the outer world. Respectively, he relies on the concept of action, as *genus proximum*, as the basis of his system and links unlawfulness and guilt with it as *diferentia specifica*.

negligence, Lizst tried to link the foreseeability of consequence, as potential mental connection, with a psychological element; however, the mandatory objective feature like prudence failed to fit with the psychological model of guilt, as stated by List himself. Due to these and other circumstances Liszt's guilt theory failed[13].

As regards Beling, he made notional-systemic synthesis of essential-normative elements of the notion of guilt[14][15]. Like other classics, in his first publication Beling would regard guilt as perpetrator's mental dependence on action, and negligence (intent) - as a type of guilt. His criterion for the delimitation between intent and negligence was awareness of misconduct and knowledge about circumstances constituting the elements of action[16]. However, in his scholarly work, published in 1910 - *Guilt and Levels of Guilt* - Beling stressed, that in the case of inclusion of intent and negligence in the concept of guilt, the intent and negligence would have naturally lost the meaning of the forms of guilt or the types of guilt. Thus, Beling regarded intent and negligence as levels of guilt based on the assumption, that as legislator provided for more stringent punishment for an intentional crime than for a negligent one, then they can be linked with the guilt according to levels[17].

Adolf Merkel did not regard negligence (intent) as a type of guilt, but rather took it as a possibility of imputation of tort. He described negligence in a form of intensive particular tort of general will and included it in generic concept of will contradicting obligation. Merkel understood that the breach of prudence standard, as an objective feature, is characteristic only for negligence and is antithetical to intent. Hence the equalisation of these two concepts is logically impossible. Instead of the concept of guilt Merkel speaks about the category of imputation, which he set against the category of action imputation, recognised by post-Hegelian dogmas[18]. Hence, Merkel's judgments are marked with an attempt to prove negligent guilt aloof from psychological moments, unlike intent[19].

Neither Stübel recognized negligence as a type of guilt and he believed that only intent was a type of guilt. He tried to find the elements of conscious guilt in unconscious negligence. In his opinion a human being is not accused of causing certain consequence, e.g. death, health injury, etc., but rather of an earlier committed dangerous action, e.g. alcoholic intoxication. However, in criticism of this viewpoint, it is often stated, that instead of discovering conscious in unconscious negligence, this opinion laid foundations for the creation of new elements of crime[20].

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13 *Achenbach H.*, Historische und dogmatische Grundlagen der strafrechtssystematischen Schuldlehre, 1974, 40, 41-43.

14 *Achenbach H.*, Historische und dogmatische Grundlagen der strafrechtssystematischen Schuldlehre, 1974, 91.

15 Neling's breakthrough is that he viewed crime as an action concurrent with the elements of crime. See *Jescheck H-H.*, Beiträge zum Strafrecht 1980-1998, Berlin, 1998, 6.

16 *Achenbach H.*, Historische und dogmatische Grundlagen der strafrechtssystematischen Schuldlehre, 1974, 94.

17 *Beling E.*, Unschuld, Schuld und Schuldstufen, 1910, 30.

18 *Achenbach H.*, Historische und dogmatische Grundlagen der strafrechtssystematischen Schuldlehre, 1974, 45-47.

19 Tinatin Tsereteli regards Merkel as a representative of normative theory of guilt. *Tsereteli T.*, Finalist Theory in Bourgeois Criminal Law and Its Criticism, The Soviet Law (journal) 1966, №2, 31 (in Georgian).

20 See *Vacheishvili Al., Mens rea* in Soviet Criminal Law, 1957, 132-133 (in Georgian). It should be mentioned, that such individual independent element already exists in the effective Criminal Code of

Based on metaphysical philosophy of Schopenhauer and Hartman, that recognises the existence of the so-called *unconscious will*, Binding tried to prove the existence of negligence, and specifically of unconscious negligence within the uniform system of guilt. He would state, that subject to act of will may become something, that a human being has not even thought of yet. To prove the foregoing, he refers to experiments, when some professional, say a physicist, wants to find about the outcomes of this research. Respectively, *'unconscious will'* was admissible for Binding, which phenomenon is not associated with imagining and he tried to solve the problem of negligence in this way. This view-point is subject to criticism as psychology, as a science, does not recognise 'unconscious will'[21]. Based on the foregoing Binding, who was a traditionalist and considered negligence (intent) as a type of guilt[22], failed in his endeavours to prove negligence, and specifically of recklessness, through psychological theory.

The judgments about the psychological theory of guilt, developed within classical doctrine, explain the problem of guilt mainly by an act of will and try to incorporate negligence (intent) into the uniform concept of guilt based on this very psychological feature; however, as already mentioned, justification of unconscious negligence by the element of the so-called unconscious will contradicts the fundamentals of psychological theory of guilt as the science of psychology itself is not aware of such a feature[23].

Hence, the problem of psychological concept of guilt was not the intent, but rather negligence, which, according to traditional natural science should have been ranked together with intent upon subjective imputation of consequence. The foregoing problem remained unsolved as there is not will to cause some consequence in the case of negligence and the impression of possible causing such consequence occurs only in the case of conscious negligence, and unconscious negligence remains out of the mix[24].

Radbruch, the follower of the psychological theory tried to rectify the situation through delimiting intent and negligence from mental facts and focused on antisocial consciousness[25] as one of the features, however, he failed to avoid psychological variations[26]. However, Radbruch regarded unconscious negligence as the remnants of objective imputation[27].

Edward Kohlrausch is also believed to be as a supporter of psychological theory. It should be stressed that Kohlrausch viewed guilt as an assessment, but psychological elements were crucial for him

Germany in terms of Paragraph 316 of the BGB "Driving while under the influence of drink or drugs". Punishability of such action does not depend on occurrence of some consequence.

21 Ibid, 119-120.

22 *Achenbach H.*, Historische und dogmatische Grundlagen der strafrechtssystematischen Schuldlehre, 1974, 32, 35.

23 *Vacheishvili Al., Mens rea* in Soviet Criminal Law, 1957, 120-121 (in Georgian).

24 *Jescheck H-H.*, Beiträge zum Strafrecht 1980-1998, Berlin, 1998, 115.

25 *Jakobs G.*, Strafrecht, Allgemeiner Teill, Part 2, 1991, 470, *Achenbach H.*, Historische und dogmatische Grundlagen der strafrechtssystematischen Schuldlehre, 1974, 69-70.

26 See *Jakobs G.*, Strafrecht, Allgemeiner Teill, Part 2, 1991, 471.

27 See *Vacheishvili Al., Mens rea* in Soviet Criminal Law, 1957, 134 (in Georgian). Objective imputation, mentioned by Radbruch, does not mean the contemporary understanding of the category of objective imputation, which is established at the stage of composition of an action.

in the justification of guilt. Kohlrausch strictly followed traditional conception and regarded negligence (intent) as a type of guilt. However, he always posed the question - whether how and to what extent the traditional punishability of negligence was compatible with the principle of culpable liability. He would state, that unconscious negligence was beyond any guilt as lacks the perception of guilt. The fact that a perpetrator could have and should have foreseen the consequence, would not maintain its culpable nature as the only moment of culpability is general awareness that someone's legal wealth is endangered. This may, at most, justify torts qualified by consequence and not the construction of the form of guilt[28]. In his opinion, if unconscious negligence is regarded as a form (type) of guilt, then the stipulation, that guilt is mental dependence on consequence, should be denied, or the recognition of negligence as a form of guilt should be abandoned and it should be otherwise proved[29]. According to Kohlrausch's explanations unconscious negligence was culpable breach of prohibition of danger, what is embodied in every provision on negligence. If guilt is interpreted in the light of specific mental connection with consequence, then this concerns only the intent[30]. Kohlrausch's view-point was an attempt to free guilt from mental elements, at least, partially. It can be said, that in this respect he made a step forward from purely psychological comprehension of guilt towards its psychological-normative understanding.

In Georgian criminal law the psychological theory of guilt, which is regarded as a left-over of Soviet criminal doctrine[31], maintained its topicality until the end of the twentieth century. This is clearly evidenced by some of the Georgian criminal-law textbooks, published in 1990s, where the guilt is defined as *perpetrator's mental dependence on committed action committed*[32]. Guilt was not an independent feature of crime, but rather constituted *mens rea* together with the motive and purpose[33]. As regards negligence, it was regarded as a form of guilt and presumption and recklessness were presumed to be the types of guilt[34]. To explain recklessness on the basis of psychological theory the supporters of the latter stated, that in the case of recklessness the "peculiar form psychic dependence" would come around, what was manifested in the neglect of the requirements of law[35]. The attempt of the followers of the psychological theory to prove mental dependence in the case of recklessness, failed as criminal law is interested in mental interrelation between an action and consequence and not in any other "peculiar forms". As regards the "neglect of the requirements of law", this problem is an ethical one. "Apart from this, the psychological theory of guilt can never convey the social and political motives of a perpetrator, the system of his/her attitude towards public values"[36].

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[28] *Achenbach H.*, Historische und dogmatische Grundlagen der strafrechtssystematischen Schuldlehre, 1974, 71-73.

[29] *Vacheishvili Al., Mens rea* in Soviet Criminal Law, 1957, 134 (in Georgian).

[30] *Achenbach H.*, Historische und dogmatische Grundlagen der strafrechtssystematischen Schuldlehre, 1974, 73.

[31] *Kutalia, L-G.,* Guilt in Criminal Law, Genesis of Guilt, Vol. 1, 2000, 232 (in Georgian).

[32] In scholarly works on criminal law, published by the end of the twentieth century in Georgia, the psychological theory of guilt still had its supporter, however ultimately, they would still opt for normative-psychological theory of guilt, See *Surguladze L.*, Criminal Law, Crime, 1997, 55; 183 (in Georgian).

[33] Ibid, 178.

[34] Ibid, 186.

[35] Ibid, 200.

[36] *Nachkebia G.*, Criminal Law, General Part, Tbilisi, 2015, 340 (in Georgian).

Hence, throughout its history, the classical system tried to unite all forms of guilt (direct, indirect, conscious, unconscious) in one logical single whole, otherwise the logical basis of the development of the uniform concept of guilt would have been undermined. Therefore the classical school was engaged in the scrutiny and settlement of these issues for quite a long period[37]. According to classical school solution of the problem of guilt was directly proportional to the settlement of negligence related issues and vice versa, explanation of the phenomenon of negligence was a "golden key" for the elucidation of guilt genesis.

In classical system it was necessary to explain the essence of guilt in such a manner as to find common generic features and basis for intent and negligence. The problem would become particularly pressing when the case concerned recklessness. The above deliberations clarified that classical system failed to cope with this problem with the help of the psychological theory of guilt[38] and thus, criminal science abandoned it[39].

3. An Attempt to Substantiate Negligence according to Normative and Psychological-Normative[40] Theory in Neoclassical Doctrine[41]

The influence of philosophical positivism, which laid the basis of psychological theory of guilt in criminal law, has gradually subsided and neo-Kantian philosophy gained a foothold instead of it, which is closely linked with Kant's theory of cognition and ethics[42]. Already after the World War I the criminal law scholars tried to substantiate the concepts and categories of criminal law in a new fresh way. Neoclassicism[43], which has substantially changed the classical system, had this very aspiration. The thinking of this period was mainly limited to neo-Kantian theory of cognition (Rickert, Lask), bringing down science to purposes and valued through own humanitarian methods of assessment. The legal science became the science of *culture* and *rule* and respectively, was no more identified with natural sciences - it had quite different tasks[44]. Neo-Kantianism stresses the individuality and independence of humanitarian-scientific methods of cognition and assessment of human relations, as compared with natural science methods of observation and description of empirically identifiable factual circumstances. Liberation of positivism from natural science methods gave way to new methods, which were defined in the context of purpose and developed into ***"Teleological Method"***. The protection of vital interests of the

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37 *Vacheishvili Al., Mens rea* in Soviet Criminal Law, 1957, 49-50 (in Georgian).

38 *Turava M*., The System of Negligent Crime (for New Interpretation of Certain Elements according to Georgian Criminal Law), Otar Gamkrelidze 80 Anniversary collection of scholarly articles, Tbilisi, 2016, 204 (*in Georgian*).

39 Such conclusion does not mean that the criminal law science has utterly turned a blind eye to provisions, developed by classical school. Contemporary criminal law was developed and transformed on the basis of scholarly thinking of just that period.

40 Some scholars name this theory of guilt as normative-psychological theory, See *Turava M*., General OArt of Criminal Law, 9th edition 2013, 209 (in Georgian).

41 *Jescheck H-H*., Strafrecht im Dienste der Gemeinschaft, Ausgewählte Beitragäge, Berlin, 1980, 162, 169.

42 *Jescheck H-H*., Beiträge zum Strafrecht 1980-1998, Berlin, 1998, 117.

43 *Vacheishvili Al., Mens rea* in Soviet Criminal Law, 1957, 180 (in Georgian).

44 *Leipziger kommentar*, Band I, Auflage 12, 718.

public and the responsibility of each and every citizen of a state are the basic values, the criminal law serves. The normative concept of guilt is defined from this very crucial viewpoint[45].

According to neoclassical system, there was no purely formal division of objective and subjective features in the concept of guilt anymore and the main focus was made on criminal-law purposes and immanent perceptions of assessment. All the features of crime were essentially changed, including the concept of guilt[46].

The normative theory of guilt was developed as a result of its detachment from the psychological theory of guilt, acknowledges by classical doctrine. As already mentioned, the latter explained guilt only through inner moments[47]. According to normative theory of guilt the guilt by negligence was not understood as a negative fact of perpetrator's non-awareness of consequences, but rather the recklessness of the perpetrator in fulfilment of his standard of prudence[48].

The intellectual-spiritual status of an individual, on the basis of which a person should be imputed a punishable action, consists of various elements, which collectively make only the subject of assessment of guilt. The negative assessment of these circumstances is called "blaming". The questions, that were left open by psychological theory of guilt, were easily solved by this doctrine. The guilt is excluded even when a perpetrator acts wilfully or negligently as intellectual-spiritual status of a mentally ill individual does not allow for negative assessment. In the case of negligence the accusation is focused not on the negative fact of "lack of perception about consequence", but rather on careless attitude towards prudence requirement of the law and social order. The function of material concept of guilt is for the factors, that are importance for perpetrator's liability in a rule-of-law state with regard to society, should be united and be accumulated in evaluative assessment, where the legitimate demands of the society express the will of the perpetrator[49].

Thanks to philosophically educated jurists - Reinhard Frank, Rudolf Stammler, James Goldschmidt, Alexander Graf zu Dohna, Gustav Radbruch and Marx Ernst Mayer - neo-Kantian movement influenced the development of criminal law science[50]. These scholars greatly committed to the enhancement-perfection of the normative teaching of guilt. For example, according to Frank, the concept of guilt requires more than mere mental dependence; hence, when constructing the concept of guilt, the account is taken of the evaluative moment, meaning that guilt is blaming[51]. Frank stressed the moment, that it was impossible to prove the circumstances excluding guilt under psychological concept of guilt, specifically - of (excusable) urgent necessity. Therefore, guilt should not have been limited only to psychological elements, but rather normative elements should have been involved as well[52]. The guilt

45 *Jescheck H-H.*, Beiträge zum Strafrecht 1980-1998, Berlin, 1998. 118.
46 *Leipziger kommentar*, Band I, Auflage 12, 718.
47 This issue is discussed in Liszt's guidebook. See *Liszt F.*, Lehrbuch des deutschen Strafrechts, Auflage 22, 1919, 150-152.
48 *Jescheck H-H.*, *Weigend T.*, Lehrbuch des Srafrechts, Allgemeiner Teil, 1996, 207.
49 *Jescheck H-H.*, Beiträge zum Strafrecht 1980-1998, Berlin, 1998, 118.
50 Ibid.
51 *Vacheishvili Al., Mens rea* in Soviet Criminal Law, 1957, 155 (in Georgian).
52 *Baumann J.*, Strafrecht, Allgemeiner Teil, 1985, 369.

was no more comprehended as the demonstration of subjective elements of an action, but rather as blaming of will, "blamefulness"[53] - where psychological understanding of intent and negligence was substituted by normative content[54]. Frank considered negligence (intent) as an element of guilt and delimited it from intent by the absence of the will to cause consequence[55].

Hence, Frank saw guilt in blaming a prohibited action. In his opinion negligence is defined as lack of prudence for the prevention of the consequence of a mistake, consciously made by a perpetrator[56]. But how to precisely define the requested lack of prudence, what may exclude criminal liability in certain cases - there is no answer to this question in Frank's works.[57].

Frank is believed to be the founder of *modified classical doctrine*, which accumulated different elements in guilt[58]. Consequently, Frank described guilt not normatively, but rather in a complex manner - through the unity of mental and normative elements[59]. Hence, Frank is not regarded as the founder of pure normative theory although referred to "blaming" element in scholarly debates. However, this was just one step in this great turnover, which already had its roots in criminal law science[60]. The followers of normative doctrine Robert von Hippel and Edmund Mezger are said to be the successors of Frank's teaching[61].

Turning to modern doctrine is notable in Rober von Hippel's work. He qualified negligence as non-accounting for the breach of obligation and provided for **dual scale** for negligence[62], what later plaid the crucial role in the development of the concept of negligence.

Hippel attributed imputability to guilt as the basis thereof, and regarded negligence (intent) as its type, form or step, while the precondition of guilt was objective unlawfulness. As per his statements, negligence (intent) becomes meaningful not only through its connection with the elements of tort, but rather develops the specific feature - an action prohibited by law. In this doctrine Heppel observed the preference of normative vision of guilt over the psychological one (intentional unlawful action and negligent unlawful action)[63].

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53 This term was introduced by Frank and it can be said, that it has become a terminological trend to a certain extent. Acting as a catalyser, it influenced the further development of guilt. See *Achenbach H.*, Historische und dogmatische Grundlagen der strafrechtssystematischen Schuldlehre, 1974, 104; *Jescheck H-H.*, Strafrecht im Dienste der Gemeinschaft, Ausgewählte Beitragäge, Berlin, 1980, 172.

54 *Jescheck H-H.*, Beiträge zum Strafrecht 1980-1998, Berlin, 1998, 9.

55 *Baumann J.*, Strafrecht, Allgemeiner Teil, 1985, 368.

56 *Frank R.*, Das Strafgesetzbuch für das deutsche Reich, Auflage 18, 1931, 194.

57 *Jescheck H-H.*, Beiträge zum Strafrecht 1980-1998, Berlin, 1998, 119.

58 *Achenbach H.*, Historische und dogmatische Grundlagen der strafrechtssystematischen Schuldlehre, 1974, 103.

59 *Turawa M.*, Straftatsysteme in rechtsvergleichender Sicht unter besonderer Berücksichtigung des Schuldbegriffs. Ein Beitrag zur Entwicklung eines rechtsstaatlichen Strafrechts in Georgien, Berlin, 1997, 64; Comp. *Tsereteli T.*, Finalist Theory in Bourgeois Criminal Law and Its Criticism, The Soviet Law (journal) 1966, №2, 31 (in Georgian).

60 See *Achenbach H.*, Historische und dogmatische Grundlagen der strafrechtssystematischen Schuldlehre, 1974, 57.

61 See Ibid, 163.

62 *Hippel R.*, Deutsches Strafrecht, Band II, 1930, 361.

63 *Achenbach H.*, Historische und dogmatische Grundlagen der strafrechtssystematischen Schuldlehre, 1974, 164.

For Edmund Mezger guilt is a *complex* notion. First of all, it means specific "circumstances of guilt". Furthermore, the guilt is the "assessment of the circumstances of guilt". Hence, Mezger united factual circumstances and assessment components in the concept of guilt. Thus he admitted objective moments in the concept of guilt[64]. Furthermore, he placed imputability in guilt on a par with certain mental connection of a perpetrator with his action, which connection is manifested in the intent and negligence, he would refer to as the forms of guilt. With regard to negligence, he would state, that a perpetrator should be aware of breached obligation, what is evident before the occurrence of the consequence[65]. Mezger also focused on dual scale of negligence[66]. He believed that the obligation to be prudent was objective, while individual abilities of a perpetrator - subjective. Hence, the mistakes, lack of knowledge and experience could have resulted in the exclusion of negligence. But, ultimately, the scholar considered negligence as a constituent of the content of guilt[67].

Goldschmidt worked out his own opinion about the perception of normative elements of guilt[68]. His presentation of the construction of guilt was dualistic. He considered, that normative element has its independent place alongside negligence (intent)[69]. In his opinion intent is purely psychological relationship, while the assumption of consequence is a normative feature in the case of intent. For Goldschmidt the construction of tort of conscious negligence was similar to an intent, when he would link the obligation standard with the perception about consequence. It was the mental part of an action that differentiated it from intent; however, Goldschmidt said nothing about the meaning of the foregoing. His perception of unconscious negligence was a complicated construction in essence. And this was conditioned by the fact, that Goldschmidt regarded it as a form of guilt, where direct mental connection with the consequence could not have been proved. He qualified the mandatory perception about consequence as quasi-psychological relationship with the consequence[70]. According to Goldschmidt if violation of mandatory standard in the case of negligence (as well as intent) is manifested in the negation of counter motivation (perception about consequence), in the case of unconscious negligence (potential perception of consequence) it is manifested in the negation of motivation upon self-motivation. Along

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[64] *Achenbach H.*, Historische und dogmatische Grundlagen der strafrechtssystematischen Schuldlehre, 1974, 165-166. Mezger also developed the *functional concept of guilt*. He stated, that criminal liability depends on the essence of punishment. Respectively, it should be defined, whether what purpose is intended to be attained by the legislator through punishment. Hence, in his opinion, the guilt is defined through deduction from the purpose. These days the functional understanding of guilt is developed by Roxine and Jacobs. See *Walter T.*, Der Kern des Strafrechts, Tübingen, 2016, 113.

[65] *Achenbach H.*, Historische und dogmatische Grundlagen der strafrechtssystematischen Schuldlehre, 1974, 168.

[66] *Mezger E.*, Strafrecht, Auflage 2, 1932, 359.

[67] *Jescheck H-H.*, Beiträge zum Strafrecht 1980-1998, Berlin, 1998, 119, *Jakobs G.*, Strafrecht, Allgemeiner Teill, Part 2, 1991, 473-474.

[68] *Achenbach H.*, Historische und dogmatische Grundlagen der strafrechtssystematischen Schuldlehre,1974, 113.

[69] Goldschmidt developed his own legal-theoretical doctrine, the so-called "Theory of obligation standards", according to which along with legal rules, when a person is required to demonstrate externally manifested behaviour, there are the rules which direct the inner behaviour of each individual so that externally manifested behaviour to be compatible with the law and order.

[70] *Achenbach H.*, Historische und dogmatische Grundlagen der strafrechtssystematischen Schuldlehre,1974, 114-115.

with required sign of violation of self-motivation, unconscious negligence also includes the violation of obligation existing in the requirement on violation of prudence obligation. Hence, the guilt of unconscious negligence twice includes the normative element. Later Goldschmidt presented the new version of the meaning of guilt by negligence. Specifically, in 1930, in his work, dedicated to Frank, be explained the normative feature of guilt as a normative connection with the composition of action in mental meaning[71].

Being influenced by neo-Kantianism Graf zu Dohna developed the ethical concept of guilt in his very first years of academic performance, thus turning back to psychological theory of guilt. He believed, that motive was decisive for punishment[72]. Hence, the will, that generates negative motive, becomes contrary to obligation. Based on the foregoing, the guilt is the volitional action, that is contrary to obligation and the will, contrary to obligation, is not the subjective connection with the consequence. However, Dohna believed, that guilt was not limited only to these normative moments, but rather was determined by two factors: one was psychological and the others were related to ethical basics. In Dohna's opinion every case of breach of general obligation of prudence and care was negligence, if the comprehension of this obligation was clear (possible) for everyone. Dohna was still bound to psychological moments, what is proved by the fact, that he would explain the connection between a perpetrator and an action by mental moments, where Dohna would include negligence (intent). He never denied that negligence was somewhat deficient from psychological point of view. He considered negligence as lack of understanding of unlawfulness and non-awareness of factual circumstances. The main flaw on Dohna's doctrine was that he believed, that normative element of guilt was of ethical nature[73]. Furthermore, he would refer to the lack of unlawfulness in the case of negligence, thus failing to prove factually conscious negligence.

Later, in his textbook "Structure of Crime Doctrine", published in 1936-1950, Dohna portrayed negligence in absolutely new and far more contemporary light, where he divided negligence in objective and subjective aspects[74]. Dohna stopped considering negligence as an element, form or type of guilt, he removed negligence (intent) from guilt, however it is not clear what was its place in the structure of crime, in his opinion. The foregoing cleared the way for the process of destruction of the so-called complex theory of guilt in the future[75].

Neoclassic Zauer identified ethical blaming with guilt. In his opinion the only difference between ethics and guilt was that criminal guilt is complemented with external behaviour, what is not necessary in ethics[76]. Recognition of normative perception of guilt in neoclassical system - specifically, the

[71] *Achenbach H.*, Historische und dogmatische Grundlagen der strafrechtssystematischen Schuldlehre, 1974, 116, 120.

[72] Dohna gives the following example: when "A" breaks a window-glass when a child is choking from smoke, he may be punished for the damage of a thing on the one hand, if he had a Hooligan motive, however, on the other hand he may be relieved of liability if his behaviour aims at saving life. See *Achenbach H.*, Historische und dogmatische Grundlagen der strafrechtssystematischen Schuldlehre, 1974, 85.

[73] Ibid, 85-86; 88-90.

[74] *Dohna zu G.*, Der Aufbau der Verbrechenslehre, (1936-1950).

[75] *Kutalia, L-G.,* Guilt in Criminal Law, Genesis of Guilt, vol. 1, 2000 (in Georgian).

[76] *Vacheishvili Al., Mens rea* in Soviet Criminal Law, 1957, 155 (in Georgian).

introduction of the element of "***blaming***" in the concept of guilt - constituted ethicism in criminal law[77]. Binding was against the foregoing. Mixing of ethical and legal concepts was inadmissible for him. According to his statements, assessment should be of legal nature. Beling also shared his position. According to his statements legal guilt is independent from ethical and religious assessment. Guilt is not excluded even in cases, when a perpetrator acted under the influence of high feelings. Hence, guilt is subject to assessment. The other scholars also supported this position and differentiated between legal and ethical blaming, between which there is a qualitative difference[78]. Bauman stated that moral guilt may be present where criminal guilt is lacking. It is also possible for the behaviour, that is compatible with some standard, to be immoral. Criminal guilt may be present, where no moral guilt is detected. Hence, negligent violation of a rule may not always be immoral. In Bauman's opinion, only in the case of removal of mental elements from guilt and their transposition into the composition (elements) of action the guilt would have become purely normative, what would have become the assessment of an object and not the object of assessment, as the other normativists believed to be the case. However, despite the foregoing Bauman still believed, that guilt should have also included psychological elements along with normative ones. This can be proved by the fact, that he included negligence (together with intent) into guilt and at the same time spoke about negligence (intent) as an element of guilt. Furthermore, he believed, that negligence (intent) was an element of guilt, unlike the proponents of psychological theory, who admitted that negligence was a type of guilt. Hence, in Bauman's opinion the elements of guilt or the steps of guilt (intent - the element of guilt - is at a relatively higher level) are sometimes referred to as forms, what is just a pure terminological problem and in no case means going back to psychological theory. Hence, Bauman tried to differentiate between intent and negligence based on psychological moment and would state, that there is no knowledge and act of will in the case of negligence unlike intent[79].

It should be mentioned, that delimitation of intent and negligence on the basis of only the psychological moment is Bauman's unsuccessful endeavour as it is a known fact, that it is the psychological moment that unites conscious negligence and indirect intent.

It can be said, that the complex concept of guilt in neoclassical system is criticised by the finalists, as the concept of guilt accumulates absolutely different, mutually incompatible moments, where the object of assessment itself includes assessment[80].

The fault of neoclassical system with regard to negligence is the fact, that after the recognition of guilt by negligence, it became necessary to define negligence by the independent content of impropriety. Hence the obligation to make necessary amendments to the system of guilt were assumed by the finalist system.[81]

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[77] It is a known fact, that Kant delimited between law and morals. In his opinion, this difference does not mean that they are situated on different fields, but rather the fact, that ethical rules make the obligation to act, as such, as an instigator (motive), whilst legal rules are defines by any instigator. See *Vormbaum T.*, Einführung in die moderne Strafrechtsgeschichte, 3rd ed., 2013, 36.

[78] *Vacheishvili Al., Mens rea* in Soviet Criminal Law, 1957, 157-158 (in Georgian).

[79] *Baumann J.*, Strafrecht, Allgemeiner Teil, 1985, 364, 370, 373.

[80] *Turawa M.*, Straftatsysteme in rechtsvergleichender Sicht unter besonderer Berücksichtigung des Schuldbegriffs. Ein Beitrag zur Entwicklung eines rechtsstaatlichen Strafrechts in Georgien, Berlin, 1997, 67.

[81] *Jescheck H-H., Weigend T.*, Lehrbuch des Srafrechts, Allgemeiner Teil, 1996, 208.

Georgian criminal law science paid particular attention to psychic moments, recognised on the basis of psychological theory of guilt, that originated within classical doctrine, however, the moment assessment was not neglected either[82]. In academic works, published during this period the scholars supported the concept of guilt, developed within criminal law, according to which the concept the guilt was comprehended as the synthesis of factual and assessment elements[83]. This understanding of guilt can be traced back to 1950s. Since then some Georgian scholars would define guilt in their works not only from mental point of view, but assessment as well, specifically from social and ethical view-point, no matter what is concerned - criminal law or moral guilt[84]. Hence, in Georgian criminal law science the guilt was defined as mental connection of an individual with dangerous for the society action, committed by him intentionally or by negligence, where the account was also taken of moral-political elements in terms of assessments, blaming[85]. According to Georgian criminal law scholars of those times the subject of assessment was the state and the society, whilst the moment of assessment was regarded as a link between the concept of guilt and punishment[86]. Hence, the Georgian criminal law science was were interested in assessment moment more for the justification of transfer to punishment, than in the light of development of uniform concept of guilt.

Upholding this concept proves, that pure psychological theory of guilt was not dominating in Georgian law, but rather guilt was viewed from psychological-normative viewpoint under the influence of German criminal law dogmas, proving that Georgian criminal law science, accounting for certain exceptions, stood on the lines of neoclassical system. E.g. T.Tsereteli acknowledged psychological theory of guilt when explained guilt by mental connection with the action and consequence, but she also introduced the element of moral (moral-political) blaming, thus actually denying pure psychological explanation of guilt[87]. However, despite apparent proximity of neoclassical system and Tsereteli's perception, there still is an essential difference between them with regard to various aspects. E.g. she would characterise guilt as a negative assessment, when, together with the moment of assessment she relied not on normative, but rather psychological concept of guilt, where she gave preference to "public hazard" as an assessment predicate[88]. And this means that Tsereteli opted more for psychological theory[89].

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82 *Kutalia, L-G.,* Guilt in Criminal Law, Genesis of Guilt, vol. 1, 2000, 9 (in Georgian).

83 *Vacheishvili Al., Mens rea* in Soviet Criminal Law, 1957, 192 (in Georgian); *Tsereteli T.*, *Tkesheliadze G.*, Crime Doctrine, Tbilisi, 1969, 60 (in Georgian).

84 *Makashvili V. G.,* Guilt and consciousness of wrongfulness, 1948 (in Russian).

85 *Vacheishvili Al., Mens rea* in Soviet Criminal Law, 1957, 19; 196; 251 (*in Georgian*); *Ugrekhelidze M.*, Guilt in danger torts, 1982, 7-8 (in Georgian).

86 *Vacheishvili Al., Mens rea* in Soviet Criminal Law, 1957, 252-253 (in Georgian).

87 See *Tsereteli T.*, Challenges of Criminal Law, vol. I, Tbilisi., 2007, 46 (in Georgian); *Tsereteli T.V.*, *Makashvili V.G.*, Concept of Guilt in Criminal Law, journal "Matsne" ("Herald"), Law and Economics series, 1986, №2, 79 (*in Russian*); *Tsereteli T.V.*, About the Concept of Guilt, "Vestnik" ("Herald"), 1960 №1, 129 (in Russian); *Shavgulidze T.*, Third Form of Guilt in Criminal Law, Legal Surveys, Collection of scholarly articles dedicated to 70th anniversary of Tinatin Tsereteli, 1977, 79-80 (in Georgian).

88 See *Turawa M.*, Straftatsysteme in rechtsvergleichender Sicht unter besonderer Berücksichtigung des Schuldbegriffs. Ein Beitrag zur Entwicklung eines rechtsstaatlichen Strafrechts in Georgien, Berlin, 1997, 214.

89 See *Kutalia, L-G.,* Guilt in Criminal Law, Genesis of Guilt, Vol. 1, 2000, 676 (in Georgian).

Like Tsereteli, Makashchili also identified two moments in guilt: the moment of mental connection with the action and consequence and the moment of guilt assessment, which was closely linked with the first moment. Hence, according to Makashvili, to understand guilt, moral assessment should have been taken into account, what would have made it easier to prove guilt by negligence. Insofar as Makashvili was fully aware of difficulties, associated with the substantiation of individual's mental connection with consequence in the case of negligence, and specifically, recklessness,[90] he would refer to mental connection with an action in the case of negligence, what requires negative moral-legal assessment. Furthermore, Makashvili regarded guilt as a type of guilt and tried to save it. This is evident from where he tried to prove the existence of "potential mental connection" in the case of negligence[91]. Hence, there is an impression that Makashvili brought psychological moments to assessment, what, naturally is not mutually compatible.

M. Ugrekhelidze offers his explanation of complex-psychological theory of guilt. He tries to substantiate guilt by negligence on the basis of psychological theory in the light of unconscious psychics, while making recourse to Uznadze's *theory of attitude* and wants to present unconscious negligent action as a manifestation of impulse attitude and thus prove the existence of mental elements in negligence. With this theory Ugrekelidze wants to prove that failure to demonstrate care in the case of negligence does not mean that human psychics is empty, but rather that he has specific psychics of unconscious form. However, it should be stressed, that Uznadze has never analysed his theory specifically for the cases of negligence[92]. Except for psychological explanation Ugrekhelidze would describe guilt as a social-ethical category, where negligence is regarded as a type of guilt. In his opinion the basis of social-ethical assessment is the possibility to comprehend a standard and respectively, the possibility to act otherwise, where an individual acts under the conditions of freedom of willpower. If an individual is not behaving according to moral rules, it is quite possible to speak about moral guilt in the behaviour of the individual concerned [93]. However, moral blaming in the case of negligence does not mean the assessment of the individual concerned in general, but rather of his/her mental condition upon commitment of a negligent act. An individual is blamed not because of his carelessness, but rather because he acted recklessly in a specific situation. Hence, the behaviour of an individual, who has not employed his inner potential to maximum practicable extent and has not taken account of potential danger, can be assessed negatively[94].

The psychological-normative theory of guilt is beyond criticism as such understanding of guilt is the mechanic linking of mental and normative, what is devoid of serious scholarly grounds as psychology is not aware of evaluative concept. Hence, these phenomena are from different realities and they cannot be

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[90] See *Makashvili V.G.*, Criminal Liability for Negligence, Moscow, 1957, 10-13 (*in Russian*). In Lakashvili's opinion legal and moral standards cannot contradict each other by their nature and purpose.

[91] *Makashvili V.G.*, Criminal Liability for Negligence, Moscow, 1957, 90-92 (in Russian).

[92] *Ugrekhelidze M.G.,* About psychological nature of negligence, journal "Matsne" ("Herald"), philosophy, psychology, economics and law series, 1972, №4, 171, 175, 177, 180 (in Russian); *Ugrekhelidze M.,* Problem of guilt by negligence in criminal law, 1976, 37-38, 40 (in Russian).

[93] *Ugrekhelidze M.G.,* Social-ethical nature of guilt by negligence, journal "Matsne" ("Herald"), philosophy, psychology, economics and law series, 1973 №1, 140 (in Russian); *Ugrekhelidze M.,* On proving moral guilt in the case of negligence, journal "Soviet Law" 1975 №1, 8, 12 (in Georgian).

[94] *Ugrekhelidze M.,* Problem of Guilt by Negligence in Criminal Law, 1976, 37-38, 40 (in Russian).

united in a single concept[95]. Furthermore, if intentional guilt can be explained by psychological moments and negligence (recklessness) can be brought down to moral guilt, the authors of this idea will contradict their own conception - to unite intent and negligence in guilt under single generic concept.

Al.Vacheishvili regarded guilt as "lack of public sense or its weakness". He applied this stipulation for proving all types of guilt, specifically, of intent and negligence. In the case of negligence public sense is not that strong to become crime countervailing force, motive[96]. Vacheishvili's conception on inclusion of negligence in single concept of guilt is as unsuccessful as the attempt of the other scholars to bring together negligence and arrogance or intent from psychological point of view.

G.Nachkebia does not describe the concept of guilt from psychological point of view as he believes, that guilt has normative preconditions. Furthermore, in scholar's opinion, it is impossible to explain guilt aloof from mental dependence when he believes that there also is a room for normative aspect in guilt. However, this does not mean, that Nachkebia presented guilt as a psychological-normative theory (in a complex manner)[97], as it was the case with Tsereteli[98]. In his opinion guilt is not purely psychological phenomenon as there is no concept of guilt in psychology and hence, it is impossible to explain guilt through psychological moments, however it is not purely normative either as "Normativism, which is not aware of the concept of legal relation, cannot provide for the concept of guilt." The guilt, along with intent and negligence, is a philosophical category. Guilt is understood as a form of the unity of positive and negative liability[99] and it is the synonym of irresponsibility. Nachkebia believes, that is it impossible to prove negligence from purely psychological standpoint as he regards it as an irresponsible attitude towards prudence standard[100].

Hence the development of Neoclassical doctrine has not started from a clean sheet, but rather its prerequisite and basis was the classical theory of guilt. Quite a number of issues, including guilt by negligence, were revised on the basis of the latter. Unlike classical doctrine, where according to psychological theory of guilt, the guilt consists of only mental elements, in neoclassical system the content of guilt is brought down to psychological-normative viewpoint (normative and psychological-normative theory of guilt).

4. Dogmatic-Systemic Analysis of Negligence according to Finalist System of Crime

It was the doctrine of guilt, worked out by Velzel in early 1930s, that managed to reorganise the teleological system of crime[101]. The finalists regarded an action as purposeful behaviour of an individual

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95 For criticism see *Nachkebia G.*, Criminal Law, General Part, Tbilisi, 2015, 330-331 (in Georgian); *Gamkrelidze O.*, Problem of imputation in criminal law and attempt to prove normative concept of guilt, journal: "Individual and Constitution", 2002, №4, 83 (*in Georgian*).

96 *Vacheishvili Al., Mens rea* in Soviet Criminal Law, 1957, 257-260 (in Georgian).

97 *Nachkebia G.*, Guilt as a Category of Social Philosophy, Tbilisi, 2001, 201-202, 255 (in Georgian).

98 Comp. *Kutalia, L-G.,* Guilt in Criminal Law, Genesis of Guilt, vol. 1, 2000, 319 (in Georgian).

99 *Nachkebia G.*, Guilt as a Category of Social Philosophy, Tbilisi, 2001, 305, 307, 310 (in Georgian).

100 Ibid, 213, 299.

101 See *Jescheck H-H.*, Beiträge zum Strafrecht 1980-1998, Berlin, 1998, 11. "The way for Velzel's judgements from criminal law viewpoint was cleared by Graf zu Dohna's work "Construction of Guilt Doctrine" and

and they separated intent from guilt and assigned it to action[102]. Unlike psychological and normative-psychological concept of guilt, the finalist doctrine, as already mentioned, acknowledges purely normative concept of guilt, where guilt is of purely normative, purely evaluative nature. The finalism transposed psychological elements from guilt to action[103].

The merit of this doctrine is that is offered the new vision of the concept of negligence. The case is that, this doctrine differentiated between *intentional and negligent torts according to the elements of unlawfulness*. The finalists also considered the concept of single executor inadmissible for the elements of intentional and negligent crime[104]. They introduced negligence not only into unlawfulness, but also in guilt as a different from intent punishable action. As a result negligence acquired equivocal meaning in the system of crime: 1. Negligence, as a part of the composition of unlawfulness, is manifested in the breach of objectively compulsory prudence when it is possible to objectively predict the consequence, pertinent to the composition of the action, and 2. Negligence, as a component of guilt, is revealed in personal liability of a perpetrator, in blaming for non-predicting and not taking account of pertinent to the action consequences[105]. Hence the finalists described the fundamental difference between intent and negligence not only through the forms of guilt but also managed to delimit between them already at the stage of unlawfulness. However, it should necessarily be stressed, that the finalists were not the first to determine unlawfulness of not only consequence, but also of negligence through the breach of standard of objective prudence. This problem is notable already in the monographs of the followers of classical school Exner and Engisch[106].

In his earlier conception on negligence Velzel stated that negligent acts cause consequences, first of all, causally. However they stem only from causal-naturalistic processes, which are oriented on the avoidance of a consequence. The fact, that the consequence was not avoided is conditioned by insufficient prudence on the part of the one, who committed the act. Prudence implies full awareness of obligation and capability, i.e. of guilt. Only as a result of the foregoing a culpable (punishable) perpetrator may commit negligent acts[107].

When discussing Velzel's judgments, it is highlighted, that preventability, as a feature of perpetrator's connection with the action, "may provide for final foreseeability, which is related to the capacity of an individual. Velzel's model of negligence is marked with individual preventability, as clear grounds for legal assessment[108]. Negligence, and specifically, unconscious negligence definitely was noy

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from philosophical point of view - N.Hartmann's ontology". See *Kutalia, L-G.,* Guilt in Criminal Law, Genesis of Guilt, vol. 1, 2000, 695 *(in Georgian)*; *Gamkrelidze O.*, Problem of imputation in criminal law and attempt to prove normative concept of guilt, journal: "Individual and Constitution", 2002, №4, 79 (*in Georgian*).

[102] *Jescheck H-H.*, Beiträge zum Strafrecht 1980-1998, Berlin, 1998, 12.

[103] *Baumann J.*, Strafrecht, Allgemeiner Teil, 1985, 371.

[104] *Jescheck H-H.*, Beiträge zum Strafrecht 1980-1998, Berlin, 1998, 12.

[105] *Leipziger Kommentar*, Band I, Auflage 12, 2007, 719.

[106] *Jescheck H-H., Weigend T.*, Lehrbuch des Srafrechts, Allgemeiner Teil, 1996, 212.

[107] *Kawaguchi H.*, „Damit waren die weichen von vornherein falsch gestellt-Anmerkungen zu Welzels Fahrlässigkeitslehre“. Lebendiges und Totes in der Verbrechenslehre Hans Welzels, 2015, 112.

[108] *Jakobs G.*, Sdudien zum fahrlässigen Erfolgsdelikt, 1972, 70.

proved in Velzel's finalism as foreseeability and preventability were associated with the awareness of an individual. Velzel was perfectly aware of the foregoing himself and later he, himself denounced his model of negligence as he believed, that part of negligent act, that was crucial in the light of criminal law, was vested in the consequence and it is not caused as a finale, but was rather conditioned by some blind causality. Hence Velzel believed, that it was necessary to introduce "*potential finalism*"[109] along with existing finalism, meaning that potential finality is oriented on the prevention of a consequence. Hence an individual is able and obliged to prevent criminal consequences[110].

Despite everything, the negligence acts have not easily found their place in final concept of an action, meaning: the moment of action is conditioned not by actual, but rather potential final connections, what generates apparent difficulties as "possibility" creates an act only mentally, through normative requirements and it does not belong to essential structure of a final act[111]. Hence, although the final act is committed imprudently in the case of negligence, as often stated by finalists, the imprudence has no finality element in the course of commitment of the act itself. For criminal-law assessment only relevant breaches of prudence can be placed beside the finality of an action to a certain extent. The committed error will be assessed only for the prevention of a consequence, which, in the case of negligent acts, is no way connected with the final one. In most cases the lack of prudence in the case of negligence does not mean that a perpetrator acted imprudently, but rather that actually, they have ever occurred. In this case it is difficult to assert, that as a general rule, an action would have been committed imprudently. E.g. a nurse, who gives wrong injection to patients by mistake, acts imprudently. But if it happens vice versa, when a patient does not need any injection because of his health status, then it should not be said, that a nurse, who, despite giving injection to the patient, is acting imprudently. Actually, the mistake is that the nurse acted at all[112].

The finalist doctrine of action was partially reflected in German criminal law (Maurach, Hirsch, Stratenvert). The finalist doctrine had its impact on judicial practice as well[113]. Despite the foregoing it had many opponents. E.g. the finalist theory was criticized by Roxin[114]. He opposed ontological justification of the concept of action as socially important elements underpin the manifestations of law, which elements should not be understood as the drivers of the causality factors. Ultimately, Roxin arrived to the conclusion, that as finalist theory of action is mixed with finalist theory of the elements of

Tsereteli T., Finalist Theory in Bourgeois Criminal Law and Its Criticism, The Soviet Law (journal) 1966, №2, 32 (*in Georgian*); *Kawaguchi H.*, „Damit waren die weichen von vornherein falsch gestellt- Anmerkungen zu Welzels Fahrlässigkeitslehre“. Lebendiges und Totes in der Verbrechenslehre Hans Welzels, 2015, 113.

110 *Tsereteli T.*, Finalist Theory in Bourgeois Criminal Law and Its Criticism, The Soviet Law (journal) 1966, №2, 32 (*in Georgian*); *Hsu H.*, Zurechnungsgrundlage und Strafbarkeitsgrenze der Fahrlässigkeitsdelikte in der modernen Industriegesellschaft, 2009, 110.

111 *Jescheck H-H.,* Beiträge zum Strafrecht 1980-1998, Berlin, 1998, 12.

112 *Jescheck H-H., Weigend T.*, Lehrbuch des Srafrechts, Allgemeiner Teil, 1996, 221-222.

113 E.g. In one of its cases the Senate of German Federal Court recognised the consciousness of wrongfulness as a constituent element of crime and resolved the question of a mistake made in prohibition according to this very moment, See BGHSt 2, 194, 196-197. Also in a civil case the Grand Senate found wrongfulness of an action in the case of negligent tort on the basis of breach of prudence provision. See BGHZ 24, 21.

114 *Roxin C.*, Zur Kritik der finalen Handlungslehre, ZStW 1962, 515.

an action, the ontological finalist concept should be substituted by the *concept of legal-social finalism*[115]. The other scholars are also of the same opinion and maintain that the content of obligation of prudence in negligence torts, presented by finalists, was not logical. Correct would have been the route, which would have made it opt for social-normative direction. A perpetrator is found guilty of commitment of unlawful action, only when he would have avoided it with due diligence. The foregoing is equally applicable to both intent and negligence. Hence, avoidability is regarded as generic concept of intent and negligence[116].

The finalist system was also criticised by the proponent of psychological-normative theory of guilt Baumann. He believes that although guilt is of evaluative nature, perpetrator's guilt cannot be understood bereft of psychological moments. The assessment of guilt is heteronomic, whilst guilt itself is autonomous[117]. Furthermore, he also states that finalists focus on dishonesty of an action even when there is a consequence which is beyond guilt and unlawfulness, whilst finalism is not oriented on the consequence and guilt concerns only an action (and not consequence). However causalists, who regard consequence as an inevitable element of unlawfulness, delimit between unlawfulness and guilt as accidental consequence has nothing to do with guilt. Based on the above opinion Baumann arrives to the conclusion, that consequence is a constituent element of unlawfulness of tort of consequential negligence. Hence, it is not just a condition for punishability and only a reason for criminal law intervention. Torts of negligence demonstrate that idea of dishonesty of an action, offered by finalists is not right, or is, at least, unilateral[118].

Some scholars do not rightfully agree to Baumann's criticism of focusing on dishonesty of an action, made by finalists system and believe, that in consequential torts an individual is called to account for the consequence, caused by the action, what does not refute the importance of consequence, but rather stresses the subordination of the importance of consequence on the importance of the action[119].

Idiosyncratic criticism is offered by Schmidhäuser, when he develops his idea about negligence. He judged by the concept of unlawfulness and not the concept of action. Later he totally refuted the concept of action[120]. According to his statements the elements of unlawfulness of torts by act may not be final, as admitted by Velzel, but rather essentially understood will[121].

Schmidhäuser regarded negligence as a feature of guilt, when a perpetrator does not take account of the breach of legal wealth, when he unconsciously encroaches upon it (negative part of negligence), but at the same time in some specific situation he could have become aware of the encroachment (positive part of negligence). Negligence proves subjective imputation of unlawfulness in guilt as an element of crime. According to its category simple concept of negligence is equal to intentional torts.

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[115] *Roxin C.*, Zur Kritik der finalen Handlungslehre, ZStW 1962, 525, 549.

[116] *Kawaguchi H.*, „Damit waren die weichen von vornherein falsch gestellt-Anmerkungen zu Welzels Fahrlässigkeitslehre“. Lebendiges und Totes in der Verbrechenslehre Hans Welzels, 2015, 113-114.

[117] *Baumann J.*, Strafrecht, Allgemeiner Teil, 1985, 372.

[118] Ibid, 429.

[119] *Kutalia, L-G.,* Guilt in Criminal Law, Genesis of Guilt, vol. 1, 2000, 505-506 (in Georgian).

[120] *Schmidhäuser E.*, Strafrecht, Allgemeiner Teil, Auflage 2, 1975, 177.

[121] *Schmidhäuser E.*, Willkürlichkeit und Finalität als Unrechtsmerkmal im Strafrechtssystem, ZStW, 1954, 39.

Both concepts go hand in hand in guilt. Intentional and negligent crimes differ in guilt only according to concept and structure. Negligent torts lack the moment of awareness of unlawfulness. Actually, it is conditioned by the absence of awareness of the act itself. Schmidhäuser categorised negligent guilt according to degree, namely into light, average and exceptionally gross negligence.[122]

Schmidhäuser tried to synthesise traditional doctrine and finalist action doctrine. He would explain unlawfulness as a wilful act and described guilt as intellectual behaviour damaging legal wealth. He made distinction between intentional and negligent act not only in the elements of unlawfulness, but only in guilt. He delimited between the elements of unlawfulness and circumstances excluding unlawfulness according to conflict of wealth and obligations. Schmidhäuser would include the circumstances excluding unlawfulness into social adequacy. The result of transposition of the concept of intent in the theory of guilt was that indirect intent included conscious negligence as well as it was guided only by the moment of envisaging[123], what naturally resulted in intermixture of intent and negligence.

It can be said that initially finalism did not find its place in Georgia. Georgian scholars were against finalism[124]. Like German scholars they also stated, that finalist system failed to explain and prove negligence from finalist point of view[125]. Thus, anyone, who tries to prove criminal negligence will oppose Hatman's ontology as the element of purpose can never been separated from the concept of action[126]. Finalism is even called "legal cubism" where nothing can be understood. The criticism of the opponents of finalism is also caused by the fact, that guilt is viewed only from the point of view on blaming, what will give wider discretion to judiciary - judge will be above the law and there will be no limit to his subjectivism[127].

O.Gamkrelidze as Tsereteli's disciple, partially upholds her judgements[128]. The case is that Gemprelidze was of positive opinion of the approach of finalist doctrine on transposition of intent from the concept of guilt into the composition of an action, however the position, that places negligence beside intent in the composition of an action, was unacceptable for him as they are the phenomena from different realities. He stated, that unlike intent, negligence is already an assessment and thus, it should

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122 *Schmidhäuser E.*, Strafrecht, Allgemeiner Teil, Auflage2, 1984, 224-225.

123 *Jescheck H-H.,* Beiträge zum Strafrecht 1980-1998, Berlin, 1998, 16.

124 E.g. *Gamkrelidze* would stress that irrespective of certain aspects of finalist theory, it had no supporters in Georgia. See *Gamkrelidze O.*, Fight for rule-of-law state 1998, 252 (in Georgian). For criticism of finalist theory see *Tsereteli T.*, Finalist Theory in Bourgeois Criminal Law and Its Criticism, The Soviet Law (journal) 1966, №2, 25 (in Georgian).

125 *Tsereteli T.*, Finalist Theory in Bourgeois Criminal Law and Its Criticism, The Soviet Law (journal) 1966, №2, 32 (*in Georgian*); *Nachkebia G.*, Criminal Law, General Part, Tbilisi, 2015, 254 (in Georgian).

126 *Kutalia, L-G.,* Guilt in Criminal Law, Genesis of Guilt, vol. 1, 2000, 699 (in Georgian).

127 See *Tsereteli T.V.*, *Makashvili V.G.*, Concept of Guilt in Criminal Law, journal "Matsne" ("Herald"), Law and Economics series, 1986, №2, 84-85 (in Russian); *Tsereteli T.*, Finalist Theory in Bourgeois Criminal Law and Its Criticism, The Soviet Law (Journal) 1966, №2, 34 (in Georgian).

128 In Tsereteli's judgement the concept of "public jeopardy" prevailed over "unlawfulness", while with Gamkrelidze "unlawfulness" dominated over the concept of "public jeopardy". See *Gamkrelidze O.*, The problem of criminal unlawfulness and grounds for punishment of complicity, Tbilisi, 1989, 124 (in Georgian).

remain at the stage of guilt[129]. Gamkrelidze shared purely normative viewpoint of guilt, admitted by finalist doctrine as he explains guilt as personal blameworthiness, where negligence is presented as a type (form) of guilt[130]. He believes, that negligence is the manifestation of guilt. Unlike intent, which is the object of assessment, negligence is already a negative assessment, blaming[131]. Gamkrelidze assigns negligence to limited capacity and, at the same time, considers negligence as a variety of a mistake, when he relies on Ugrekhelidze's position[132]. Gamkrelidze's justification is as follows: when an individual is called to account for negligence in the case of inexcusable mistake, this means that the individual concerned is of limited capacity. In this case the individual will be called to account only partially[133].

Gamlrelidze's judgment, that negligence, unlike intent, is already blaming and, consequently, guilt, dates back to Liszt's theories[134]. No doubt, such presentation of negligence was somewhat new for Georgian criminal law science of those time[135], however this approach was not further developed to reveal its benefits and deficiencies. In its turn, the foregoing excites desire for Gamkrelidze's judgments about the nature of negligence and determination of its place within the system of crime not to be neglected in future works.

By the end of the twentieth and at the beginning of the twenty-first century the cohort of new generation criminal law scholars supported the finalist system to a certain extent, what was conditioned by the steps made by this doctrine for the determination of the place of negligence within the system of crime. In this regard, the mention can be made of Professor Merab Turava in Georgian criminal law science, who is the proponent of the development of contemporary synthesis of **neoclassical** and **finalist doctrines** (**neofinalism**) and develops the new system, where the element of crime like negligence (intent) has dual function, specifically as objective negligence at the stage of the composition of an action and as individual negligence at the stage of guilt. Furthermore, the absolute subjective composition of an action is admitted in the case of conscious negligence and in the case of unconscious negligence only objective composition of an action is proved[136].

Insofar as according to new system dogmatic-systemic analysis of negligence is beyond the scope of this paper, the detailed analysis of this system will be offered in the papers to follow.

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129 *Gamkrelidze O.*, Problem of Imputation in Criminal Law and Attempt to Prove Normative Concept of Guilt, Journal: "Individual and Constitution", 2002, №4, 84 (in Georgian).

130 *Turawa M.*, Straftatsysteme in rechtsvergleichender Sicht unter besonderer Berücksichtigung des Schuldbegriffs. Ein Beitrag zur Entwicklung eines rechtsstaatlichen Strafrechts in Georgien, Berlin, 1997, 215.

131 *Gamkrelidze O.*, Problem of imputation in criminal law and attempt to prove normative concept of guilt, journal: "Individual and Constitution", 2002, №4, 88 (in Georgian).

132 *Ugrekhelidze M.*, Problem of Negligent Guilt in Criminal Law, 1976, 126-129 (in Russian).

133 *Gamkrelidze O.*, Problem of imputation in criminal law and attempt to prove normative concept of guilt, journal: "Individual and Constitution", 2002, №3, 76 (in Georgian).

134 See footnote №13.

135 Tinatin Tsereteli also judged negligent guilt likewise. See *Tsereteli T.*, Finalist Theory in Bourgeois Criminal Law and Its Criticism, The Soviet Law (Journal) 1966, №2, 36 (in Georgian).

136 *Turava M.*, Criminal Law, General Part, Doctrine of Crime, Tbilisi, 2011, 6-7, 10 (in Georgian).

5. Conclusion

Historical scrutiny of the development of negligent crime demonstrated, that negligence is viewed differently in classical, neoclassical and finalist systems from dogmatic and systemic points of view. The foregoing is conditioned by specific nature of negligence, what makes it different from intent. Hence, criminal law scholars tried to develop such flexible system, where it would have been possible to develop a single concept of guilt both for intent and negligence. However, this attempt failed with psychological and normative-psychological theories, that originated within classical and neoclassical systems, what made scholars to liberate guilt from psychological moments. For this very reason the finalist system was based on purely normative meaning. This was a huge step forward from traditional to contemporary understanding of guilt, where negligence is no more considered as a form (type) of guilt, but rather it found its place in the composition of an action. This, in its turn, gave way to the development of the new system where negligence was delegated with dual function at the stages of composition of an action and guilt. The foregoing necessitated the creation of an independent system of negligent crime, separate and different from intentional one.

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Shalva Kipshidze*

Judge-Made Law as a Source of Law (Solving of Legal Issues and Developing the Law)

"Justice, making of law, is such a fundamental need,
so that a country and a nation cannot live without it even for a single day"
Ilia Chavchavadze[1]

Effective system of justice represents a fundamental prerequisite for reinforcing legal system and legal security[2]*. The work with regard to using the law is conducted by the governmental bodies and the courts. At the same time, while detecting legal deficiencies, courts intend to eliminate the problems. Legal issues are being detected in the process of applying the law, in which the judge-made law takes its special place, providing the fact that, real possibilities to detect and eliminate the deficiencies in legal norms by explaining them, is in the hands of the courts*[3]*.*

According to the prevailing opinion in the countries of Roman-German legal system, judge-made law is not considered to be "deserving" of granting the predicate of the "source of law" and it does not have binding force in connection with law[4]*. Despite this consideration, there is a controversy in the legal literature regarding this matter.*

The purpose of present article is to discuss the judge-made law, as a source of law and to demonstrate the role of the court in the process of solving of legal issues and developing the law. While settling these issues this article provides logical analysis, it represents informational-perceptual aspects of the issue and discusses judicial practice.

Keywords: *Judge, Judge-Made Law, Legal Norm, Source of Law, Developing the Law, Solving of Legal Issues, Interpretation of Legal Norms.*

1. Introduction

According to the Article 82 of the Constitution of Georgia, "Judicial Authority shall be exercised through constitutional control, justice and other forms determined by law". Effective protection of human rights is exercised truly by the means of justice.

Under the principle of separation of powers between the authorities having Roman-German legal system, the court is not entitled to exercise legislative activity. However, according to the opinions expressed in judicial literature, in the terms of legislative technique, it is possible to develop legal norms

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1 *Chavchavadze I.*, Complete Collection of Compositions (20 Volumes), Vol. 13, Tbilisi, 2007, 62.

2 *Schmidt S., Richter H.,* The Process of Decision-Making in Civil Law, GIZ, 2013, 3.

3 *Kokhreidze L.,* Problems Regarding Interpretation of Particular Norms in Civil Law in the Process of |Hearing Disputes Related to Intestacy, Jour. Justice and Law, №2 (41)'14, Tbilisi, 2014, 13.

4 *Kruse H.W.,* Das Richterrecht als Rechtsquelle des innerstaatlichen Rechts, Tübingen, 1971, 3.

in such way, so that the judge is entitled to fill the open gaps, which have not been yet decided by the legislator. In this case, it needs to be determined, whether within this action the actual normative power needs to be granted to the judge-made law, or whether the judicial activity is powerless in the process of applying the law.[5]

The purpose of this article is to demonstrate the role of the judge in the process of exercising justice, as an interpreter of the norm, applier of the norm and in certain cases as a creator of the norm. Following from the abovementioned, researching this issue and studying the existing practice is an actual matter.

2. Source of Law

2.1. Definition of the Source of Law

Universal definition of the source of law cannot be found in legal literature. The term source of law has different meanings, including, the normative base, which underlies the legislation; the forces resulting in the content of legal norms; historical monuments; documents that enable us to familiarize with the fields of law[6].

According to the prevailing opinion, there are notions of social source of law and legal source of law. Social source of law contains facts of reality, which influence the process of making of law. It does not include conduct requirements that are mandatory. However, it has a certain importance in the decision-making process. Legal source of law involves positive legislation, "law of lawyers", judge-made law. Legal source of law provides conduct requirements that are obligatory[7], but its unit share is differed in formation of the law in a particular country. With regard to narrow interpretation, "the source of law is labelled as ways and forms, used by the state while expressing the legal norms"[8].

The above-mentioned sources of law are included in any legal system or the family of legal systems. At the same time, the families of legal systems differ from each other not only in the fundamental legal institutes, but also in the scope of representing certain legal sources in the entire legal system. For example, common law is characterized by a special role of case law. On the contrary, the role of normative acts dominates in Roman-German legal systems. The role of customs, as a source of law, is considerable in Muslim and less developed legal systems[9].

Traditionally, Georgian law is a part of Roman-German legal system. Accordingly, the main source of Georgian Law consists of normative acts.

Present paper discusses the importance of interpreting the norms by the judges, in particular, the role of judicial practice in Georgian law. Herewith, the paper considers whether the judge-made law creates the foundation for legislation and whether it can become the source of law.

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5 *Kruse H.W.,* Das Richterrrecht als Rechtsquelle des innerstaatlichen Rechts, Tübingen, 1971, 8.
6 *Vacheishvili Al.,* General Theory of Law, Tbilisi., 2010, 139.
7 *Khubua G.,* Theory of Law, Tbilisi, 2004, 130.
8 *Fafiashvili S.,* Introduction to Jurisprudence, Tbilisi, 2006, 229.
9 *Kiknavelidze P.,* Problems Regarding Judiciary Practice in Georgia, 2009, 1. <http://www.mkd-ge/geo/sasamart.praqtikis%20problemebi.pdf>, [12.03.2018].

2.2. Judge-Made Law as a Source of Law

"Justice develops the law in such way that it specifies,
extends and corrects the law
(preater legem)".[10]

Judge-made law represents the norms stated in the particular decisions of the higher courts of the country – the case law, which has a binding legal nature in similar cases[11].

The matter of judge-made law, as an independent source of law, has been disputed in legal doctrine. In the countries of Roman-German legal system a judge is not entitled to perform legislative work, following the separation of powers between the state authorities. Each branch of the state authorities shall not breach its competence and shall not be in conflict with the main area of competence associated with other state authority. In addition, each branch shall remain inviolable in the scope of its main, significant area. According to Montesquieu, the decisions of a judge should represent not the exact duplication of the legal text, but the periphrasis of the exact wording of law[12]. Making of legal norms is in the hands of a legislative body. The judge interprets the law and evaluates the facts independently and impartially based on existing legislation.

Judge-made law plays an important practical role in the process of filling "legal gaps". This method is used when an appropriate legal norm cannot be found or the existing norm is incomplete. In this case, the practical meaning of judge-made law is relevant and it is directly connected with teleological interpretation of the norm. [13]

In the process of interpreting the judge-made law, judge-made law is often referred to as superior to the law, which can be considered as the truth, providing the fact that in a particular case judge-made law can be transformed into the norm. Consequently, three types of judge-made law can be found:

1. Judicial Interpretations (Eigentliche Auslegung) – while the judge interprets the norm in the scope of his/her discretion;
2. "Legal gap" filling Interpretations – while the judge provides teleological interpretation of the norm;
3. Gesetz übersteigend (Exceeding the law)– while the judge makes the law[14].

According to the Article 4 of the French Civil Code, a judge shall give judgement even if the legislation is silent or obscure,[15] whereas Article 5 of this code forbids the judges to decide cases by the

[10] Lat. Preater legem – outside of the law, refers to condition that cannot be included, but does not contradict with the scopes of the law and the laws. Such kind of condition does not comply with the laws fundamentally, but at the same time, it does not contradict with the laws. See: Zippelius R., Theory of Legal Methods, 10th revised Edition, Tbilisi, 2009, 99.

[11] *Savaneli B.,* General Theory of Law, Tbilisi, 2005, 36.

[12] *Kruse H.W.,* Das Richterrecht als Rechtsquelle des innerstaatlichen Rechts, Tübingen, 1971, 15.

[13] *Kramer E A.,* Juristische Methodenlehre, fünfte auflage, Verlage C,H. Beck München, 2016, 191.

[14] *Rüthers B., Fischer Ch., Birk A.,* Rechtstheorie mit juristischer Methodenlehre, 9. Auflage, C.H BESK, 2016, 571-575.

[15] Code civil, p. 8, Dernière modification: 01/10/2017, <http://codes.droit.org/CodV3/civil.pdf>, [10.04.2018].

way of general and regulatory provisions[16]. Therefore, a judge is not entitled to create legal norm in case of legal deficiency, instead a reasoning of a judge shall be based on the existing legislation. In case of obscurity, a judge shall apply the analogy of a statute or law. "Judge-made law is an act of legal imposition, not an act of lawmaking".[17] Judicial practice operates in frames, determined by the legislature, whereas the activity of legislative authority is to establish these frames. As stated in the Code of Justinian, legal force is possessed by the laws, not by the particular cases[18].

Kelsen found certain expression for the judge-made law in his doctrine. Kelsen connects the impact of a legal norm to the impact of a superior norm. However, he faces controversy, with regard to founding the impact of the lower norm on its main-norm (base norm).[19] To be certain: *subordinate normative acts are based on the law, on the other hand, the law is based on the constitution. – The question is: where does the constitution originate from?* In order to answer this question, different natural law doctrines were applied. According to Rupert Schreiber, a scientist working on the problematics of the judge-made law, the normative impact of the judge-made law is founded on the written – material law and it is limited to it. However, from the point of view of the legal technique, it is possible to develop legal norms, formulated by the legislative authority, in such way to entitle the appropriate body, including, the judge, to fill up the existing legal regulations with new legal norms.[20]

In contrast to the countries having Roman-German legal system, the American and English legal system is characterized by the Case Law, which focuses on the decisions of higher courts.[21] The influence of the judges on the governmental bodies is immeasurably considerable. The norms of judge-made law influence the process of exercising the laws, deemed adopted by the parliament, from the point of judiciary explanation. Whilst having the mandatory precedents for the courts, in the process of legal imposition, the laws are modified on the impact of the mandatory precedents. This is the reason why the law becomes the part of judicial precedent in practice.[22] The duty of the countries of English legal system is to protect the rules required in the judicial decisions, obliging English judges to follow the decisions of their predecessors. It is noteworthy that only the Supreme Court and the House of Lords are entitled to create mandatory precedents. The decisions adopted by other judicial or quasi-judicial bodies do not make mandatory precedents.

Accordingly, judge-made law includes every legal norm established and developed by the courts in an intra legem way[23]. Herewith, the versatile meaning of the judge-made law does not affect the law

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[16] Code civil, p. 8, Dernière modification: 01/10/2017, <http://codes.droit.org/CodV3/civil.pdf>, [10.04.2018].

[17] *Khubua G.,* Theory of Law, Tbilisi, 2004, 133.

[18] „Non exemplis sed legibus judicandum est", David R., Major Legal Systems in the World Today, Editor: *Ninidze T.,* Tbilisi, 2010, 226.

[19] *Kruse H.W.,* Das Richterrrecht als Rechtsquelle des innerstaatlichen Rechts, Tübingen, 1971, 15.

[20] *Kruse H.W.,* Das Richterrrecht als Rechtsquelle des innerstaatlichen Rechts, Tübingen, 1971, 8.

[21] *Khubua G.,* Theory of Law, Tbilisi, 2004, 134.

[22] *Savaneli B.,* General Theory of Law, Tbilisi, 2005, 38-39.

[23] Lat. intra legem – In the limits of the entitlement granted from the law, see: Explanatory Legal Dictionary <http://gil.mylaw.ge/ka/dictionary/6.html>, [19.03.2018].

consolidated in a contra legem[24] way. With regard to this matter, following is to be said: If a judge is entitled to create the law, he/she has to be entitled to cancel the law made by himself/herself. These two entitlements encumber exercising each other, because each decision of the same court cancels the determinant norm established by this court earlier (Lex posterior derogate legi priori). By using intra legem way judge-made law does not intervene in the main competence of legislature. Legal gaps are often separated from the spheres possessed by the executive authority. From this point of view, it is possible to note that founding a norm only represents "ancillary product" of judiciary activity.[25]

3. Developing the Law by the Judges

3.1. Interpreting the Norms by the Judge

Interpreting legal norms is especially essential in the modern process of forming rule-of-law as it is connected to the rising of society's legal culture and legal awareness. The obtainable and understandable the legal norms are for the population, the more effective it becomes to implement them, including, from the perspective of applying them. S.M. Amosov states, "A judge, having considered his/her civil duty, is required to be not only applying the law, but also to be the creator of its interpretation, because interpreting the law is the same as recreating it. Disputing parties obey the law in such manner, as it is interpreted in the judicial decision, meaning the general rule, which became famous after giving the decision"[26].

Interpreting the law means explaining the obscure norms and determining the meanings of words[27]. The laws express legal imaginings in words. Understanding the law means to make the general imagining content relevant to the words of law, which shall be indicated in these words. If the law gives the judge freedom while giving decision, the decision needs to be given based on the legal perception of the judge. Acting according to the law means giving the judicial decisions only in the limits of the standing law. Interpreting the norms shall be exercised solely on the grounds of legal methodology. In case of detecting legal deficiency, argumentation of a judge shall be provided only according to the immanent principles of the constitution.[28]

The judge obeys not solely the legal norms, but also the law in general. In particular, general legal principles, given in the constitution or other sources of law. The judges are entitled to develop the laws written by this "true law". This can be exercised by the way of interpreting the laws, as well by correcting the deficiencies. Developing the law due to the "judge-made law" exceeds the literal meaning

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[24] Lat. Contra cogem – against the law, See: Explanatory Legal Dictionary <http://gil.mylaw.ge/ka/dictionary/6.html>, [19.03.2018].

[25] *Kruse H.W.,* Das Richterrecht als Rechtsquelle des innerstaatlichen Rechts, Tübingen, 1971, 15.

[26] *Kokhreidze L.,* Problems Regarding Interpretation of Particular Norms in Civil Law in the Process of Hearing Disputes Related to Intestacy, Jour. Justice and Law, N2 (41)'14, Tbilisi, 2014, 10-11.

[27] *Papuashvili S.,* Legal Tendencies, Developing the Law through the Judge-Made Law and Accessibility of Justice, Journal "Georgian Law Review", 6 №4 2003, 458.

[28] *Izoria L.,* Modern State, Modern Administration, Tbilisi, 2009, 191.

of the law and it can be allowed if the supporting arguments are more important than the arguments regarding separation of powers and legal security.[29]

While talking about developing the law due to the judge-made law, it is considerable that the obligatory nature of the judge-made law is fundamentally different from the mandatory character of the legal norms. The judge-made law norm is originated when the judicial decision has taken effective.[30] The judicial decision is not limited to its effective date. Legal force of the final judgement and the consistency of a legal norm differ from each other fundamentally. Legal force of the final judgement makes the decision effective and obligatory. It is significant that a judgement is effective solely for the disputing parties and their successors. However, the prejudication given in the judgement is effective in general: It is effective for everyone and against everyone.[31] At the same time, while deciding similar case, other courts may be guided by existing decisions given in judicial practice. However, it is not obligatory and the courts itself are entitled to decline the norms given by the judge-made law.

If the court is not bounded by the norms established by itself, the judge-made law, as a sphere having the characteristics of the source of law, will not have a solid binding force for the lower court instances. The courts of instances will have the force to decline the norms established by the higher courts, when the norm contradicts with the norm of higher hierarchy. Consequently, each judge shall check the following: Is the subordinate normative act included in their legislative power, does this norm comply with the constitution. Furthermore, the judge has to check whether the decision of the higher instance court is based on the effective law and whether the prejudicial norm fits in legal definition that will fill up the law. As for the constitutional laws, whether a legal norm contradicts with the constitution, the judge shall deliver this task to the constitutional court. In other cases of conflict of laws, the judge has to decide himself/herself, whether the legal norm contradicts with the higher norm. Providing this fact, the judge-made law is considered as the (pre) constitutional court in connection with the subordinate normative acts. Accordingly, if a prejudicial norm does not fit in the scopes of entitlement, it becomes inactive.[32]

The functional side of this entitlement is to be considered. Well-known obiter dictas[33] do not represent legal norms, providing the fact that the court is entitled to establish legal norms if the legal norm requires that itself, for the purposes of deciding the case. [34]

Undefined legal terms represent certain parts of an "open" legislation. At the same time, they strengthen the power of a judge regarding the entitlement of norm developing. While giving the decisions those terms allow judges to answer the questions asked but not answered by the legislature.[35]

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[29] *Zippelius R.,* Theory of Legal Methods, 10th revised Edition, Tbilisi, 2009, 83.

[30] *Papuashvili S.,* Legal Tendencies, Developing the Law through the Judge-Made Law and Accessibility of Justice, Journal "Georgian Law Review", 6, №4 2003, 460.

[31] *Reimer F.,* Juristiche Methodenlehre, Nomos, 2016, 105.

[32] *Kruse H.W.,* Das Richterrecht als Rechtsquelle des innerstaatlichen Rechts, Tübingen, 1971, 15-16.

[33] obiter dicta – Arguments mentioned additionally in the judgement, See: Explanatory Legal Dictionary, < http://gil.mylaw.ge/ka/search/6/obiter/.html>, [21.03.2018].

[34] *Kruse H.W.,* Das Richterrecht als Rechtsquelle des innerstaatlichen Rechts, Tübingen, 1971, 15-16.

[35] *Kruse H.W.,* Das Richterrecht als Rechtsquelle des innerstaatlichen Rechts, Tübingen, 1971, 6.

It is considerable, whether the judge is obliged to fill out the open fragments of legislation and give the judge-made law actual normative power due to this action, or, whether from this point the judge-made law is powerless. The answer to this question given by classical teaching methods is positive. According to the historical school, prejudicial existence of every right is integrated. However, this approach with regard to the integrated nature of norms no longer exists. Despite this, it is often considered that the judicial judgement is a result of solely using the legal text and; from this point, it represents a typical act of recognition and acknowledgement. This reasoning leads to the conclusion that the legislative body has not given any other role to the judge. However, if the judge is obliged to fill out open fragments of legislation, it means that the judge has to fill the gaps given by the legislature. The judge faces this controversy in each case, when he/she meets the individualism distinctive for particular case.[36]

To sum up, finding the law is not a typical process of cognition, which could be defined based on objective criterions. Consequently, in the process of developing the law, interpretations given by the judge plays an important role. Wherever the law cannot exercise its function of solving legal issues fairly, judge has an opportunity of restricted exercising "productive critics" of the law, in order to determine deficiencies and to fill out them.[37] It is noteworthy that while interpreting the norm, the judge is not completely free to decide the case solely on the grounds of personal legal perception. In such case, the judge is obliged to use every possibility of cognition, in order to find the way of eliminating the deficiency, which is most relevant to the particular case or complies with the existing judicial practice. According to the federal constitutional court of Germany: "the person using the law obeys not only the norms, but the law in general". Consequently, interpreting the norm by the judge, while exercising judicial power, represents legitimate foundation for developing the law, originating from the principle of "fair law". [38]

3.2. Role of the Judge-Made Law in Georgian Legal System

Legal regulation of the court, as an authority to make justice, is determined by Georgian Constitution. According to the Article 82, paragraph 1, of the Constitution, "judicial authority shall be exercised through constitutional control, justice, and other forms determined by the law". [39] The organization of justice should apply to the constitutional right of human regarding effective protection of the right. Three-step system of human rights protection serves exercising of effective justice. [40] Administrative justice is exercised by general courts, through trying cases at the first instance, court of appeals and court of cassation. Interpreted norms and decisions adopted by each instance of court plays an important role in the process of developing the law. However, the judgements given by the Supreme Court is important for establishing uniform judicial practice and developing the law. Due to the decision

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[36] Ibid, 8-11.

[37] *Zippelius R.,* Theory of Legal Methods, 10th revised Edition, Tbilisi, 2006, 105.

[38] Ibid, 23, 105-106.

[39] Compare: Article 59, Paragraph 3 of the draft Constitution of Georgia, according to which "Justice shall be administered by general courts".

[40] *Kopaleishvili M., Skhirtladze N., Kardava E., Turava P. (ed.),* Handbook on Administrative Process Law, Tbilisi, 2008, 398.

of the Supreme Court, the judgements of lower instances can be changed completely or partially or can be uphold. However, behind every ruling stands the uniform judicial practice and the meaning of the Supreme Court, as an instance having the function of interpreting the law.[41]

According to the Article 34, paragraph 3, Administrative Code of Georgia a cassation appeal shall be admissible if resolving the case would contribute to the development of law and the establishment of uniform judicial practice.[42] Providing the fact that the court of cassation was created not solely for protecting individual, but also for protecting public interest, establishing uniform judicial practice, as well as developing the law, it serves implementing the public purpose of the court. This is the case, when there is a universal interest for similar understanding of certain norms. A case is important, when it is likely that the decision adopted by the court of cassation will contribute similar understanding of legal norms and further developing of the law. First essential prerequisite is that, this legal issue can be clarified, meaning the case has to concern such legal norm, which can be revised. When the same legal norm (or issue) is understood differently by the different court instances, there is no uniform judicial practice represented.[43] Furthermore, only legal issues, included in the judgement of Court of Appeals and legal issues that had to be decided by the Court of Appeals, can be revised by the way of cassation. Second essential prerequisite for determining importance of legal issue, is that the legal issue needs to be clarified. Legal issue does not need to be clarified if it is undisputed, as the solving of this issue follows from the text of the law.[44] The function of judicial practice, especially the Supreme Court, is not limited to interpreting the law and eliminating deficiencies in particular cases, providing that the principle of equality requires resembling cases to be considered similarly. From this point, judicial decisions exceed particular cases and develop as the judge-made law.[45]

In conclusion, despite the importance of interpretations of the Supreme Court for developing uniform practice, judge-made law, can be considered as a source of law, solely if new legal norm is established by the court, which is not included in the promulgated normative acts. The principle of analogy of law can be recognized as a legal foundation of creation of norms by the courts, when normative acts do not include the regulation of similar or particular public relation. In such case, the court fills out the legal deficiency and at the same time, the court establishes legal norm according to the general principles of justice, as well as the requirements of fairness, good faith and morality (Article 5, paragraph 2 of the Civil Code of Georgia).[46]

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41 <http://www.supremecourt.ge/news/id/486>, [22.03.2018].

42 Similar Regulation is included in the Civil Process Code of Georgia, compare: Article 391, Paragraph 5 of the Civil Process Code of Georgia, Parliament of Georgia, N1106, 14.11.1997, <https://matsne.gov.ge/ka/document/view/29962>, [22.03.2018].

43 *Kokhreidze L.,* Problems Regarding Interpretation of Particular Norms in Civil Law in the Process of Hearing Disputes Related to Intestacy, Jour. Justice and Law, №2 (41)'14, Tbilisi, 2014, 15.

44 *Kopaleishvili M., Skhirtladze N., Kardava E., Turava P., (Editor),* Handbook on Administrative Process Law, Tbilisi, 2008, 404.

45 *Wienbracke M.,* Juristische Methodenlehre, C.F. Müller, 2016, 107. Compare: *Zippelius R.,* Theory of Legal Methods, 10th revised Ed., Tbilisi, 2009, 100.

46 *Kiknavelidze P.,* Problems regarding Judiciary Practice in Georgia, 2009, 1-2. <http://www.mkd.-ge/geo/sasamart.praqtikis%20problemebi.pdf>, [12.03.2018].

According to the Article 84, paragraph 1 of the Constitution of Georgia, "A judge shall be independent in his/her activity and shall comply with the Constitution and law only". Consequently, we can come to the conclusion that the judge-made law, as a source of law, is forbidden by the Constitution.[47]

Therefore, Georgian judicial practice can be discussed from the respect of its role in the process of interpreting the norms of normative acts.

3.3. Judge of the Administrative Law, as an Imposer of the Norm

According to the Article 7, paragraph 1 of organic law of Georgia on General Courts, "A judge shall be independent in his/her activity". In administrative proceedings court is obliged to exercise its entitlement only "according to the Constitution of Georgia, universally accepted principles and standards of international law, other laws and by his/her inner conviction. A judge may not be requested to report or instructed as to which decision to make on a particular case".[48]

Praetorian law was founded in ancient Rome and it was introduced for protecting public interest, in order to contribute, extend and improve the law.[49]

First question arising while deciding administrative cases is connected to the issue of imposing the burden of proof regarding submitting and proving factual circumstances. According to the principle of officiality[50], the court itself is obliged to examine important issues with regard to the case. "Administrative proceedings are characterized by adversarial and inquisitorial principles, meaning that court examines factual circumstances due to its obligation and is entitled to ex officio decide whether to gather and provide additional information or evidence. It depends on the position of the court whether to obtain particular evidences."[51] By using this principle the judge deciding an administrative case examines factual circumstances completely, which contributes to the process of applying the norm.

Providing the fact that there are frequent disputes in judicial practice, involving the claimant claiming for compensation for damages inflicted by administrative bodies, we can discuss the role of a judge, as an interpreter of the norm, in the process of hearing administrative case, on the example of the disputes regarding compensating for damages.

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[47] *Khubua G.,* Theory of Law, Tbilisi, 2004, 132.

[48] Organic Law of Georgia on „General Courts", Parliament of Georgia, N2257, 04.12.2009 <https://matsne.gov.ge/ka/document/view/90676>, [12.04.2018]. Compare: Article 6, Paragraph 1, of the Civil Process Code of Georgia, Parliament of Georgia, N1106, 14.11.1997, <https://matsne.-gov.ge/ka/document/view/29962>, [12.04.2018].

[49] „Ius praetorium est, quod praetors introduxerunt adiuvandi vel supplendi vel corrigenda iuris civilis gratia propter utilitatem publicam", See: *Zippelius R.,* Theory of Legal Methods, 10th revised Edition, Munich, 2006, 100.

[50] Principle of Officiality, same as Principle of Inquisitorial System, is a processual principle, under which the court is entitled to examine factual circumstances.

[51] *Vachadze M., Todria I., Turava P., Tskepladze N.,* Commentary on Georgian Administrative Process Code, Tbilisi, 2005, 29.

Compensation for damages inflicted by administrative bodies – according to the Article 42, paragraph 9, "Any person, who has illegally sustained damage inflicted by the State, Autonomous Republics, or self-government bodies and officials, shall be guaranteed by the court to receive full compensation accordingly from the funds of the State, Autonomous Republic, and local self-government". According to the interpretation of the Constitutional Court of Georgia, present norm entitles everyone, to claim and receive compensation from the funds of the State and the scope of compensation represents full compensation for the damage.[52] Present right can be exercised due to Article 207 and 209 of General Administrative Code of Georgia (Hereinafter referred to as "GACG") and Article 1005 of Civil Code of Georgia.[53] In addition, the wording of this norm needs to be considered, as a case can be heard through administrative proceeding, if a claimant claims for compensation from the administrative body, providing that "only the damage inflicted by an administrative body can be compensated through administrative proceedings".[54] The damage needs to be compensated when there are required conditions for imposing liability for compensating damage. In particular, damage is required to be caused a) in a line of a duty, b) intentionally and c) through the breach of the duty.[55]

According to the argumentation of the Tbilisi Court of Appeals "Restitution of the violated right is connected to the legitimate possibility of claiming compensation inflicted by the State, which is based on trustworthy verification of ineligible, unlawful acts performed on the duty (in the process of exercising public duty) by the State officials or public officers. While imposing liability on the State, Chamber considers having the consequences of the damage verified. Furthermore, Chamber discusses legal term of the damage and reasons that while compensating material damage the following circumstances need to be proved: Evidences of the consequences of damage, the fault of the tortfeasor, connection between consequences and the activity, and the possibilities of the injured party with regard to avoid the damage. Consequently, liability for compensating damages can be imposed if there are verified conditions for the compensation of damages and other required normative criterions as well".[56]

In case there are legal norms regulating particular obligations for administrative bodies, there is an obligation to understand, interpret and apply these norms properly. Legal norms are not created for purpose of provoking a dispute from every legal issue and for purpose of making this issue the object of

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[52] Judgement of December 7, 2009 of the Constitutional Court of Georgia N2/3/423, „Public Defender v. Parliament of Georgia", II. Paragraph 2.

[53] *Turava P., Tskepladze N.,* Handbook on General Administrative Code, Tbilisi, 2013, 232.

[54] *Giorgadze G., Kopaleishvili M., Loria A., Loria V., Salkhinashvili M., Tskepladze M., Chkareuli Ts., Kharshiladze I.,* Commentary on Administrative Process Code of Georgia, Edited by *V. Loria,* Publisher "Bona Causa", Tbilisi, 2008, 17.

[55] *Turava P., Tskepladze N.,* Handbook on General Administrative Code, Tbilisi, 2013, 235. See: Judgement of March 27, 2014 of the Supreme Court of Georgia Nbs-551-532(k-13), According to the interpretation of the Court of Cassation "standing legislation requires an obligation of compensating damage from the state, which is inflicted by the action or the decision of an official. For imposing the liability of compensating the damage following requirements need to be fulfilled: Action, which inflicted the obligation for compensating the damage, shall be connected with exercising public duty; the breach shall be intended to violate the rights of the other; the tortfeasor shall act with fault; the relationship between unlawful action and result shall be causal".

[56] Judgement of June 15, 2014 of the Administrative Chamber of Tbilisi Court of Appeals, №3b/1474-15.

discussion in the court. Particular norms of administrative law entitle administrative bodies to administrate and solve certain issues, meaning that administrative body shall exercise this entitlement with good faith and in accordance with the laws. Whenever administrative body does not fulfill its obligations, it is assumed that the official of administrative body acts through his fault – intentionally or negligently, otherwise administrative body shall prove that it acted without fault and that its official has not acted with fault – intentionally or negligently. Whether the action is intentional or negligent is not important, providing that damage needs to be compensated in full.[57]

As the Supreme Court of Georgia has stated in one of its judgements regarding compensation of damages inflicted by the administrative body: "According to the Article 208 of General Administrative Code of Georgia, the compensation of damages through administrative proceedings requires to be discussed only if one of the disputed parties is represented by the administrative body. If a claimant claims for compensation of damages from the State and the official jointly, based on the Article 1005 of Civil Code of Georgia and Article 208, paragraph 1 of General Administrative Code of Georgia, the Court of Appeals shall clarify which particular administrative body is named as defendant. The court of cassation explains that the court is entitled to hear the case through administrative proceedings solely after the abovementioned proceedings are exercised.[58]

The chamber of administrative cases of Supreme Court and the Court of Appeals have played an important role in developing judicial practice regarding the above-stated issue.

3.4. The Judge of Administrative Court, as an Body Exercising Control over the Administrative Body (Exemplified in the Decisions Adopted through the Discretionary Power)

Activities of an administrative body has always been handled as an object of exceptional attention, as the State exercises its public duties through the administrative bodies.

Determining the scopes of court control over the decisions adopted by the administrative bodies in administrative law represents an important issue. There are three legal processual possibilities: 1) Control over the norm through administrative court; 2) Control over the norm through Constitutional Court; 3) "Instance Control", meaning that each court is entitled to give an independent decision regarding the necessity of determining provision as valid or void and as a result this provision can be avoided.[59]

The issue of possibility of revision "admissible judgements" has a practical importance. Revising decisions of the administrative body leads to intervention in the competence of other body,[60] originating from the purpose of administrative proceedings – to exercise objective control over the activity of the administrative body. In case the judgement given by the administrative body based on the principle of

[57] Judgement of June 19, 2014 of the Administrative Chamber of Tbilisi Court of Appeals N3b/762-14.
[58] Judgement of April 8, 2010 of the Supreme Court of Georgia Nbs-233-224(g-10).
[59] *Kilasonia N.,* Formal and Nonformal Procedures of Participation of People in the Process of Creating Norms and Court Control over these norms, PhD Thesis, Tbilisi, 2016, 101-102.
[60] *Zippelius R.,* Theory of Legal Methods, 10th revised ed., Tbilisi, 2009, 128.

disposition contradicts with public interests, the court is entitled to continue decision-making process against the will of administrative body and to decide the case.[61]

According to the judgement of the Supreme Court of Georgia, complete investigation of factual circumstances due to the principle of officiality represents an unconditional necessity in order to decide disputes lawfully and to exercise proper control over the activity of the administrative bodies[62].

As for the possibility of exercising court control over the decisions adopted through the discretionary entitlement of the administrative body, we can discuss the following:

According to the Article 2, paragraph (k), discretionary powers grant freedom to an administrative body or official to choose the most acceptable decision out of possible decisions under the legislation, to protect public or private interests.[63]

The law empowering discretionary powers has a double meaning: On the one side, it determines the grade of freedom for the administrative body, and on the other side, it determines the scope of control of the decisions adopted through the discretionary powers. The idea of the court control does not empower the court to give the decision instead of an administrative body and to correct or annul individual administrative act as a result of this discussion. The court control leads to reviewing the mistakes made while exercising discretionary powers. The scope of court control has to originate from the legal base of the discretionary powers. The court control implies verifying the decision that has already been adopted. The scope of the court control depends on the content of the norm, which includes the discretionary power.[64]

The court investigates whether the administrative body had the discretionary power at first and then checks whether the act adopted by the administrative body is lawful.[65] It is noteworthy that the peculiarity of discretionary powers is indicated solely in the regulation of the General Administrative Code. Administrative Process Code of Georgia does not include the regulation regarding court control over discretionary judgements. Therefore, the role of the court and interpretations related to reviewing decisions adopted through the discretionary power are essential.

The court of cassation explains that the court is empowered with processual competence to review legitimacy of the act adopted by the administrative body. Referring solely to the discretionary power while exercising the court control does not represent sufficient ground for verifying the legitimacy of the

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[61] *Turava P.,* Administrative Proceedings and Administrative Legal Proceedings, Handbook on Foundations of Public Governance, Editors: *G. Khubua and K.-P. Zomermann*, Publishings of TSU Institute for Administrative Sciences, Volume 3, Tbilisi, 2016, 160.

[62] Judgement of May 20, 2014 of the Supreme Court of Georgia №bs-534-515 (k-13).

[63] See Article 2, Paragraph K of the General Administrative Code of Georgia, Parliament of Georgia, N2181, 25.06.1999. <https://matsne.gov.ge/ka/document/view/16270>, [22.03.2018].

[64] *Brinktrine R.,* Verwaltungsermessen in Deutschland und England: Eine rechtsvergleichende Untersuchung von Entscheidungsspielräumen der Verwaltung im deutschen und englischen Verwaltungsrecht, Heidelberg 1998, 13. *Kopp F., Ramsauer U.,* Verwaltungsverfahrensgesetz, Kommentar, 11. Auflage, München 2010, 767-768. See: *Khoperia R.,* Control over the decisions given by the administrative body through the discretionary power, PhD Thesis, Tbilisi, 2017, 31-32.

[65] *Khoperia R.,* Control over the decisions given by the administrative body through the discretionary power, PhD Thesis, Tbilisi, 2017, 94-95.

administrative act, as the court has to evaluate the legitimacy of the act adopted by the administrative body and review whether there is an error in the discretionary power.[66]

The administrative body shall reason and indicate the circumstances as the base of the given decision. The discretionary power of the administrative body does not imply the possibility of disregarding the principles of proportionality and legality. Exercising discretionary power is especially noteworthy in order to avoid procedural breaches and exceeding the scopes of the law, which may result in violation of the property, legality and the rights of the person. The measures mentioned in the administrative act adopted through the discretionary power shall not result in unreasonable restriction of the rights and interests of the person. The obligation of giving reasonable arguments originates from the purpose of exercising control over the activities of the administrative body. The court shall base its decision on the requirements of the law and not only on the opinions of advisability, as the discretionary power is not an absolute entitlement and exercising this power is restricted under the requirements of the law.[67]

While hearing several cases, the Supreme Court of Georgia has explained that the court shall exercise the entitlement, granted from the Article 32, Paragraph 4[68] of the Administrative Process Code of Georgia, if the factual circumstances cannot be identified or established. Accordingly, the court shall exercise this power if it is impossible to evaluate legality of the disputed administrative act. This processual possibility contributes to effective justice and complete court control over the legality of the administrative governance. If administrative body has not established and evaluated factual circumstances, it is often impossible to examine these facts in administrative proceedings. Furthermore, the reference of the court regarding necessity of examining particular circumstances has mandatory power. The Supreme Court states that the court control involves reviewing legality and substantiation of the act and it does not include exercising control over the content of the act. The court is obliged to determine whether the act is adopted in accordance with the Article 96[69] of the General Administrative Code of Georgia, as a result of examination and evaluation of every relevant circumstance.[70]

On 20 May 2014, the Supreme Court of Georgia established an important interpretation regarding exercising court control while reviewing the legality of the decision adopted through the discretionary powers. The court of cassation considered this interpretation as a directive for the existing administrative bodies and their practice. Furthermore, the court of cassation deemed this interpretation to contribute to the establishment of the uniform judiciary practice.[71]

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66 Judgement of June 9, 2011 of the Supreme Court of Georgia №bs-348-345 (k-11).

67 Judgement of October 4, 2016 of the Supreme Court of Georgia №bs-211-210 (k-16).

68 Article 32, Paragraph 4 of the Administrative Process Code of Georgia, Parliament of Georgia, №2352, 23.07.1999, <https://matsne.gov.ge/ka/document/view/16492>, [12.04.2018].

69 Article 96 of the General Administrative Code of Georgia, Parliament of Georgia, 25.06.1999 <https://matsne.gov.ge/ka/document/view/16270>, [12.04.2018].

70 Judgement of October 4, 2016 of the Supreme Court of Georgia №bs-68-67 (k-16), Judgement of January 14, 2009 of the Supreme Court of Georgia Nbs-896-863 (k-08), See: Judgement of February 04, 2016 of the Administrative Chamber of Tbilisi Court of Appeals №3b/1952-15.

71 See: Judgements of May 20, 2014 of the Supreme Court of Georgia №bs-389-378 (k-13) and Nbs-534-515 (k-13).

According to the above-mentioned judgement, the court of cassation explains that while discussing the legality of exercising discretionary powers national courts shall examine to what extent the decision is reasoned, which shall be based on the objective examination-establishing-evaluation of the factual circumstances. The court examines not the advisability, but the legality and substantiation of the decision and administrative body shall prove that the adopted decision was the most appropriate, optimal from the existing options. The court shall not determine which measures needed to be taken from the side of administrative body. The court examines not the advisability, but the legality and substantiation of the adopted decision. Therefore, the court control over the decisions adopted by the administrative body through the discretionary power applies on such a scale to give the court the opportunity to evaluate whether the administrative body used the most appropriate way of deciding the dispute comparatively to other alternatives. The court of cassation considers that this kind of "dictation" from the courts represents the intervention in the process of exercising discretionary powers and it will provoke the selection of governance measures or in other words – administration. Also, it will provoke exceeding the scopes of its constitutional function - court control over the activities of administrative bodies, as examining the complete court control represents direct obligation of the court organs with the help of reviewing compliance between the decisions of governmental bodies and the standing legislation. This function represents constitutional function of the judicative power and it contributes to the most important constitutional principle – separation of powers and implementation of the principle of checks and balances.[72]

As a result of the above-mentioned discussion it can be clearly assumed that the judge-made law plays an important role in the process of solving legal issues and developing the law.

4. Conclusion

The present paper discusses the judge-made law as the source of law (solving of legal issues and developing the law).

In conclusion, judge-made law is playing an important role in every legal system. These legal systems differ from each other in the levels of representing the judge-made law, they differ from each other in the unit share of the judge-made law while forming the law of the country as well.

Providing the fact that Georgian Law is a part of Roman-German Law, the Constitution of Georgia forbids judge-made law as a source of law, consequently, the main source of law in Georgia is represented by the normative acts.[73] Despite this, judge-made law (mainly the judgements adopted by the Supreme Court of Georgia) has a significant meaning in the process of solving legal issues, developing the law and establishing uniform judiciary practice. Therefore, the judgements should be well reasoned, and different legal issues should be given wide interpretations, which will contribute to establishing uniform judiciary practice and uplift the quality of solving the dispute and increase the trust of the civil society towards the court.

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72 Judgement of May 2014 of the Supreme Court of Georgia №bs-534-515 (k-13).

73 See: the Law of Georgia on „Normative Acts", Parliament of Georgia, N1876, 22.10.2009, <https://matsne.gov.ge/ka/document/view/90052>, [12.04.2018].

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Trends of Protection of Women's Rights in the Case Law of European Court of Human Rights

Protection of Women's Right became very acute in Georgia recently. Therefore, the article aims to analyze the existing trends in European Court of Human Rights as well as which approaches are established in European Court of Human Rights in this regard, taking into consideration that the European Convention of Human Rights does not contain a special provision about the protection of women's rights. Together with the theoretical deliberation there are underlined initial discussions contained in the classical historical cases in this Article. In addition, the Article analyzes recently created case law of European Court of Human Rights having fundamental significance for the protection of women's rights and the author concludes that through the evolution of the case law of European Court of Human Rights the European Convention of Human Rights becomes an effective legal document for the protection of women's rights.

Keywords: *European Court of Human Rights (ECHR), Case Law of ECHR, Women's Rights, Domestic Violence, Positive Obligation, Osman Test, Evolution of case Law of ECHR.*

1. Introduction

Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as the Convention) was signed on November 4-th 1950 and became effective for the certain part of its signatory states as early as 1953[1]. However, its significance and influence has been increasing year after year. The clear evidence of its increasing significance is the fact that European Court of Human Rights established according to the Convention is sometimes called as "the conscience of Europe[2]". There are many reasons of such popularity but the main reason is creation of the most effective human rights protection system for the person under the jurisdiction of the states, members of the Council of Europe.

Together with the emergence of the human rights in the international community, from 70-ies of the last century the protection of women's rights became more and more sharp issue in the international agenda. Finally, those issues have been solved by such a fundamental document as the Convention on Elimination of all Forms of Discrimination Against Women adopted by General Assembly of UN on November 18, 1979. This Convention included many specific issues related with the protection of women's rights under the umbrella of general human rights protection and at the same time, established supervisory body over the protection and implementation of the rights guaranteed by the convention – Committee for the Elimination of Discrimination against Women. Despite this fact, according to some scholars international human rights law has not yet been applied effectively to redress the disadvantages

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1 <http://www.echr.coe.int/Pages/home.aspx?p=basictexts&c=#n1359128122487_pointer>.

2 <http://www.echr.coe.int/documents/anni_book_content_eng.pdf>.

and injustices experienced by women by reason only of their being women[3]. In this sense, respect for human rights failed to be "universal"[4].

According to scholars, the UN human rights system aimed to promote and protect the enjoyment of human rights by women in two ways: through the principles of non-discrimination and equality in its *mainstream* human rights treaties and through these principles in a *women-specific* human rights treaties[5]. However, none of these norms is sufficiently broad or focused to have more than a minimal impact in controlling or eradicating violence against women[6].

After the adoption of international and regional conventions, the responsibility of states to protect women's right increased. Of course, the state can be imputed to the activities of its agents but whether or not the state maybe impugned with any obligation if women's rights are violated by other persons? This question has a positive answer in theory, especially in relation to such breaches of women's rights as domestic violence[7]. The evolving concept of state responsibility for acts of violence and the subsequent recognition of domestic violence as a violation of human rights is a recent advance in international law[8].

At the same time, international human rights law has been used to establish standards that transcend national barriers and has opened up to external scrutiny atrocities that would otherwise have remained solely the concern of the states wherein they were perpetrated[9].

Fight for the protection of women's rights and adoption of the specific international legal instruments resulted in increasing number of applications to international legal institutions[10]. Among increase in such applications the most noteworthy is the call for applying to ECHR[11]. Despite the diversity of the rights enshrined in the Convention, it did not include any specific provision for the protection of women's rights. When reviewing the text of the Convention, one might have an impression

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[3] *Cook R.J.,* Women's International Human Rights Law: The Way Forward" in *Cook R.J. (ed.)*, Human Rights of Women: National and International Perspectives, University of Pennsylvania Press, 1994. 3.

[4] Ibid.

[5] *Van Leewen F.*, Women's Rights are Human Rights!: The Practice of the United Nations Human Rights Committee and the Committee of Economic, Social and Cultural Rights, in *Hellun A., Aasen N. S. (eds.)* Women's Human Rights. CEDAW in International, Regional and National Law, Cambridge University Press, 2012, 246.

[6] *Fitzpatrick J.*, The Use of International Human Rights Norms to Combat Violence Against Women, in *Cook R.J. (ed.)*, Human Rights of Women: National and International Perspectives, University of Pennsylvania Press, 1994, 532.

[7] *McQuigg R.J.A.,* International Human Rights Law and Domestic Violence, the Effectiveness of International Human Rights Law, Routledge 2011, 7.

[8] *Hasselbacher L.*, State Obligations Regarding Domestic Violence: The European Court of Human Rights, Due Diligence and International Legal Minimums of Protection, 8 Nw.J.Int'l Hum. Rts. 190 (2010), 192, <http://scholarlycommons.la.northwestern.edu/njihr/vol8/iss2/3>, [19.04.2017].

[9] *McQuigg R.J.A.,* International Human Rights Law and Domestic Violence, the Effectiveness of International Human Rights Law, Routledge 2011, 2.

[10] See, Convention for the Protection of Human Rights and Fundamental Freedoms, 1950; American Convention on Human Rights, 1969; International Covenant on Civil and Political Rights, 1966; Convention on Elimination of all Forms of Discrimination against Women, 1979.

[11] *McQuigg R.J.A.,* The Use of Litigation as a Vehicle for Implementation, in *McQuigg R.J.A.,* International Human Rights Law and Domestic Violence, the Effectiveness of International Human Rights Law, Routledge 2011, 16-18.

that this instrument might not be as effective for the protection of women as for the protection of other rights directly stipulated therein. Although even in the very first cases heard by ECHR there did emerge the issue of protection of women's right[12]. In spite of non-existence of specific rules. ECHR by means of interpretation of the Conventional provisions created a vast case law providing for the efficient legal response to the breach of women's rights. At the same time, adequate protection of women's rights is an important issue for Georgia, since in couple of cases there have been established non-conformities of existing practice or approaches with the international standards[13].

Therefore, the present article shall attempt to answer how efficiently ECHR protects a wide range of women's rights without direct stipulation of such rights within the text of the Convention and what is the influence of the principle of state's positive obligation established by case law over such protection. In order to answer those questions, the essence and purpose of positive obligation, as well as its usage in the very first cases shall be analyzed. Thereafter, we shall reveal ECHR's approach to the protection of women's rights through the most significant cases related with women's rights in a way that the evolution of normative basis in relation to women's right is clearly established.

2. Definition of Positive Obligation and its Essence

Before explaining the emergence of the notion of positive obligation, it is essential to make a brief overview why this notion emerged at all in the practice. It is widely accepted that the subject of public international law are the states and natural or legal persons are not directly bound by public international law.

The concept of human rights evolved to protect the rights of the individual from encroachment by the state[14]. However, the rights norms that emerged were generally formulated in a very negative manner whereby the state was required only to refrain from violating the rights in question[15].

The objective of the framers of the earlier human rights instruments was to ensure that there was a space wherein the individual would be "left alone" by the state[16]. Their aim was not to obtain positive entitlements from the state, and neither was it to compel the state to intervene in a situation whereby the rights of one individual were being breached by another private entity[17].

It should be noted that human rights law has developed in such a manner as to create a range of ways in which it may now enter into the private sphere[18]. One of such ways is a concept of state responsibility under which positive obligation can be placed directly on the state to ensure that human rights standards are upheld in situations involving only private individuals[19].

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[12] Airey v. Ireland, judgement of October 9, 1979, No. 6289/73. Marckx v. Belgium, Judgement of June 13, 1979, No. 6833/74.

[13] CEDAW Communication No. 24/2009, 13 July 2015, X and Y v. Georgia.

[14] *McQuigg R.J.A.,* International Human Rights Law and Domestic Violence, the Effectiveness of International Human Rights Law, Routledge 2011, 4.

[15] Ibid.

[16] Ibid.

[17] Ibid.

[18] Ibid, 7.

[19] Ibid.

Some of the most important writing tackling the issue of human rights violations by private parties are contained in a book of individual articles entitled *Privacy and human rights*[20]. In his contribution, "Twenty Years" Experience of the Convention and Future Prospects, Phedon Veglaris pointed out: "The only qualitative difference between private infringements of this kind [on human rights] and those which may be perpetrated by public authorities is that the private individual, unless he manages to establish a de facto government, can never legally remove or impair any of these rights or freedoms, either generally or individually[21]".

This explanation affirms the basic principle that when human rights are violated by non-state actors, these rights have still a binding effect and hence they are legally actionable[22]. Therefore, it is the responsibility of the state to regulate private conduct and duly enforce the regulated standards[23]. In this regard, the sovereign state becomes accountable for acts of interference of private parties[24]. Interestingly enough, this approach developed gradually in the academic research of other scholars and eventually found its expression in case law[25].

However, such a development did not take place at once and it took quite some time. Taking into account that there were number of doctrines to define states' international undertakings by control bodies[26], the ECHR has for its part opted for a simpler, two-pronged approach, dividing states' obligations into two categories: a) negative obligations and b) positive obligations[27].

In general, there are quite a lot of negative obligations of the state depicted in the text of the Convention. Couple of positive obligations can also be found therein. However, the concept of the positive obligations and the whole bunch of such obligations have been created under the influence of *Belgian Linguistic Case* in the end of 60-ies of the last century[28]. According to scholars, resorting to the concept of positive obligation has enabled the Court to strengthen, and sometimes extend, the substantive requirements of the European text[29].

Despite the fact that the evolution of the concept of positive obligations was preceded by strong theoretical and scientific works, motivation of legal grounds for such obligations was still of utmost

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20 *Vegleris P.*, "Twenty Years" - Experience of the Convention and Future Prospects, in *Robertson A.H. (ed.)*, Privacy and Human Rights (Reports and Communications Presented at the Third International Colloquy about the European Convention on Human Rights, 30 September – 3 October, 1970), Manchester: Manchester University Press 1973, 382, in *Xenos D.,* The Positive Obligations of the State under the European Convention of Human Rights, Routledge, 2011, 19.

21 Ibid.

22 *Xenos D.,* The Positive Obligations of the State under the European Convention of Human Rights, Rutledge, 2011, 19.

23 Ibid.

24 See in details, *Xenos D.,* The Positive Obligations of the State under the European Convention of Human Rights, Routledge, 2011, 20-22.

25 Ibid.

26 See in details *Akandji-Kombe J-F.*, Positive Obligations under ECHR. A Guide to the implementation of ECHR, Human Rights Handbooks, No 7, Council of Europe, 2007, 4-5.

27 Ibid, 5.

28 Ibid.

29 Ibid, 6.

significance since the member states not only had to accept the concept of positive obligations but also had to restore rights breached through such obligations. Therefore, it was one of the most challenging tasks of ECHR to prove legal background of positive obligations and to enforce them steadily. This task was even more challenging when through concept of positive obligation there took place such an interpretation of the Conventional provision which could have adverse consequences for the state. Additionally, the concept of *ratione matiriae* implies that the Convention protects only those rights and enforces those obligations that are stipulated in the Convention i.e. those obligations that were accepted by the states at the material time (i.e. when signing the Convention and additional Protocols).

Thus, ECHR attempted and quite successfully, to prove the existence of the concept of positive obligations in the text of the Convention. If initially this obligation was found only in the rule of the Convention dealing with substantial right and in relation to procedural rule it could be established only in conjunction with Article 1, today ECHR bases both procedural and substantive positive obligations on a combination of the standard-setting provisions of the European text and Article 1 of that text[30].

In accordance with Article 1 of the Convention "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention". The scholars believe that with the decisions in cases *Assanidze v. Georgia* and *Ilascu and others v. Moldova and Russia*, Article 1 of the Convention is seen more than ever as the cornerstone of the Convention system, to the point that it constitutes an independent source of general obligations – which are also positive obligations – on states[31]. For example, in the *Assanidze* judgment, the Court found that Article 1 implied and required the implementation of a state system such as to guarantee the Convention system over all its territory and with regard to every individual[32].

It is clear from what has been said that the positive obligations stem from the duty to protect persons placed under the jurisdiction of the state and the state will perform that duty mainly by guaranteeing observance of the Convention in relations between individuals[33]. Thus the theory of positive obligations is underpinning the very marked trend towards extending the scope of the Convention to private relations between individuals which is called "horizontal effect"[34]. In practical terms, it is because the state has been unable legally or materially to prevent the violation of the right by individuals and otherwise because it has not made it possible for the perpetrators to be punished, that it risks being held responsible by the European Court[35]. This is why, Jean-Francois Akadji-Kombe makes a categorical declaration in his work that "As the law stands at present, then, it may be said that the establishment and development of the horizontal effect of the Convention by the European Court is, in its entirety a consequence of the theory of positive obligations[36]". From this analysis it become clear that the concept of positive obligations occupies a significant part in ECHR's activities.

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30 See in details *Akandji-Kombe J-F.*, Positive Obligations under ECHR. A Guide to the implementation of ECHR, Human Rights Handbooks, No 7, Council of Europe, 2007, 8.
31 Ibid, 9.
32 Ibid.
33 Ibid, 14.
34 Ibid.
35 Ibid.
36 Ibid, 15.

3. First Cases of Positive Obligation and "Osman" Test

The doctrine of positive obligations was applied by ECHR in order to define state's duties in relations of private individuals. However, is it possible to use this doctrine for the protection of women's rights? Most of cases of women's rights violations occurs in such situations which do not emerge on surface or may emerge after significant amount of time. In addition, lots of cases of women's rights violations take place outside of state's authority - in personal relations.

The application of positive obligations in the Court's jurisprudence begins with the judgments in the cases of *Marckx* and *Airey* in 1979[37]. In both these cases, the Court's ruling should be considered quite ahead of its time, even by current standards, in that the issue of protection of human rights against acts of interference from private actors was either not relevant (as in *Marckx*) or did not concern the general question of the state's indirect responsibility as such (as in *Airey*)[38]. At the same time, it is essential to note that both of these cases more or less concern particularly the protection of women's rights.

a) Marckx v. Belgium (Judgment of July 13, 1979, Case No 6833/74)

At the material time, under Belgian legislation no legal bond between an unmarried mother and her child resulted from the mere fact of birth as well as from the fact of indication of mother's name and surname in the birth certificate - neither legal bond as a parent and son/daughter nor legal bond in relation to inheritance. It was also necessary to perform maternal affiliation of a child by means of voluntary recognition of a child by mother or by means of legal proceedings. The latter could be fulfilled by the child within 5 years from achieving legal capacity. At the same time, the child had limited inheritance rights over the estate of his/he mother but not over the estate of mother's relatives. Only legitimation and legitimation by adoption placed an "illegitimate" child on exactly the same footing as a "legitimate" child; both of these measures presupposed the mother's marriage[39].

When ECHR discussed applicability of Article 8 of the Convention over this case, it turned to the concept of positive obligation and absolutely clearly underlined essence of this concept as well as its relevance to the case. In particular, ECHR directly stressed out in paragraph 31 of the judgment

The first question for decision is whether the natural tie between Paula and Alexandra Marckx gave rise to a family life protected by Article 8 (art. 8).

By guaranteeing the right to respect for family life, Article 8 (art. 8) presupposes the existence of a family. The Court concurs entirely with the Commission's established case-law on a crucial point, namely that Article 8 (art. 8) makes no distinction between the "legitimate" and the "illegitimate" family. Such a distinction would not be consonant with the word "everyone", and this is confirmed by Article 14 (art. 14) with its prohibition, in the enjoyment of the rights and freedoms enshrined in the Convention, of

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37 *Xenos D.,* The Positive Obligations of the State under the European Convention of Human Rights, Routledge, 2011, 22.

38 Ibid.

39 Marckx v. Belgium, [1979], ECHR, (HUDOC).

discrimination grounded on "birth". In addition, the Court notes that the Committee of Ministers of the Council of Europe regards the single woman and her child as one form of family no less than others (Resolution (70) 15 of 15 May 1970 on the social protection of unmarried mothers and their children, para. I-10, para. II-5, etc.).

Article 8 (art. 8) thus applies to the "family life" of the "illegitimate" family as it does to that of the "legitimate" family. Besides, it is not disputed that Paula Marckx assumed responsibility for her daughter Alexandra from the moment of her birth and has continuously cared for her, with the result that a real family life existed and still exists between them.

It remains to be ascertained what the "respect" for this family life required of the Belgian legislature in each of the areas covered by the application.

By proclaiming in paragraph 1 the right to respect for family life, Article 8 (art. 8-1) signifies firstly that the State cannot interfere with the exercise of that right otherwise than in accordance with the strict conditions set out in paragraph 2 (art. 8-2). As the Court stated in the "Belgian Linguistic" case, the object of the Article is "essentially" that of protecting the individual against arbitrary interference by the public authorities (judgment of 23 July 1968, Series A no. 6, p. 33, para. 7). Nevertheless it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective "respect" for family life.

This means, amongst other things, that when the State determines in its domestic legal system the regime applicable to certain family ties such as those between an unmarried mother and her child, it must act in a manner calculated to allow those concerned to lead a normal family life. As envisaged by Article 8 (art. 8), respect for family life implies in particular, in the Court's view, the existence in domestic law of legal safeguards that render possible as from the moment of birth the child's integration in his family. In this connection, the State has a choice of various means, but a law that fails to satisfy this requirement violates paragraph 1 of Article 8 (art. 8-1) without there being any call to examine it under paragraph 2 (art. 8-2).

Article 8 (art. 8) being therefore relevant to the present case, the Court has to review in detail each of the applicants' complaints in the light of this provision.

It clearly derives from this paragraph that ECHR directly indicated to the positive obligation of the state to protect "family" life through creating such a legislation which provides full protection of the child born without wedlock and his/her parent.

b) Airey v. Ireland (Judgment of October 9, 1979, Case No 62830/73)

At the material time, legislation in force in Ireland required to pass through a special procedure in High Court for judicial separation of spouses. As statistics showed, out of 250 cases heard in High Court, the plaintiff always used to be represented by a lawyer. In this particular case Mrs. Airey could not hire a lawyer and defend her rights with lawyer's assistance. She applied to ECHR to assess whether or not Article 6.1 of the Convention was violated. ECHR noted the following in paragraph 26 of its judgment:

The conclusion appearing at the end of paragraph 24 above does not therefore imply that the State must provide free legal aid for every dispute relating to a "civil right".

To hold that so far-reaching an obligation exists would, the Court agrees, sit ill with the fact that the Convention contains no provision on legal aid for those disputes, Article 6 para. 3 (c) (art. 6-3-c) dealing only with criminal proceedings. However, despite the absence of a similar clause for civil litigation, Article 6 para. 1 (art. 6-1) may sometimes compel the State to provide for the assistance of a lawyer when such assistance proves indispensable for an effective access to court either because legal representation is rendered compulsory, as is done by the domestic law of certain Contracting States for various types of litigation, or by reason of the complexity of the procedure or of the case.

As regards the Irish reservation to Article 6 para. 3 (c) (art. 6-3-c) , it cannot be interpreted as affecting the obligations under Article 6 para. 1 (art. 6-1); accordingly, it is not relevant in the present context[40].

The conclusions reached in *Airey* case directly point to the positive obligation of the state to provide legal aid in certain cases even if such cases determine civil right.

In spite of ECHR's approaches to the abovementioned cases, it was the case *Osman v. UK*, which became of cornerstone where ECHR specifically underlined what should be implied under state's positive obligation. Some scholars refer to this approach as *Osman Test*[41].

That case concerned the murder of the senior teacher and wounding of his son as well murder of the parent of the pupil and wounding the pupil by the teacher with psychological problems. Before all those sad events there took place number of actions of that teacher which had been known to the law enforcement officials and could cause sufficient ground for suspicion that the teacher intended to commit much grosser crime.

In paragraph 116 ECHR emphasized *"In the opinion of the Court where there is an allegation that the authorities have violated their positive obligation to protect the right to life in the context of their above-mentioned duty to prevent and suppress offences against the person (see paragraph 115 above), it must be established to its satisfaction that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk*[42]".

The "Osman Test" revolves around the element of knowledge that is pertinent in the determination of the state's positive obligation[43].

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40 Airey v. Ireland, [1979], ECHR, (HUDOC).

41 See *Xenos D.,* The Positive Obligations of the State under the European Convention of Human Rights", Routledge, 2011, 111.

42 Osman v. United Kingdom, [1998], ECHR, (HUDOC).

43 *Xenos D.,* The Positive Obligations of the State under the European Convention of Human Rights, Routledge, 2011, 111.

4. Evolution of the Protection of Women's Rights in Case Law

After discussion of the essence of the positive obligation and its applicability to the women's rights, we shall briefly touch upon the evolution of the case law in the area of women's rights.

The case of *Kontrova v. Slovakia* was one of the first cases dealing directly with protection of women's rights and despite the fact that violation of Article 2 of the Convention was established not in relation with the applicant but in relation to her children, this case is still considered as one of the most significant cases for the protection of women's right especially for elimination of domestic violence.

In the present case, the applicant notified local police department in writing about her husband's violence (however, she later withdraw her notification as it was advised by police officer) and afterwards, she informed the police by phone that her husband was threatening to kill himself and the children. Police moved her to her parents and interrogated her. However, after couple of days her husband shot their two children and himself dead.

When motivating its judgment ECHR considered first part of Article 2 imposing a positive obligation on the state and underlined that "*the first sentence of Article 2 § 1 enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction. This involves a primary duty on the State to secure the right to life by putting in place effective criminal-law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and punishment of breaches of such provisions*[44]".

Repeating "Osman Test", ECHR concluded that failure to adopt appropriate measures by police caused violation of Article 2. The applicant also complained that Article 8 of the Convention was also violated but since this complaint had the same factual background as complaint under Article 2 which was considered violated, ECHR came to a conclusion that it was not necessary to examine the facts of the case separately under Article 8 of the Convention. At the same time, because there was no effective remedy in the state to make a claim in respect of non-pecuniary damage, ECHR also considered that there was a breach of Article 13 of the Convention taken together with Article 2.

Such an approach of ECHR was even widened in another case *Bevacqua and S. v. Bulgaria*. As scholars point out this case, together with *Opuz v. Turkey* case, these two cases signify a turning point for ECHR and international law, specifically, they enumerate several identifiable minimums which give practical substance to judging a state's adherence to the principles of protection, investigation and prosecution[45].

In *Bevacqua and. S. v. Bulgaria* applicant lady filed a lawsuit for divorce and at the same time requested for an interim custody order to set second applicant's - a child's – residence place to be

[44] Kontrova v. Slovakia, [2007], ECHR, (HUDOC), § 49.

[45] *Hasselbacher L.*, State Obligations Regarding Domestic Violence: The European Court of Human Rights, Due Diligence and International Legal Minimums of Protection, 8 Nw.J.Int'l Hum. Rts. 190 (2010), 203, <http://scholarlycommons.la.northwestern.edu/njihr/vol8/iss2/3>, [19.04.2017].

mother's place. Local court failed to hear in time interim order which caused many conflicts and disputes between the applicant and her husband, who battered her and inappropriately treated the child.

Now ECHR did invoke Article 8 and noted that "*As regards respect for private life, the Court has previously held, in various contexts, that the concept of private life includes a person's physical and psychological integrity. Furthermore, the authorities' positive obligations – in some cases under Articles 2 or 3 and in other instances under Article 8 taken alone or in combination with Article 3 of the Convention – may include, in certain circumstances, a duty to maintain and apply in practice an adequate legal framework affording protection against acts of violence by private individuals*[46]". Eventually ECHR criticized local courts' handling of the interim measures issue for more than 8 months and concluded that such inaction adversely affected applicant and her child. Lack of sufficient measures by authorities in reaction to applicant's husband amounted to a failure to assist the applicant contrary to the State's positive obligations under Article 8 of the Convention to secure respect for their private and family life.

It should also be noted that the applicant also complained of the length of the custody proceedings as violating Article 6 para 1., based on the same factual backgrounds. However, ECHR considered that failure to examine interim measures for 8 months breached Article 8, although it was not sufficient for violating Article 6. Para.1 because this Article concerned examination of the merits of the civil case. According to ECHR, hearing on merits of the case took place within reasonable time.

It becomes clear that taking into consideration the peculiarities of a case ECHR gradually used to increase normative base that might be violated through violation of women's rights. In this end, ECHR made its most far reaching and brave conclusions in case *Opuz v. Turkey*. According to the facts of the case applicant lady and her mother were victims of systematic physical abuse of the husband (son in law). There took place number of investigations against husband one of which ended with his three months detention which later has substituted by a penalty. Eventually, despite lots of complaints and investigations, offender shot dead the mother of the applicant. During the hearing of this criminal case in domestic courts he was released from prison because of expiration of maximum term of pre-trial detention in spite of his conviction for 15 years of imprisonment.

ECHR invoked Article 2 and 3 of the Convention and as in previous cases, it established violation of the above mentioned Articles. However, the present case does differ from other cases because of the special attention of ECHR on Article 14 and in relation to women's right protection ECHR for the first time in its history, established violation of Article 14, in conjunction with Articles 2 and 3.

ECHR invoked the arguments about the content of discrimination developed in classical case of indirect discrimination *D.H. and others v. Czech Republic*, as well as applied to the definition reiterated by the Committee on the Elimination of All Forms of Discrimination Against Women that violence against women, including domestic violence, is a form of discrimination. ECHR also invoked resolution 2003/45 of the United Nations Commission on Human Rights stipulating "*all forms of violence against women occur within the context of de jure and de facto discrimination against women and the lower*

[46] Bevacqua and S. v. Bulgaria, [2008], ECHR, (HUDOC), § 66.

status accorded to women in society and are exacerbated by the obstacles women often face in seeking remedies from the State[47]."

Together with other evidences, ECHR also discussed conclusions of two non-governmental organizations as well as some statistical data and came to the conclusion "*that the general and discriminatory judicial passivity in Turkey, albeit unintentional, mainly affected women, the Court considers that the violence suffered by the applicant and her mother may be regarded as gender-based violence which is a form of discrimination against women*[48]".

This case became a huge source of interest for the legal scholars working on the women's rights and became a foundation of number of researches. "The Opuz decision has clear social implications as well. Failure to adequately enforce Convention protections can arise from discrimination embedded in social institutions and practices. A showing of systemic discrimination can be supported by reports and statistics documenting a lack of sufficient law enforcement activity to protect women from domestic violence[49]".

Thus, in cases of women's rights violations ECHR initially established violation of Article 2 but gradually together with increase of seriousness of the cases it methodologically enhanced normative bases and additionally established violation of Article 8, together with article 3. Eventually, in conjunction with Articles 2 and 3 ECHR also found possibility of violation of Article 14. Such an increase in normative base positively influences protection and promotion of women's rights.

5. Conclusion

Despite existence of number of mechanisms for the protection of women's rights in contemporary international law, such a regional instrument as ECHR, still remains one of the most effective tribunals in the area of women's rights protection. Although there is not a direct stipulation in the text of the European Convention for the Protection of Human Rights and Fundamental Freedoms on women's rights, ECHR by means of establishing the doctrine of positive obligation and introducing it in the very first cases achieved that the states bear responsibility to women within their jurisdiction not only for those violations carried out by state officials but also by private individuals. In addition, if initially conventional protection included only so called core rights[50], time after time, as a result of increase in diversity and seriousness of cases, applicable normative base developed through evolution and encompassed also Articles 8 and 14 (in conjunction with Articles 2 and 3). Taking into consideration all the above mentioned it should be underlined that ECHR strictly protects women's rights and the role of the doctrine of state's positive obligation in this end is enormous.

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47 Opuz v, Turkey, [2009], ECHR, (HUDOC), § 188.

48 Ibid, § 200.

49 *Abdel-Monem, T.*, Opuz v. Turkey: Europe's Landmark Judgment on Violence Against Women. Human Rights Brief 17, no. 1 (2009): 32.

50 See <http://www.echr.coe.int/Documents/Priority_policy_ENG.pdf >, [03.06.2017].

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The Impact of EU Energy Law External Action on Georgian Legislation

Georgian energy legislation reform and the creation of stable, competitive and market-oriented regulatory framework is an irreversible, but difficult process. It goes in the ambit of the EU-driven legal harmonization pattern, which causes substantial challenges for Georgian energy sector. The present article reviews the fundamentals of the EU energy law and examines its transportation potential into Georgian legal system. In so doing, this research studies the regional Europeanization instruments and assesses the organizational-institutional structure of the legal obligations stemming from EU-Georgia Association Agreement and Energy Community Treaty. The scientific research is based on the contemporary legal methods and comparative analysis. This manuscript vigorously invokes the existing works of Georgian and west European scientists and legal practitioners in the field of energy law.

Keywords: *Europeanization of Law, Legal Harmonization, Energy Law, Association Agreement, Energy Community Treaty.*

1. Introduction

In the wake of transnational dominant organizations and the global legal order,[1] as defined by *Philip Jessup*,[2] it is no wonder anymore legal thinking to be based on pragmatic approaches. In the era of "legal realism," jurisprudence does not only transcend the national borders, but the legal approximation and harmonization[3] become the central element of international cooperation. Along with growing events of the assimilation and fragmentation of law as well as the emerging number of comparative legal studies, today's lawyer is not only limited to the knowledge of the domestic legal systems.[4] S/he rather frequently applies the foreign legislation to solve the complicated matters.

Europeanization of energy law, which can be provisionally called as an "export" of the European Union[5] energy norms, sets a good example of global legal order. In recent years, Europe is more and

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1 *Pierrick L.G.,* Global Law: A Legal Phenomenon Emerging from the Process of Globalization, Indiana Journal of Global Legal Studies, Vol.14 (1), 2007, 212. The examples of Global legal order: "Lex Mercatoria" and "Lex Petrolea." See *Goldman B.*, The Applicable Law: General Principles of Law - the Lex Mercatoria*: Lew J.* (ed.), Contemporary Problems in International Arbitration, London, 1986, 113; *Martin A. T.,* Model Contracts: A Survey of the Global Petroleum Industry, Journal of Eenergy & Natural Resources Law, Vol. 22, 2004, 281.

2 *Ralf M.,* Globalization and Law: Law Beyond the State, in Law and Society Theory, Banakar and Travers, 2013, 42.

3 Harmonization of law implies co-existence of different legal systems on the basis of implementation of legislative activity. See *Fox E.M.,* Harmonization of Law and Procedures in a Globalized World: Why, What and How? Antitrust Law Journal, Vol. 60, 1992, 594.

4 *Khubua G.,* Theory of Law, Tbilisi, 2004, 20 (In Georgian).

5 Hereinafter "EU" or "Union."

more interested in expanding the geographical scope of its energy legislation, which exerts a great influence on the domestic regulatory framework of the "third countries." Transporting EU energy laws is the big "remedy" for Georgia to systemize its ill-regulated energy sector. In contrast with the potential benefits, it is quite ambiguous to foresee the negative side-effects of this process. Analysis of this process is exactly the subject matter of the present paper, which studies the specificities of penetrating EU norms into Georgian legal system and scrutinizes the tendencies of the legal harmonization.

For this particular purpose, the manuscript assesses the organizational-institutional structure of the legal obligations deriving from EU-Georgia Association Agreement and Energy Community Treaty. Structurally, the paper is divided into two main parts. The first chapter creates the conceptual basis and identifies the fundamental principles of EU energy law, while the second delimits the EU competencies in this field. It further discusses the "modernization" trends of Georgian energy legislation via analysing the concrete instruments paving the way towards the approximation of national laws to the European standards.

2. European Energy Law: Fundamental Principles and Definitions

2.1. Legal Origins of European Energy Regulation

According to *Leal-Arcas,* energy has a powerful influence on every aspect of human activity.[6] It is extremely timely and relevant to think of the modern approaches to the energy matters. During many years, energy was believed to be eternal and constantly accessible. This consideration is by gradually changing due to the massive world events[7] proving the obsolescence of this idea. Therefore, the modern world is now oriented on reshuffling the respective energy strategies, which requires the development of new regulatory frameworks at the international as well as the national levels.

Europe tends to be one of the biggest global players in this whole process. Energy "centrality" in the EU context traces the development since 1950s.[8] It is of great importance that in early days the EU founding fathers[9] masterminded to join the forces in two key energy sectors (coal and steel as well as the atomic energy) and manage them by the common European authority. Based on "*Schuman* Plan"[10] the

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6 *Leal-Arcas R., Filis A.,* Conceptualizing EU Energy Security Through and EU Constitutional Law Perspective, Fordham International Law Journal, Vol. 36 (5), 2013, 1125.

7 E.g. Arab oil embargo (so-called "OPEC Shock" in 1973) and increasing the oil prices thereof (1981). In recent years – Italy energy deficit in 2003 and Russia-Ukraine energy dispute in 2008-2009. See *Barton B., Redgwell C., Ronne A., Zillman D.,* The Growth of Concern for Energy Security, in Energy Security: Managing Risk in Dynamic Legal and Regulatory Environment, Oxford University Press, 2005, 3.

8 *Pradel N.*, The EU External Energy Policy and the Law: Does the EU Really Matter? *Squintani, L., Vedder, H., Reese M., Vanheusden B.,* Sustainable Energy United in Diversity – Challenges and Approaches in Energy Transition in the European Union, European Environmental Law Forum Book Series, Vol. 1, 2014, 245.

9 See *Guibernau M.*, The Birth of a United Europe: On Why the EU Has Generated a 'Non-Emotional Identity. Nations and nationalism, Vol. 17, 2011, 302.

10 French Foreign Minister Robert Schuman in his declaration of 9 May 1950, in which he put forward the plan he had worked out with Jean Monnet to bring Europe's coal and steel industries together to form a European Coal and Steel Community.

renewed European ideology must have been grounded on the supranational control of coal and steel.[11] This would create the community to replace the conflict with the cooperation, animosity with prosperity. As a result, two of the three EU founding treaties[12] are related to energy[13] calling it "the driver for European reunification." Even the third one[14] is applicable to energy, as ruled by the Court of Justice of the European Union in its landmark *Costa v. Enel*[15] case. It thus can be argued that three founding treaties construct the constitutional basis for the European energy matters.

The EU energy law is the continuous subject of development across the many dimensions of European integration, which has progressively shifted from national sovereignty[16] and heavy state control to liberal markets. The biggest moves with that regard are seen especially in the end of 80s and beginning of 90s[17] when the origins of European energy regulatory primary and secondary principles arise.

The evolution of energy law itself is an obvious outcome of the "legal dynamism"[18] insofar as the energy law does not distinguish with solid regulatory history. The same applies to Georgian energy legislation development standards too, as the first insights of this kind start off in 1997, when the Georgian Parliament adopted the Law of Georgia on "Electricity and Natural Gas."[19] Nowadays, the existing key legislative acts and respective by-laws in energy sector do not quite create a unified functional system.

Traditionally, energy law has been emerged fragmented in the framework of the different energy resources and initially was not characterized with high degree of cross-border cooperation. The energy related legal matters were the spotlight of more internal regulatory scrutiny, rather than international law.[20] Consequently, in the very beginning of its development, energy law was not considered as the discipline with the ability to regulate wide range of energy relations.[21]

Accounting on *Bradbrook's* frequently cited functional definition, as the pioneer in offering the academic concept of the discipline,[22] energy law is "the allocation of rights and duties concerning the exploitation of all energy resources between individuals and, between individuals and governments,

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[11] *Talus K.,* Introduction to EU Energy Law, Oxford University Press, 2016. 1.

[12] The Complexity of EU founding treaties is the result wide range of areas being regulated by them. They articulate all fundamental constitutional, political, economic, social and cultural aspects of legal relations.

[13] The European Coal and Steel Community (ECSC); European Atomic Energy Treaty (Euratom Treaty).

[14] The European Economic Community Treaty ((EEC).

[15] Case 6/64 Costa v. Enel, 1964, ECR.

[16] *Fatouros A. A.,* An International Legal Framework for Energy, Hague Academy of International Law, Vol. 332, 2007, 355-446.

[17] *Heffron J. R., McCauley D.,* The Concept of Energy Justice Across the Disciplines, Elsevier, Energy Policy, Vol. 105, 2017, 663.

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[20] *Arabidze G., Gudiashvili M., Jishkariani T.,* International Law on Energy and Environment, Tbilisi, 2015, 4. (In Georgian).

[21] *Heffron J. R., Talus K.,* The Evolution of Energy Law and Energy Jurisprudence: Insights for Energy Analysts and Researchers, Energy Research & Social Science, 2016, 19.

[22] See *Samkharadze I.*, Energy Law, as an Academic Discipline, Journal "Justice and Law," № 2 (58), 2018, 63 (In Georgian).

between governments and between states."[23] *Attanasio* corresponds to this explanation, who also believes that the energy law is the conglomeration of the rules and regulationsgoverning the development and use of energy resources and energy related facilities and affect the daily lives of energy consumers.[24]

The present paper is in agreement with these thoughts of *Bradbrook* and *Attanasio* and argues that the central element of energy law is the regulation of energy related right and obligations of various stakeholders over energy resources including its traditional as well as relatively non-traditional ways. Energy law is the integrated system of the laws, normative acts and the rules adopted by the competent authorities.[25] Without further engaging into deeper discussion of energy law as an autonomous area of law and the phenomenon of "energy law" v. "energy resources laws," this manuscript is also in favour of looking at energy from holistic approach (Heffron, 2016).[26] Sharing *Schill's* opinion, it is preferable to treat energy law as a field encompassing all energy means, instead of considering different energy resources separately given that energy sources are, in principle, substitutable.[27] This is why this article perceives the need of qualifying energy law as the autonomous field of law. It is more logical to develop the field based on the unified philosophical fundaments and not in the fragmented or specialised manner.[28]

European Union is the prime example of looking at the energy from holistic approach against its multifaceted nature. EU energy law, which has particularly evolved over the last two decades, represents the subject of the supranational[29] (federal-like) supervision. As of today, the EU is a key policy maker and legislator in the field throughout the Europe involving almost the whole continent and even more.

The contemporary energy law theory is isolated from fundamental beliefs of traditional forms of energy. It is thus oriented more on exploring the modern energy trends – low-carbon energy economy and ecological aspects. Today's energy markets are driven by the rules, which are supposed to incentivize the alternative sources of energy in contrast with the traditional ones.[30] This concept must be upheld whilst building the modern Georgian energy law.

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23 The author acknowledges that the suggested definition is somewhat "working definition" and it is possible to emerge future discussion on this issue. The author recommends the following literature for an in-depth analysis: *Bradbrook A. J.,* Energy Law as an Academic Discipline, Vol. 14 (2), Journal of Energy and Natural Resources Law, 1996; *Babie P., Leadbeter P.,* Law as Change, University of Adelaide Press, 2012; *Heffron R. J.,* Energy Law: An Introduction, Springer International Publishing, 2015; *Roggenkamp M., Redgwell C., Ronne A., Guayo I.,* Energy Law in Europe, Oxford University Press, 2007.

24 *Attanasio D.,* Energy Law Education in the U.S.: An Overview and Recommendations, Energy Bar Association Report, 2015, 218.

25 *Gatserelia A.,* Energy Law in *Khubua G., Sommerman K. (eds.),* Handbook of the Legal Bases of Public Administration, Tbilisi, 2016, 345 (In Georgian).

26 See *Heffron J. R., Talus K.,* The Evolution of Energy Law and Energy Jurisprudence: Insights for Energy Analysts and Researchers, Energy Research & Social Science, 2016, 19.

27 *Schill W. S.,* The Interface Between National and International Energy Law in *Talus K.,* Research Handbook on International Energy Law, Edward Elgar Publishing, 2014, 44.

28 Avoiding differentiation between "energy law" and "energy resources law" is crucial in the sense that all energy sources are in principle interchangeable and it is only up to the national governments to decide from which sources supply the energy demand within the specific jurisdiction.

29 See *Bregadze R.,* Material Supranationalism in European Law, Journal "Georgian Law Review," Tbilisi, 2005, 336. (In Georgian).

30 *Heffron J. R., McCauley D.,* The Concept of Energy Justice Across the Disciplines, Elsevier, Energy Policy, Vol. 105, 2017, 659.

2.2. The Key Specificities of EU Energy Law

"The new European energy era," – this is how the development stage can be called in which the EU energy law currently locates. It also characterizes with many challenges. Europe's energy dependability is one of the central problems that the EU is facing to the present day.[31] The Union is the biggest energy importer from outside world, which unveils the risks related to energy supply and demand and energy security.[32] Responding these challenges, in 2007 the EU has adopted the strategy "An Energy Policy for Europe,"[33] which has uncovered Europe's energy endeavours including the long-term vision of low-carbon energy economy, technology transfer and global greenhouse gas emissions reduction pathway. According to this Strategy, the EU energy policy and law should be based on three fundamental objectives: Competition-liberalisation, sustainable development and security of supply.[34] In principle, these three core policy pillars are interchangeable by nature and they need to be achieved jointly when discharging the EU energy policy action.

In order to effectively realise Europe's key energy objectives, special attention must be paid to the legal enforcement measures.[35] With that regard, it is crucial to recourse to the Internal Energy Market[36] idea, which is the good exemplification of afore-mentioned supranational governance in terms of transferring the sovereign rights from the member states to the EU institutions. Respecting the competition rules and anti-discriminatory legislation makes up the core principle of these processes that are primarily ensured by the loyalty to founding treaties and secondary legislation.[37]

These rules are mainly incorporated by the European legislation (regulations, directives and decisions)[38] creating the legal framework. In this respect, the main law is the Lisbon Treaty – primary EU legal source with almost the constitutional nature.[39] Introducing the new legal basis in the field of energy, Lisbon is a big stepping stone to set out EU energy policy objectives.

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[31] Based on Eurostat Survey, EU is 54 % dependent on energy import. See *Rostowska, M.,* Energising TTIP: A Step towards Better EU Energy Security, PISM Bulletin, № 57, 2014, 652.

[32] *Andoura S., Hancher L., Van der Woude M.,* Towards a European Energy Community: A Policy Proposal, Notre Europe, 2010, 56.

[33] Communication from the Commission to the European Council and the European Parliament of 10 January 2007, An Energy Policy for Europe COM(2007) 1.

[34] *Talus K.,* EU Energy Law and Policy: A Critical Account, Oxford University Press, 2013, 56.

[35] Respective articles: *Esch V. D. B*., Legal Aspects of a European Energy Policy, 2 Common Market Law Review, 1965, Issue 2, 139-167; *Omorogbe Y.,* Promoting Sustainable Development Through the Use of Renewable Energy: The Role of the Law in: *Zillman D., Redgwell C., Omorogbe Y., Barrera-Hernández K. L.,* Beyond the Carbon Economy, Oxford University Press, 2008, 39.

[36] In broader sense, the Internal Energy Market may be differentiated from the Common Energy Market. Nevertheless, the present article does not consider this issue and applies them interchangeably. For detailed analysis see *Jegen M.,* Energy Policy in the European Union: The Power and Limits of Discourse, Les Cahiers Européens de Sciences Po., № 2, 2014, 2.

[37] *Andoura S., Hancher L., Van der Woude M*., Towards a European Energy Community: A Policy Proposal. Notre Europe, 2010, 58.

[38] *Kanellakis M., Martinopoulos G., Zachariadis T.,* European Energy Policy – A Review, Energy Policy Journal, Vol.62, Elsevier, 2013, 1021.

[39] Should not be mixed with the Treaty establishing a Constitution for Europe, which is an unratified international treaty due to the failure on Dutch and French referenda in 2005.

The Article 194 of the treaty translates the policy goals into legally binding measures (Talus, 2016).[40] It spells out what to be expected from Europe in order to achieve the policy objectives. These include: a) Ensuring the functioning of the energy market (194 (1a)). The present provision is the mere codification of internal energy market standing the competition rules in the core of this process. b) Ensuring security of energy supply in the Union (194 (1b)). This provision is the reflection of Europe's increased energy dependence. Although it is not clarified what to be meant by the "security of supply," it must be considered as the "state, when the consumers have full access to energy resources with relatively reasonable price."[41] Therefore, this clause is focused on developing the legislation targeted on avoiding the energy security risks and diversifying EU's energy resources. c) Promoting energy efficiency and energy saving and the development of new and renewable forms of energy (194 (1c)). Although the treaty does not clarify it, environmentally-friendly legislation must be implied in this clause. This is Europe's "warning" not to adopt the legislative acts undermining the environmental interest.[42] d) Promoting the interconnection of energy networks (194 (1d)). This is somewhat external dimension of EU energy policy, as functional and effective interconnections is the key aspect of effective cross-border cooperation.

Afore-discussed policy pillars are very much dependent on external energy policy. Therefore, Europe is to create the pan-European network, which would expand the geographical scope of the EU energy law. Pursuing this politics, EU's energy law applicability is expanding beyond the current domain of the EU and involves all non-EU countries, which are voluntary adopting the EU norms in their domestic legal systems.[43]

Two issues need to be clarified at this point: a) Does the EU enjoy the external energy competence to push the cross-border cooperation? b) In case such a competence exists, what are the concrete legal mechanism that EU applies to pursue its external energy policy? These two questions will be highlighted in the next chapter of the paper analysing the EU impact on current global energy regulatory on the basis of Georgian example.

3. International Dimension of EU Energy Law

3.1. EU's External Energy Competence

Europe's increasing energy dependence has been mentioned in the first part of the manuscript influencing on the internal as well as the external action of the EU energy policy. Recent years led a greater

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40 Prior to the entry into force of Lisbon treaty, general EU energy regulatory framework was based on indirect legal basis especially on the provisions of Environmental Law (Article 175); Legal harmonization general principles (Article 100); Competition rules (Articles 81-88); International development policy (Articles 130-131); Trans-European networks (Article 154).

41 *Barton B., Redgwell C., Ronne A., Zilleman D. (eds.),* Energy Security – Managing Risk in a Dynamic Legal and Regulatory Environment, Oxford University Press, 2004, 5.

42 *Ehricke U., Hacklander A.,* European Energy Policy on the Basis of the New Provisions in the Treaty of Lisbon in *Bausch A., Schwenker B.* (eds.), Handbook Utility Management (Berlin Heidelberg, Springer-Verlag, 2009, 752.

43 *Featherstone K., Radaelli C.,* The Politics of Europeanization, Oxford University Press, 2003, 25.

involvement of the EU in this field and external energy policy became one of the central elements[44] of today's EU diplomacy. In 2006 European Commission points EU External energy dimension as the external element of the foreign policy putting big emphasis on external energy cooperation.

Being qualified as a "*sui generis*"[45] interstate organization mired in-between intergovernmental and supranational features, this ambiguity is mostly seen in the external representation of the EU, which applies to the Europeanization of law as well. According to the Article 4 (2) of the Lisbon Treaty, energy is one of those specific and complex fields, where there is no explicit competence and it is usually "shared" between the EU and the member states to be decided in accordance with the subsidiarity and proportionality principles. This means, that the EU adopts legally binding norms in the field only in case this is more effective and adequate to be done at the European level rather than adopting them by the member states.[46]

Due to the multifaceted nature of energy, different approaches exist on EU competence per different energy-related matter, which is the subject of a specific assessment. Therefore, the concrete legal norm must be found to specify the energy competence. Afore-mentioned Article 194 of the Lisbon Treaty can be considered as such a specific norm. However, this norm at the same time requires high degree of cooperation between the EU and the member states ("in the spirit of Solidarity") when discharging the energy activities. This clause does not shed the legal certainty and it is not thus clear what to be considered in such joint act of solidarity.[47] Is there any other legal solution?

While Article 194 Treaty does not explicitly mention any external action in the field of energy, by virtue of the theory of "implicit powers", now codified in Articles 216 (1) and 3 (2), enables the EU to develop a real external energy policy. What is more, the Articles 47 should be mentioned in this respect, which empowers the Union with the international legal personality to contract certain international agreements and carry out effective external representation.[48] Speaking from the practical perspectives, the latest developments also show that the EU enjoys almost exclusive competence to adopt the energy legislative acts and enforce them.

As an interim conclusion, the compilation of these norms seems to be the concrete legal solution empowering the Union to extend the application of its energy law extra-territorially. Through Lisbon the EU acquires effective competence in the field of energy policy, which is "enough" for the Union to expand the application of its energy legislation. This is mainly executed by the Europeanization of law, which includes "the incorporation of formal and informal rules, procedures, policy paradigms, styles, ways of doing things, shared beliefs and norms into domestic legal systems."[49] One of the common

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44 Green Paper, A European Strategy for Sustainable, Competitive and Secure Energy, COM(2006)105.

45 The EU is a *sui generis* regional international organization whose status is still controversial. Detailed discussion about the legal nature of the Union falls beyond the scope of this paper. See *Metz J.,* Expert Groups in the European Union: A Sui Generis Phenomenon?, Journal Policy and Society, Vol. 32, № 3, 2017, 267.

46 *Piris J-C.,* The Lisbon Treaty, A Legal and Political Analysis, Cambridge University Press, 2010, 318.

47 *Andoura S., Hancher L., Van Der Woude M.,* Towards a European Energy Community: A Policy Proposal, Notre Europe, 2010, 98.

48 *Vooren, V. B., Wessel A. R.,* EU External Relations Law, Text, Cases and Materials, Cambridge University Press, 2014, 447.

49 *Samkharadze I.,* Europeanization of Georgia: The Key Legal Aspects of EU Membership, Journal "Justice and Law," № 5, 2015, 41 (In Georgian).

forms of European norm transfer is the contractual relationships, which directly or indirectly impulse the legal harmonization process.[50] The dynamics of European normative power in the third countries are mostly tracked by the legal nature of these contractual relationships.

3.2. The Organizational-Institutional Aspects of Approximation of Georgian Energy Legislation to the European Standards

It is an absolute novelty for Georgia to endorse the liberal market model[51]of the European energy legislation targeting on competition rules, anti-cartel agreements and transparency principles. Things are becoming more dynamic when it comes to adaptation and modernization of existing legislation based on the European experience. It was not long ago, when Georgia was facing catastrophic energy crisis, such as severe energy deficit, outdated and amortized infrastructures, massive electricity and natural gas blackouts.[52]

Harmonizing the legal environment in line with the European values is the key aspect of Georgian Energy Strategy document spelling out key policy directions in the field. Georgia's strive to approximate its legislation to the EU core requirements would be possible to realize with the proper codification to ensure solid and not-fragmented transformation process.[53] It is interesting to learn what are the legal instruments in the EU's machinery to facilitate such a transformation process.

Two ways can be identified in this respect: The bilateral and multilateral treaty framework as the legal basis for transplanting the European acts into the Georgian system. EU-Georgia Association Agreement[54] signed in 2014 and ratified in 2016 and "Energy Community Treaty" - an international agreement, which Georgia joined in 2017. Unlike the political tools,[55] these two instruments distinguish as the most powerful mechanisms of Georgian energy Europeanization creating the legally binding nature. They can be characterized as interchangeable instruments specifying the concrete agenda of the approximation process.

More specifically, the Association Agreement is a "new-generation" legally binding document, which replaces the Partnership and Cooperation Agreement concluded in 1996 and mandates the harmonization of Georgian legislation with EU laws across a number of sectors. The Agreement is a binding international treaty on Georgia enjoying supremacy over its national laws as long as it does not contradict the Constitution and the Constitutional law of Georgia.[56]

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[50] *Gabrichidze G.*, Legal Approximation to the EU Acquis – a Georgian Perspective in *Kellerhals A., Baumgartner T.(eds.),* EU Neighbourhood Policy – Survey and Perspectives, Zürich, 2014, 30.

[51] Liberalization can be thought of as a reformist approach, when the hierarchical "top-down" mechanism is replaced by market-based relationships.

[52] Energy Strategy of Georgia 2016-2025 (working document), See <http://www.energy.gov.ge/show%-20news%20mediacenter.php?id=600&lang=geo>.

[53] *Kalichava K.,* Strategic Aspects of Environmental Improvement of Georgia, Journal "Journal of Law," № 2, 2012, 11 (In Georgian).

[54] Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part. Hereinafter: "Association Agreement" or "AA".

[55] European Neighbourhood Policy (2003) and Eastern Partnership Initiative (2008).

[56] *Samkharadze I.,* Harmonization of Legal Systems: EU and Georgia, Journal "Journal of Law," № 1, Tbilisi, 2015, 322 (In Georgian).

Pursuant to the Agreement, Georgia is in the process of aligning its domestic law to European standards in various fields. The energy sector is a crucial aspect of it underpinning an important part of EU-Georgia relations. The Article 297 of the AA defines the general cooperation principles between the EU and Georgia based on the principles of partnership, mutual interest, transparency and predictability, which very much reflects EU's endeavour to support the modernization of Georgia's energy legislation by offering convergence with its rules. This is mostly initiated due to the country's strategic geographic location between key East-West transportation routes, positioning it an attractive alternative for Europe in transporting oil and gas from Central Asia to the European market in ensuring the EU's future energy security.[57] AA further specifics the concrete EU legal acts (regulations & directives) that need to be implemented in the fields of electricity, natural gas, oil, renewable energy and energy efficiency. In this respect, the AA details the implementation agenda and provides the timeline in which the domestic legislation should be approximated.

Furthermore, Georgia has recently acceded to the "Treaty Establishing the Energy Community" to "endorse" already assumed legal obligations assumed brought by the Association Agreement and to "manifest" the reliable energy partnership with Europe. Energy Community contracting parties are non-EU countries that see some benefit from joining the Energy Community and committing to implement EU energy law into their national systems.[58] The Accession Protocol lists the number of EU legal acts including the ones described in the first chapter to be aligned by Georgia and defines the specific legal harmonization timeline. Energy Community membership does not engage with the different process as derived from the Association Agreement. It rather supports the established process and further enlarges the scope with potential additional political, technical and financial to incentivize the effective reforms.

This process requires high political leverage and even more. In order to further develop the energy legislation, mirror "repetition" and formal implementation of the European norms are not enough. For this purpose, it is inevitable to employ effective enforcement measures. It is also noteworthy to closely cooperate with Energy Community Secretariat and adopt the action plan putting forward the interim and final results in the light of accountability principles.[59] The enforcement of rules, rather than simple legal transposition, is a key aspect of EU influence on Georgian domestic energy sector. It may require the establishment of formal institutions and procedures as architected by the EU rules to ensure the smooth implementation.

Furthermore, this should not be confused with the displacement of national laws. On the contrary, domestic law and domestic actors fulfil an equally important function in governing and regulating international energy markets. Transmission of the norm is a legislative activity and it cannot be identified as a translation of the work. "The legal translator" is not limited in this process and supplements, extends

[57] *Margvelashvili M., Maghalashvili A., Kvaratskhelia T., Ushkhvani L., Mukhigulashvili G.,* Georgian Energy Sector in the Context of EU Association Agreement, Tbilisi, 2015, 14 (In Georgian).

[58] *Wustenberg M., Talus K.,* Risks of Expanding the Geographical of EU Energy Law, European Energy and Environmental Law Review, 2017, 139.

[59] *Janelidze S.,* A Year Assessment of Georgia's Membership in Energy Community. See European Energy Union and Reforms in Georgian Energy Sector, World Experience for Georgia (WEG), Tbilisi, 2017, 92.

when necessary and reduces and shortens if necessary and the most important is that in many cases, he/she translates not literally but analyses the article to translate."[60]

For the sake of proper implementation of EU regulations and directives into Georgian legal system, it is of crucial need to establish competent authorities with effective, independent and transparent regulatory bodies balancing the rights and interests of the different stakeholders on the market.[61] Thus, the final "product" of the harmonized national energy regulatory framework should be consistent legislation with transparent national energy markets and advanced machinery of regulating energy matters. This is why the modern energy regulatory framework should be based on the organizational structure ensuring high competition standards, which are mutually beneficial and reflects the international character.[62] This would be beneficial for country's strategic goals in terms of improving the investment environment,[63] uncovering transit potential and implementing energy projects.

4. Concluding Remarks

The present paper tried to shed the light on the external effects of EU energy law and its impact on the Georgian legislation. With this aim, the article reviewed the fundamentals of the EU energy law and the potential extension of its geographical scope to spread the liberal, competitive legislation extra-territorially. Pursuing its own rules, the EU is actively engaged in the energy diplomacy to diversify its energy resources. Being "generous" the EU further supports the modernisation of "third countries" energy sector.

Exemplified by the Georgian case, the impact of energy Europeanization in Georgia must not be assessed as very strong, but quite intensive. The implementation of EU energy rules in domestic legal system is an irreversible process, however this process must be accompanied with the high degree of political leverage and real domestic enforcement mechanisms.

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[63] Regarding investment environment and concession see *Ohler C.*, Concessions, Max Planck Encyclopaedia of Public International Law, February, 2013, 2; *Walter v. A.*, Oil Concession Disputes, Max Planck Encyclopaedia of Public International Law, December, 2008, 2.

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Levan Alapishvili*

Institutional Organization of Georgian National Security Assurance System, Actual Issues of Accountability and Oversight

Effective and accountable national security assurance system, which corresponds to the democratic standards, has crucial significance for state governance. It ensures protection of society from different threats, peaceful and stable development.

The institutions of security assurance system by their origin are in conflict with individual liberties and open society. This system by its essence contradicts to the principles of external control, oversight and accountability. Therefore, the role of parliamet as a high political organ serving to the interests of people, is crucial.

Effective parliamentary oversight enhances a quality of accountability of security assurance institutions and insure society from willful, improper and repressive governance.

In transitional democracies reforms of security assurance system and transformation its institutions to the decmoctratic standards, requires huge efforts of states and public inclusiveness.

Reform of security assurance system seems unsuccessfull without proper and consecutive legal framework. Security assurance institutions and their activities are legitimate when thier power does not exceed a mandate defined by the law. Contradictions and obscurity enhances the risks of illegitimate activities of national security assurance institutions.

In the article is provided an analysis of legal basis of national security assurance system of Georgia, actual issues and problems. The legal basis of national security assurance system of Georgia is contradictive. In some cases the competences of leading institutions of national security assurance of Georgia, are not clearly defined by the law and mandate is enhanced by the decision of government, without parliamentary engagement. Solution of identified problems is possible by creation of new legislative framework of competences and accountability of national security assurance institutions.

Academic or parliamentary discussion of actual issues of this article will benefit to creation of sustainable and democratic system of national security.

Keywords: *National Security, National Security Management, Accountability, Parliamentary Oversight, President, Government, Prime-Minister, National Security Council, Security and Crisis Management Council, Group of Confidence, Intelligence Agency, State Security Service.*

1. Introduction

Creation of democratic sustainable state and national security system is impossible without clear regulations and divided competences.

State does not exist without a human. Depending on the conditions of human rights and reality of human a source of legitimacy of power and governance, the states are divided as democratic and totalitarian. We rely on exact definition of Professor Gia Khubua that in the centre of state governance shoud consireder a human, states supreme and only objective may be only a human. [1]

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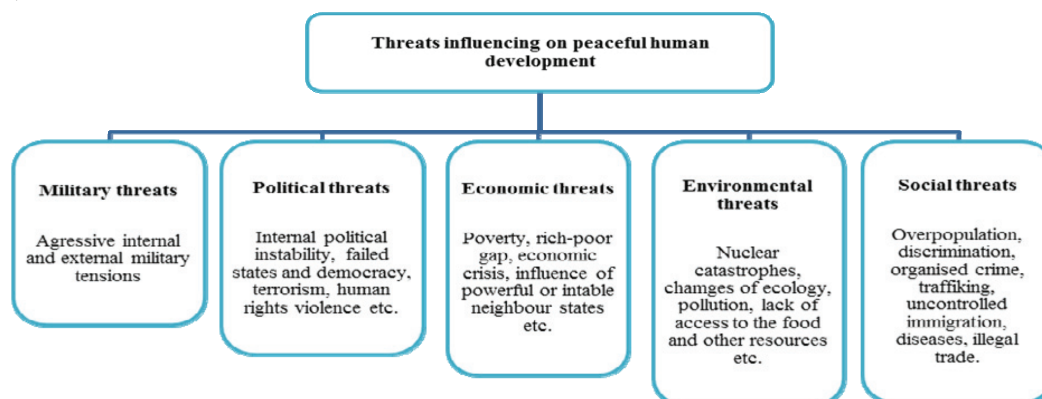
[1] *Khubua G., Zomerman K.-P., (eds),* Legal base of public administration, Tbilisi, 2016, 65 (in Georgian).

In a contemporary world the number of democratic states is accelerated. Furthermore, we see the process of formation of new international instruments and institutions, having main function of protection people against violence from the states, governments and military. Vivid example is Rome Statute[2] of the International Criminal Court, formation and development of the International Criminal Court.[3] The mandate of the International Criminal Court covers the investigation, judgement and execution of genocide, crimes agains humanity and war crimes.

Increasing number of democratic states and development of human rights institutions indicates on the growth of human significance not only in a concrete state or society, but in international relations. The issues of national security should be discussed in this context.

National security is subject of research mainly for political sciences and there is no consensus of definition and terminology. Part of scientists considers the security as state security, in a traditional context of activities of military and secret services and international relations.[4] While, other scientists apply national security as human security[5] and considers in a broad concept: economy, health, food, ecology, defence, international relations and human rights.[6][7] National security is applied in a broad context in the reports[8] of Secretary-General of the United Nations on the security sector reforms. In his report of August 13, 2013 Secretary-General defines the objective of security sector reform to ensure that people are safer through the enhanced effectiveness and accountability of security institutions operating under civilian control within a framework of the rule of law and human rights.[9]

By the nature and intensity the security environment schematically could be figured in following manner:



[2] The Romes Statute of the International Criminal Court,A/CONF. 183/9, 17/07/1998.

[3] About the International Criminal Court see: <https://www.icc-cpi.int/about>.

[4] *Nodia G., Darchiashvili D. (eds.),* Civil-Military Relations, Theory and Georgian Example, Tbilisi, 2000, 7, 11, 17 (in Georgian).

[5] *Born H.,* Parliamentary Oversight of the Security Sector, OPPD-European Parliament, Brussels, 2013, 20.

[6] *Laura R. Cleary L.R., McConville T. (eds.),* Managing Defence in a Democracy, Routledge, Oxford, 2006, 3, 15.

[7] *Vashakmadze M.,* The Legal Framework of Security Sector Governance in Georgia, DCAF, Geneva, 2016,7.

[8] Securing Peace and Development: the Role of the United Nations in Supporting Security Sector Seform. Report of the Secretary-General, A/62/659–S/2008/39,2008, 5-6.

[9] Securing States and Societies: Strengthening the United Nations Comprehensive Support to Security Sector Reform. Report of the Secretary-General, A/67/970–S/2013/480, 2013, 4.

Despite of diversity and difference of scientific understanding, there is consensus that final objective of security is ensuring safe environment for state and society.

For a broad understanding of security and research of its legal basis, in addition to the scientific definitions and contents of international documents, should be analysed terms and definitions given in the Georgian legislation. In this line one of the main and interesting document is the law on Defence of Georgia (hereinafter referred as *Defence law*) [10]. In the defence law is given definition of the term defence and is defined not only as activities of military, police and special services, but in a broad content. In the defence law defence is defined as integral part of security and important function. In the defence law is mentioned that defence of Georgia is: "couple of political, economic, military, social, legal and other activities, which ensures defence of state, population, territory and souveregnity against military attacks".[11] As seen, security and its function also covers economic, social and legal issues. Nevertheless the defence law defines the term defence, there is no legal definition of national security in defence law or other laws.

As mentioned, national security has legal basis, because it covers issues of inner-state or international relations. State organization and governance, also interstate or international relations are based on legal framework. Research of national security in legal science is on initial stage. For this reason there is no scientific arguments of different issues of security. Also, there is no legal definitions of national security.

Therefore, besore the analysis of institutions, accountability and oversight of security, we have to legally define main topics of national secutity: what is security, national security security assurance. We suggest, **security** is a state which is achieved in the decision-making (governance) process and ensures human protection and peaceful development of society. Based on this definition, **national security** could be defined as a state of concrete country which is achieved in the decision-making (governance) process and ensures peaceful development of society and protection of people from internal and external, military, economic, social and other threats.

In the democratic country national security is ensured by democtratic governance of public institutions and instruments. Part of public institutions, representative institutions (the parliaments) define security policy, legal framework and ensure oversight on national security and institutions. Other parts, executive institutions (givernmet, ministries, and agencies) implement and execute security policy defined by representative institutions. They ensure management and control of security and its institutions. Third part of institutions (judiciary, ombudsman, state audit, independent institutions) ensure the protection of legal framework and humant rights by the representative and executive institutions duting the process of security assurance.[12]

Representative or executice political institutions may infringe the mandate defined by the law and become as threat to the society and its peaceful development. Part of public institutions has exclusive right to the use of force[13], arm and secret activities. [14] Their objective is protection of open society using

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[10] Law of Georgia on Defence of Georgia, Herald of the Parliament of Georgia, 45, 31/10/1997.

[11] Ibid, Article 2.

[12] *Born H., Leigh I.,* Making Intelligence Accountable: Legal Standards and Best Practice for Oversight of Intelligence Agencies, Oslo, 2005, 16.

[13] *Fuior T.,* Parliamentary powers in security sector governance, DCAF, Geneva, 2011, 6.

sectet resources.[15,16] Considering contradictory nature of this mandate, existence of effective mechanisms of accountability, oversight[17] and control is substantial.[18] The questions of security sector reform and creation of oversight standartds are underlined by the Secretary General of United Nations in its security sector reform reports[19][20] and by the Venice Comission in its recommendations[21][22], which are a basis of resolutions of Council of Europe.

International institutions are developing the standards of security and oversight. Thus, by the correspondence to the standards is definition of democtracy of the states.[23] Effevtive democratic and civil control over the security sector is a key component of democratization and precondition for transitional coutries for their integration in Euro-Atlantic institutions.[24] In some cases, depending on the existence or quality of standards of oversight and control of security sector, coutries are identified as unfinished or uncomplete democracy. Supreme security sector oversight institution, National Assembly of Serbia is considered as a developing representative institution, which has competence, but not consensus and political will to have executive institutions accountable, implement effective parliamentary oversight on security.[25] Georgian practice and contradictory legal environment reviewed in this article confirms that some security institutions with police or military competence, but without effective control, were violating a legal framework.[26] This is a threat for stable developmet of society, democracy and Euro-Atlantic integration of Georgia.

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14 *Nodia G., Darchiashvili D. (eds.),* Civil-Military Relations, Theory and Georgian Example, Tbilisi, 2000, 19, 24 (in Georgian).

15 *Born H,. Leigh I.,* Making Intelligence Accountable: Legal Standards and Best Practice for Oversight of Intelligence Agencies, Oslo, 2005, 16.

16 *Fuior T.,* Parliamentary Powers in Security Sector Governance, DCAF, Geneva, 2011, 2, 7.

17 *Fluri P., Johnsson A.B., Born H. (eds.),* Parliamentary Oversight of the Security Sector: Principles, Mechanisms and Practices, DCAF, Geneva, 2003, 20, 40.

18 *Born H., Leigh I.,* Making Intelligence Accountable: Legal Standards and Best Practice for Oversight of Intelligence Agencies, Oslo, 2005, 23.

19 Securing Peace and Development: The Role of the United Nations in Supporting Security Sector Reform. Report of the Secretary-General, A/62/659–S/2008/39, 2008.

20 Securing States and Societies: Strengthening the United Nations Comprehensive Support to Security Sector Reform. Report of the Secretary-General, A/67/970–S/2013/480, 2013.

21 Recommendation no: 1402 (1999) "Control of Internal Security Services in Council of Europe Member-States", 1999.

22 Recommendation no: 1713 "Democratic Oversight of the Security Sector in Member-States", adopted by the Venice Commission at Sixty-Fourth Plenary Session (Venice, 21-22 October 2005).

23 Government defence anti-corruption index. Transparency International UK. <http://government.-defenceindex.org/>

24 Recommendation no: 1713 (2005) "Democratic Oversight of the Security Sector in Member-States", Parliamentary Assembly, Council of Europe. <http://www.assembly.coe.int/Documents/WorkingDocs/-2006/EDOC10972.pdf>

25 *Rokvic V., Ivanis Z.,* Parliamentary Oversight of the Security Sector in Serbia: Perceived Effects, Problems of Post-Communism, Vol.60, no.1, Routledge, UK, 2013, 60.

26 *Hammarberg T.,* Preliminary Advice, Dealing with Illegal Surveillance Material. EU Special Adviser on Legal and Constitutional Reform and Human Rights in Georgia, 2013, 9. <https://www.trans-parency.ge/sites/default/files/post_attachments/Dealing%20with%20illegal%20surveillance%20material.pdf>; *Hammarberg T.,* Georgia in Transition, Report on the Human Rights Dimension: Background, Steps Taken

Considering all the above mentioned, **security assurance** could be defined as activities and *democratic decision-making process* of states and international institutions, with objective of human protection and peaceful development. **National security assurance** could be defined as activities and democratic decision-making process of state, with objective of human protection and creation of environment for peaceful development.

In constitutional law the policy (including security policy) planning and implementation roles and functions of heads of states, legislative institutions and governments are defined. Therefore, for a scientific research the security governance issues and institutions are important.

By the broad, modern understanding of security, all executive institution, ministry, agency or department has own function and place in the secutity system. Protection of environment, economy and financial stability, fighting poverty, energyresources, nuclear security, terrorism and crime prevention, immigration and border protection – these are issues having special importance for stable development and security assurance.

In the diversity of sectoral ministries and institutions in the national security system, the leading role has so called traditional institutions – military, police and special security agencies. Therefore, in the new constitutional model of governance[27] the reform of security system and traditional security institutions has vital importance. Accordungly, in this article is given analysis of legal basis of national security assurance system and national security coordination, together with actual questions of main institutions of national security assurance and their oversight. The article and discussed actual issues may benefit to the discusstions and decision-making process of reform of national security sustem.

2. Overview of National Security Coordination System

After the enactment of *new constitutional model of governance* of Georgia the competences of President has decreased and the role of Government has increased. Considering the principle of division of powers and chask and balances in the national security assurance process none of the institution has sole competence of making decision.

According to the Constitution of Georgia[28], action of government or military unit needs agreed decision of government and the President. This decision becomes legally binding just after the approval by the Parliament of Georgia. Holding institional and authority independence, there is a need of coordination of the process and activities of institutions of national security assurance. For coordination, effective and constitutional security assurance mechanisms in the system of goverrment are important. On the contrary, delayed reactions and decisions on the concrete crises may have hard results.[29]

and Remaining Challenges, 2013, 24-25. <http://eeas.europa.eu/archives/delegations/georgia/documents/-human_rights_2012/20130920_report_en.pdf>

[27] Perceived the model of state governance which exists after the 2013 presidential elections and the President of Georgia is not the head of executive branch of power.

[28] Constitution of Georgia, Herald of the Parliament of Georgia, 31-33, 24/08/1995. Articles 46, 73, 73^1, 98, 100.

[29] Unfortunate example was demonstrated in the capital of Georgia, Tbilisi Flood of June 13-14, 2015, when the Government and the Security and Crises Management Council were late in reactions or were making

During the period of 2013-2018 Georgia has 2 mechanisms, format of national security coordination. First, constitutional National Security Council and second - State Security and Crisis Management Council. After an enactment of new constitutional model of governance the Parliament passed appropriated laws and the Government – decrees creating the legal basis for national security coordination.

The National Security Council was the format for preparation and approval of decisions on the supreme political level, while in the executive system such a format remained the governmet, collective organ which ensures executive power and coordination inside the government. In this conditions creation and existence of the National Security and Crises Management Council based on the governments' decree[30], initially and on the law[31], lately, and being as temporary consultative organ[32] to the Prime-Minister, was legally arguable. Nevertheless of argued critics and pointing on contradictions[33][34] and ineffectiveness of decisions, the National Security and Crises Coordination Council and its staff existed till 2018.[35] According to the constitutional changes[36] of 2017, in the Constitution which will be enacted after taking oath by the winner of 2018presidental elections, permanent format of national security coordination doesn't exist, only ad-hoc national defence council[37] will be formed during the war, with the mandate defined by the ordinary law. [38]

New constitutional model of governance needs effective and systemic legislative changes to ensure effective coordination, cooperation and communication of national security sector institutions.

Decision of use of military units during the Tbilisi Flood of June 2014, demonstrated legislative and systemic problems. According to the Georgian legislation[39][40] the ecological catastrophe is one of the

mistakes. Nonetheless of existence of constitutional basis, the state of emergency was not declared in Tbilisi.Instead of loimitation of movement in the the epicenter of disaster, the representatives of government and the Security and Crises Management Council were just asking people forbear movement on this territory. During this crisis, lack of coordinated dissemination of verified information was attractive – people and even police were seeking wolverines on the whole territory of Georgia. It has to be remembered, unfortunately, that in the epicenter of disaster, where the rescues and military units were concentrated and movement was not limited, the man died with the attack of tiger just after 3-rd day of flood. These issues are subject of investigation, but analysis of mistakes is also important for evaluation of the system of security assurance and crises management.

30 Decree of the Government of Georgia №38 on Creation of the Council of State Security and Crises Management and Adoption of its Chapter, Legislative Herald of Georgia, <www.matsne.gov.ge>, 06/01/2014.

31 Law of Georgia on Security Policy Planning and Coordination, Legislative Herald of Georgia, <www.matsne.gov.ge>, 04/03/2015.

32 Law of Georgia on the Structure, Competence and Procedures of the Government of Georgia, Legislative Herald of Georgia, 3, 11/02/2004. Article 29.

33 Georgia's Security Sector Review Project, Final Report, Atlantic Council of Georgia, Tbilisi, 2014, 45-48, 51-54, (in Georgian).

34 *Vashakmadze M.,* The Legal Framework of Security Sector Governance in Georgia, DCAF, Geneva, 2016, 13.

35 Law of Georgia on the Changes to the Law of Georgia on Security Policy Planning and Coordination, Legislative Herald of Georgia, <www.matsne.gov.ge>, 07/12/2017.

36 Constitutional Law of Georgia on the Changes to the Constitution of Georgia, Legislative Herald of Georgia, <www.matsne.gov.ge>, 13/10/2017.

37 Ibid, article 73.

38 Till the autumn of 2018, when new Constitution will be enacted, the National Security Council is permanent organ of security coordination and its competences are defined by the organic law.

39 Constitution of Georgia, Herald of the Parliament of Georgia, 31-33, 24/08/1995. Article 73.1.h.

40 Law of Georgia on the State of Emergency, Herald of the Parliament of Georgia, 44, 17/10/1997. Article 1.

basis for declaration of state of emergency. During the state of emergency, use of military forces is permitted by the decision of the President of Georgia and consent of the Parliament of Georgia.[41] On the territory of natural calamity or the flood, where the life or health of people, plants or animals are threatened, the threat is evaluated as ecological catastrophe[42] and the state of emergency is declared.[43] All mentioned signs existed for qualification as ecological catastrophe of Tbilisi Flood of 13-14 June of 2014 and declaration of state of emergency.

During the Tbilisi Flood the President of Georgia doesn't declared the state of emergency. Though, by the decision of the President and with consent of the Parliament of Georgia, the military units were used for elimination of consequencies of natural calamity.

Considering that the decree of the President of Georgia as the Supremme Commander of Military Forces is not public document and in the resolution[44] of the Parliament of Georgia is not mentioned a law or a qualification of situation, which served as basis for use of military units, presumable, the decision about the use of military forces without declaration of state of emergency, was made on the base of Civil Safety Law (hereinafter referred as civil safety law).

In tbe civil safety law[45] the term "Ecological catastrophe" is not defined, it is indication of the terms "Natural calamity" and "Catastrophe".[46] Definition of the term "Catastrophe" is not defined in the civil safety law or in other laws. According to the civil safety law on the territory of catastrophe or natural calamity where the life or health of people is threatened, is defined as an emergency situation.[47] It is important to remember that the qualification of concrete situation as an emergency situation doesn't require making decision by the Government of Georgia or by the President of Georgia. This is a threat of subjective and nontransparent decisions and mistakes. Moreover, during the emergency situation use of military units is permitted by the civil safety law.[48] According to the civil safety law, one of the sign for emergency situation is "natural calamity".[49]

Flood which is threating to the life or health of people is defined as "natural calamity" by the Law of Water.[50] According to the Law on the State of Emergency,[51] ntural calamity is one of the basis for declaration of the state of emergency. While, this situation is named as emergency situation in the civil safety law,[52] which doesn't require making decision.

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41 Law of Georgia on the State of Emergency, Herald of the Parliament of Georgia, 44, 17/10/1997. article 9.

42 Law of Georgia on Water, Herald of the Parliament of Georgia, 44, 16/10/1997. Articles 25.2.a, 26.2.d, 29.

43 Law of Georgia on Protection of Environment, Herald of the Parliament of Georgia, 44, 10/12/1996. Article 42.

44 Resolution of the Parliament of Georgia on the Approval of Orders of the President – Supreme Military Commander of Georgia on Use of Armed Forces for Reaction on Emergency Situation of June 14, 2015, №2, of June 14, 2015, №3 and June 16, 2015 №4, Legislative Herald of Georgia, <www.matsne.gov.ge>, 16/06/2015.

45 Law of Georgia on Civil Safety, Legislative Herald of Georgia, <www.matsne.gov.ge>, 29/05/2014.

46 Ibid, article 5.2.

47 Ibid.

48 Ibid, article 15.3.

49 Ibid, article 5.2.

50 Law of Georgia on Water, Herald of the Parliament of Georgia, 44, 16/10/1997. Article 26.3.d.

51 Law of Georgia on the State of Emergency, Herald of the Parliament of Georgia, 44, 17/10/1997. Article 1.

52 Law of Georgia on Civil Safety, Legislative Herald of Georgia, <www.matsne.gov.ge>, 29/05/2014. Article 5.2.

Nevertheless mentioned contradictions the Tbilisi Flood had marks of ecological catastrophe and also natural calamity. This meants that the basis for declaration of the state of emergency existed. For security assurance and legitimacy of oversight, limitation of use of military units by the existence of concrete facts, their evaluation and argumented decisions is very important. Accordingly, use of the military forces internally is permitted only during the state of war or the state of emergency.

Development of legal basis of national security assurance coordination system and other gaps will be demonstrated on the important examples, described in the next chapters.

2.1. State Security and Crises Management Council

In the conditions of new constitutional model of governance, rethinking of national security system is critically important. By the decree №38 of January 6 of 2014 of the Government of Georgia (hereinafter referred as 38th decree) in the system of executive power were created the new structures of security coordination and crises management: (a) the State Security and Crises Management Council, (b) the staff of the State Security and Crises Management Council, (c) the Operative Center of Management of Crises Situations. It was ineffective and lawless action of reflection of new security competence (function) in the system of Govergment of Georgia.[53]

In the new constitutional model of governance as a result of decrease of competences of the President of Georgia, big part of competences delivered to the Government of Georgia, collective institution (an not to the Prime-Minister). Therefore, the Government of Georgia acquired new function in the new security architecture. Execution of new function required new, effective and correctly operated system and mechanism. Realization of the State Security and Crises Management Council by the 38th decree as a consultative advisory to the Prime-Minister was mistake.[54] “Elaborates recommendations and the Prime-Minister decides” – is mentioned in the chapter of the State Security and Crises Management Council.[55]

Considering the constitutional competences, the Prime-Minister’s decisions on the security issues has to be defined by the appropriate normative act. According to the Law on Normative Acts (hereinafter referred as the normative acts law) the Prime-Minister has no right to issue of normative act. The Prime-Minister is not named in the hierarchy of the institutions with the competence to issue normative acts.[56] According to the Constitution of Georgia the Prime-Minister’s competence is limited to issue only

[53] Ineffectiveness of this, security and crises management system was confirmed by the Prime-Minister of Georgia in December of 2017 and by the initiative the Government, the Parliament adopted the changes to the “Law of Georgia on the structure, competence and procedures of the Government of Georgia” and “Law on security policy planning and coordination”, this resulted the abolition of the Security and Crises Management Council.

[54] Law of Georgia on the Structure, Competence and Procedures of the Government of Georgia, Legislative Herald of Georgia, 3, 11/02/2004. Article 29.

[55] Decree of the Government of Georgia №38 on Creation of the Council of State Security and Crises Management and Adoption of its Chapter, Legislative Herald of Georgia, <www.matsne.gov.ge>, 06/01/2014. Articles 2.h and 4.5.

[56] Law of Georgia on Normative Acts, Legislative Herald of Georgia, 33, 22/10/2009. Articles 8-14.

administrative acts.[57] The Constitution of Georgia does't define exclusive competence to the Prime-Minister in the security sphere, such an institution is the Government of Georgia. Limitation of Prime-Minister's competence significaltly narrows and reduces his/her legal competence not only in security sphere but generally in the governance. Nevertheless high political legitimacy[58], legal competence of governance is limited by the competence of collective institution, the Government of Georgia. Accordingly, in the national security assurance system the central institution is the government.

By the chapter[59] of the State Security and Crises Management Council (approved by the 38th decree) the council was composed by the members of the government. The Government of Georgia is accountable to the Parliament of Georgia[60,61], contrary, by the chapter[62] of the Council (members of government, ministers) the Council is accountable to the Prime-Minister. By this definition of the decree, the Government's accountability to the high legislative institution in the security issues was ignored. Therefore, there was no effective parliamentary oversight on the security assurance coordination.

Based on the decree of the Government, the State Security and Crises Management Council existed bit more of one year. In March 4 of 2015 the Parliament of Georgia passed the law on National Security Policy Planning and Coordination (hereinafter referred as security coordination law). This fact is important because the system of security and crises acquired high legitimacy, based on the law. Furthermore, adoption of the law gave the Parliament the mechanism of control of security system's effectiveness. By the Constitution of Georgia and Regulation of the Parliament[63] the competence of the Parliament is a control of execution of the laws, also making changes to the laws.[64] Therefore, by the adoption of the law the Parliament acquired the mechanism of control over the Government of Georgia in the sphere of natonal security assurance coordination.

According to the security coordination law, the State Security and Crises Management Council[65] is formed with the mandate of preparation of the Prime-Minister's political decisions related to the national

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[57] Constitution of Georgia, Herald of the Parliament of Georgia, 31-33, 24/08/1995. Article 79.4.

[58] Demonstration is the leading role of the Prime-Minister in the process of formation of government. Formation of the Cabinet and governmental program, is exclusive competence of Prime-Minister. The parliament approves confidence to the Prime-Minister, his/her program and team.

[59] Decree of the Government of Georgia №38 on Creation of the Council of State Security and Crises Management and Adoption of its Chapter, Legislative Herald of Georgia, <www.matsne.gov.ge>, 06/01/2014. Article 1.

[60] Constitution of Georgia, Herald of the Parliament of Georgia, 31-33, 24/08/1995. Articles 78.1.

[61] Law of Georgia on the Structure, Competence and Procedures of the Government of Georgia, Legislative Herald of Georgia, 3, 11/02/2004. Article 1.

[62] Decree of the Government of Georgia №38 on Creation of the Council of State Security and Crises Management and Adoption of its Chapter, Legislative Herald of Georgia, <www.matsne.gov.ge>, 06/01/2014. Article 3.5.

[63] Regulation of the Parliament of Georgia, Legislative Herald of Georgia, <www.matsne.gov.ge>, 03/07/2012. Articles 16, 43, 235.

[64] Constitution of Georgia, Herald of the Parliament of Georgia, 31-33, 24/08/1995. Article 48.

[65] Permanent Members of State Security and Crises Management Council are: The Prime-Minister, Minister of Finances, Minister of Internal Affairs, Minister of Defence, Minister of Foreign Affairs, Chief of State Security Service, Chairman of State Security and Crises Management Council – security issues assistant to the Prime-Minister.

security, strategic issues of internal and external policy, defence, stability and order, also all types of crises situation management. Vague mandate of the State Security and Crises Management Council influenced the sustainability, effectiveness and decisiveness of the security and crises management system. [66]

The only competence of making decisions on the issues of the mandate of the Government is under the Government of Georgia and delegation of this competence to other institution is prohibited. Furthermore, the content of political decisions of the Prime-Minister was unclear. While constitutionally the Prime-Minister is a leader among the equals of the collective institution and not sole decision maker.

According to the security coordination law the State Security and Crises Management Council was responsible for coordination of security assurance and crises management inside the executive power, for evaluation of internal and external threats and its prevention, also for a management of the crises situations on the political level. [67]

Nonetheless of the progress reached by the adoption of security coordination law and subordination of security issues of exetutive to the legislative regulation, potential of weakening of parliamentary control and expanding a mandate of the council was stipulated in the following sentence of security coordination law: exercise other authorities assigned by the Georgian legislation. [68] By the normative acts law[69], the term "Georgian legislation" has concrete contnetnt da it covers the laws and bylaws. Therefore, mentioned sentence of the security coordination law gives possibility to expand a competence of the State Security and Crises Management Council by the governmental decree or other bylaw. This meant a decrease of controlling competence of the Parliament of Georgia over the Government of Georgia.

According to the security coordination law[70] the State Security and Crises Coordination Council was a consultative institution and accountable[71] to the Prime-Minister of Georgia. Anticonstitutional concept of 38th decree which doesn't consider an accountability of the Government of Georgia to the Parliament of Georgia in the security assurance coordination, was shared by the legislative institution and remained till the 2018.

According to the security coordination law[72] the State Security and Crises Coordination Council elaborates recommendations for the Prime-Minister. As mentioned, the Prime-Minister has no a right to issue normative acts and has no any personal competences in the sphere of security assurance coordination. Besides the contradiction to the Constitution and the law, this mechanism was wrongful by the practical means. After the discussions of security related issues by the State Security and Crises Coordination

66 Law of Georgia on Security Policy Planning and Coordination, Legislative Herald of Georgia, <www.matsne.gov.ge>, 04/03/2015.Article 20.1.
67 Ibid, article 21.
68 Ibid, article 21.m.
69 Law of Georgia on Normative Acts, Legislative Herald of Georgia, 33, 22/10/2009. Article 7.1.
70 Law of Georgia on Security Policy Planning and Coordination, Legislative Herald of Georgia, <www.matsne.gov.ge>, 04/03/2015. Article 20.2.
71 Ibid, article 22.
72 Law of Georgia on Security Policy Planning and Coordination, Legislative Herald of Georgia, <www.matsne.gov.ge>, 04/03/2015. article 23.5.

Council, not the Prime-Minister nor the Council itself has a competence to make decision. Therefore, the Prime-Minister was obliged to initiate a session of the Government of Georgia and discuss again the same, security related issues and make decision. It is not effective and operative mechanism of governance.

The need of formats of national security coordination should be considered systematically. The collective institution, Government of Georgia doesn't need advisory structure consisting its own members – the members of Government interact on the meeting of the Government or by other formats (thematic councils and comissions). The President needs advisory format, because in the new constitutional model of governance the Government of Georgia is out of his control. The President institutionally is not collective organ, therefore for decision-making he needs consultative format for interaction with the Government.

Therefore, there was no a need to have the State Security and Crises Management Council inside the executive system. But the need of staff, equipped with special functions and enough capacity, was clear.[73][74]

As a conclusion, analysis of experience and examples after the period of an enactment of new constitutional model of governance, demonstrates the problems of national security assurance coordination, accountability and parliamentary oversight.

2.2. National Security Council of Georgia

The National Security Council of Georgia is advisory, constitutional institution[75] of the President of Georgia. The mandate of the Council is defined by the Constitution of Georgia and the Organic Law on National Security Council (hereinafter referred as Security Council law).[76]

In the new constitutional model of governenace the sphere of competences of the President of Georgia has significaltly decreased, but as the Head of State and the Supreme Commander still preserves authority in spheres of the security planning and assurance. The President as a sole decision-maker which is separated from the executive, needs advisory format for interaction with the Parliament and the Government. Exact and only format is the National Security Council of Georgia, for discussion of issues of preparation of decisions on the supreme level.

Appearing from the competences of the President of Georgia, the National Security Council discusses the issues of military building and defence organization, declaration and management of state of war and state of emergency, appointment and dismissal of the management of military forces.[77]

The competence of the National Security Council is limited by the constitutional competences of the President of Georgia and by the organic law.

Same as in the case of the State Security and Crises Management Council, definition of the mandate of the National Security Council by the law is a tool to keep the Council accountable and ensure parliamentary oversight. Adoption of law, making changes in the laws and the control of execution of the laws is broadly spread classic mechanism of parliamentary control and accountability of public institutions.

73 Georgia's Security Sector Review Project,Final Report, Atlantic Council of Georgia, Tbilisi, 2014, 54 (in Georgian).

74 *Vashakmadze M.,* The Legal Framework of Security Sector Governance in Georgia, DCAF, Geneva, 2016, 13.

75 Constitution of Georgia, Herald of the Parliament of Georgia, 31-33, 24/08/1995. Article 99.

76 Organic Law of Georgia on National Security Council, Legislative Herald of Georgia, 33, 11/11/2004.

77 Ibid, article 2.

Changes of 2015 to the Security Council Law increased a parliamentary participation[78] in the National Security Council. The members of the National Security Council are: Prime-Minister of Georgia, Chairman of the Parliament of Georgia, Minister of Foreign Affairs of Georgia, Minister of Defence, Minister of Internal Affairs, Chairman of the Parliamentary Committee on Defence and Security, Chairman of the Parliamentary Committee on Foreign Affairs, Chief of State Security Service, Chairman of the National Security Council, Chief of Staff of the Military Forces. The President, as the head of state and supreme commander is not a member of the Council, but the President leads the Council.[79] Interested analysts indicate on the positive decision of rise of number of the members of parliament. It is indication of rise of accountability and parliamentary oversight over the national security policy.[80]

Holding two formats[81] responsible for national security coordination, without clear separation of competence[82], had a potential of parallelism and management conflicts.[83] As mentioned, practical indication was the case of management of crisis situation during the Tbilisi Flood of 13-14 June of 2015. In this case the meetings of responsible councils were not held, while the necessity of operative decisions and coordination of activities of different institutions existed. Considerable, that by the decision of the President and by the consent of the Parliament the military units were used[84]. While the question of declatarion of state of emergency on the territory of Tbilisi Flood was not discussed by the National Security Council nor by the State Security and Crises Managemnt Council.

In the new constitutional model of governance, the communication in decision-making process among the President and the Government is problematic. The Constitution[85] gives concrete list of decisions of the President of Georgia, which does not need a consent, contrassignation by the Prime-Minister of Georgia. All other decisions of the President of Georgia needs a contrassignation. Security-related important issue of declaration of state of emergency needs a contrassignation of the Prime-Minister. Accordingly, the responsibility[86] on this jount decision of the President of Georgia and the Prime-Minister relays on the Government of Georgia, while this collective organ never discussed this decision and gave consent.

We conclude that limited mandate of the National Security Council and contradictory mechanism of contrassignation significantly decreases a potential of operative decisions on the high political level, the consensus and division of responsibilities among the President of Georgia and the Government of Georgia. Solution of the problems may be adoption of the law defining effective mechanisms of

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78 Ibid, article 3.

79 Constitution of Georgia, Herald of the Parliament of Georgia, 31-33, 24/08/1995. Article 99.2.

80 *Vashakmadze M.,* The Legal Framework of Security Sector Governance in Georgia, DCAF, Geneva, 2016, 13.

81 The National Security Council and the Security and Crises Management Council

82 Georgia's Security Sector Review Project,Final Report, Atlantic Council of Georgia, Tbilisi, 2014, 49, 51 (in Georgian).

83 *Vashakmadze M.,* The Legal Framework of Security Sector Governance in Georgia, DCAF, Geneva, 2016, 13.

84 Resolution of the Parliament of Georgia on the Approval of Orders of the President – Supreme Military Commander of Georgia on Use of Armed Forces for Reaction on Emergency Situation of June 14, 2015, №2, of June 14, 2015, №3 and June 16, 2015 №4, Legislative Herald of Georgia, <www.matsne.gov.ge>, 16/06/2015.

85 Constitution of Georgia, Herald of the Parliament of Georgia, 31-33, 24/08/1995. Article 73[1].

86 Ibid, article 73[1].6.

communication between the President of Georgia and the Government of Georgia in the decision-making process in the format of the national Security Council.

3. Institutions of National Security System and their Accountability

One of the main objective of modern states is establishment of democratically functioning effective institutions of national security assurance and their accountability. Development of democratically functioning institutions of national security assurance and system of accountability is dependent on the history, constitutional and legal system, experience of statehood, democracy traditions and political culture.[87]

Reform of national security agencies and creation of democratically functioning security assurance institutions is facing difficulties in the countries of transitional democracy. In these countries before the reforms the objective of special services was protection of authoritarian leaders from the people.[88] Transformation of national security assurance institutions from repressive to modern democratic mechanisms requires huge effort of states and public inclusiveness.[89]

Reform of national security assurance system would not be successful without a right and consecutive legislative base. Security assurance institutions and their activities are legitimate when their power doesn't exceed the mandate defined by the law.[90] Contradictions or obscurity of legislative basis enhances the risks of going beyond the legal framework and illegal activities of national security assurance institutions.

A role of parliament as a legislator and as a supreme constitutional organ overseeing of activities of national security assurance institutions is vital. Consequently the quality of responsibility of the parliament is important.

Last 20 year a reform of national security assurance system and institutions is important for Georgia. On the different stages of reform, impressive success and mistakes occurred in the development of different institutions. Analysis of actual issues of legal framework of Georgia's national security organization and accountability will benefit to improvement of the system and legislation.

3.1. Ministry of Internal Affairs of Georgia

Ministry of Internal Affairs of Georgia is powerful institution of security system equipped with a wide range of authority. Starting from the 2000th the process of reformation of the Ministry of Internal Affairson on its initial stage was limited on insignificant changes.[91] Systemic and wide-scall reforms

[87] *Born H,. Leigh I.,* Making Intelligence Accountable: Legal Standards and Best Practice for Oversight of Intelligence Agencies, Oslo, 2005, 3, 17.

[88] Ibid*,* 16.

[89] *Vashakmadze M.,* The Legal Framework of Security Sector Governance in Georgia, DCAF, Geneva, 2016, 3.

[90] *Born H,. Leigh I.,* Making Intelligence Accountable: Legal Standards and Best Practice for Oversight of Intelligence Agencies, Oslo, 2005, 3, 18.

[91] *Marat E.,* Reforming the Police in post-Soviet States: Georgia and Kyryzstan, U.S. Army War College (USAWC) Press, Carlisle, Pennsylvania, 2013, 12.

started after the Rose Revolution. The process of reform was conducted without public debates and with nominal inclusion of the Parliament.The reform of the Ministry of Internal Affairs was directed by the decisions of the President and Minister of Internal Affairs. This has negatively influenced on the accountability and parliamentary oversight of the Ministry of Internal Affairs.[92]

Seccessful result of the reform of Ministry of Internal Affairs was creation of patrol police, open institution oriented on public interests which has wide public confidence. Together with success, the reform has negative developments – based on the constitutional amendments[93] of 2004th, the Ministry of Internal Affairs and Ministry of Security were united. Unification of police and special secret functions in one institute, with uneffective parliamentary oversight, resulted human rights violations, that was demonstration of systemic mismanagement. [94]

Starting from the 2013, objective of first stage of reform of the Ministry of Internal Affairs was depolitization of system[95], following division of the State Secutity Service from the Ministry of Internal Affairs in 2015. [96],[97]

In the wide variety of functions inside of the Ministry of Internal Affairs, different and controversial mechanisms of accountability and oversight exist.

By the Law of Police[98], the Law of Intelligence Activities (hereinafter referred as intelligence law) [99], the Law on State Border[100] and by the chapter[101] of the Ministry of Internal Affairs in the competence of the Ministry of Internal Affaitrs is assigned issues of operative, intelligence, investigative and police activities, border protection, migration, fighting trafficking, state material reserves, fire and rescue services. The Ministry of Internal Affairs is main and directive institution in the coordination of such an important direction as crime prevention and investigation, fighting trafficking, border protection.

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92 *Marat E.,* Reforming the Police in post-Soviet States: Georgia and Kyryzstan, U.S. Army War College (USAWC) Press, Carlisle, Pennsylvania, 2013, 11.

93 Constitutional Law of Georgia on the Changes to the Constitution of Georgia, Legislative Herald of Georgia, 2, 06/02/2004.

94 *Hammarberg T.,* Preliminary Advice, Dealing with Illegal Surveillance Material. EU Special Adviser on Legal and Constitutional Reform and Human Rights in Georgia, 2013, 9. <https://www.transparency.ge/sites/default/files/post_attachments/Dealing%20with%20illegal%20surveillance%20material.pdf >; *Hammarberg T.,* Georgia in Transition, Report on the Human Rights Dimension: Background, Steps Taken and Remaining Challenges, 2013, 24-25. <http://eeas.europa.eu/archives/delegations/georgia/documents/human_rights_2012/20130920_report_en.pdf>

95 *Marat E.,* Reforming the Police in post-Soviet States: Georgia and Kyryzstan, U.S. Army War College (USAWC) Press, Carlisle, Pennsylvania, 2013, 12.

96 *Vashakmadze M.,* The Legal Framework of Security Sector Governance in Georgia, DCAF, Geneva, 2016, 23.

97 Law of Georgia on the State Security Service of Georgia, Legislative Herald of Georgia, <www.matsne.gov.ge>, 08/07/2015.

98 Law of Georgia on Police, Legislative Herald of Georgia, <www.matsne.gov.ge>, 04/10/2013. Articles 16 and 17.

99 Law of Georgia on Intelligence Activities, Legislative Herald of Georgia, 24, 27/04/2010. Articles 2, 7 and 8.

100 Law of Georgia on the State Border, Republic of Georgia, 198, 17/07/1998. Articles 13, 15, 25 and 32.

101 Decree of the Government of Georgia №337 on Adoption of Chapter of the Ministry of Internal Affairs of Georgia, Legislative Herald of Georgia, <www.matsne.gov.ge>, 13/12/2013. Articles 3 and 4.

The competence of the Ministry of Internal Affairs covers the intelligence activities and in this field it is subordinated to the main institution of intelligence system – the regulations[102] of the Intelligence Service. Such a systemic controversy results an ineffective management and low quality of accountability.

According to the Law on Intelligence Service[103] the Intelligence Service is independent and subordinated to the Prime-Minister, whereas the units of the Ministry of Internal Affairs with intelligence functions (such as border police, security police department, department of special assignments) is subordinated to the Minister of Internal Affairs and to the Intelligence Service, simultaneously. Without clear division of competences, accountability of units having intelligence functions at the Ministry of Internal Affairs is ineffective and opaque, which results the risks of human rights violations.

In the intelligence law is mentioned that on the institutions of intelligence system (including the Ministry of Internal Affairs) parliamentary oversight is conducted by the Parliamentary Committee on Defence and Security.[104] But there is no clear regulation of concrete mechanisms of parliamentary control over the intelligence activities. Such a mechanisms shoud incorporate the specific of intelligence activities and information and which will be different from the traditional oversight mechanisms. The problem of parliamentary control could not be solved by the term of the intelligence law defining that the forms of parliamentary control is defined by **"the legislation of Georgia"**. As mentioned, the term legislation of Georgia is problematic for definition of mandate of the institutions of security sector and their accountability. The term "the legislation of Georgia" covers the laws and bylaws, or governmental decrees. Therefore it is possible to establish different, diminishing standards of accountability and control. The parliamentary control is main constitutional function which should be regulated by the concrete law.

Intelligence law does not consider the possibilities of prosecutors or judiciary control[105] over the Ministry of Internal Affairs as an institution with intelligence competence. Considering the secret nature of intelligence activities, wich results human rights limitation, nominal accountability and nonexistence of effective mechanisms of parliamentary control and prosecutors or judiciary oversight, enhances the possibility of exaggeration of mandate and unsanctioned invasion in the protected sphere of human rights.

Based on the analysis of regulations of system of the Ministry of Internal Affairs, we conclude the weakeness of accountability and parliamentary control over the intelligence activities of the Ministry of Internal Affairs. Only and weak mechanism of parliamentary control remains the control by the Group of Confidence of the Parliament of Georgia.

3.2. State Security Service of Georgia

In the Constitution of Georgia existed the provision prohibiting unification of military, police and state security service institutions and functions. "The armed forces, state security forces, and the police shall not be united" was mentioned in the Article 78 and this regulation was in force till the February of

[102] Law of Georgia on Intelligence Activities, Legislative Herald of Georgia, 24, 27/04/2010. Article 9.
[103] Law of Georgia on the Intelligence Service of Georgia, Legislative Herald of Georgia, 24, 27/04/2010. Article 2.
[104] Law of Georgia on Intelligence Activities, Legislative Herald of Georgia, 24, 27/04/2010. Article 16.
[105] Law of Georgia on Intelligence Activities, Legislative Herald of Georgia, 24, 27/04/2010. articles 15 and 16.

2004.[106] After the Constitutional changes, extraction of this provision gave possibility unify police and state security functions in one institution, the Ministry of Internal Affairs. This decision was criticized by tne international and local organisations. The Government and the Parliament were forced for rational compromise and in 2015 the Ministry of Internal Affairs was divided institutionally: the Ministry of Internal Affairs remained as police and investigative institution with limited intelligence and operative functions, and the State Security Service was formed as an independent special counterintelligence and investigative agency in the system of the Government of Georgia.[107]

The law on state security service of Georgia (hereinafter referred as security service law)[108], was adopted in the July 8 of 2015. Security assurance, fighting terrorism, transnational crime and corruption, protection of state secrecy were defined as main directions of the State Security Service by the security service law.

According to the Law on the counterintelligence activities (hereinafter referred as counterintelligence law) in the competence of the Department of Counterintelligence of the State Security Service, was assigned the organization of counterintelligence activities and coordination of special services (including Department of Intelligence, also the units of the Ministry of Internal Affairs and the mInistry of Defence)[109]. The special units of the Ministry of Internal Affairs and the Ministry of Defence are accountable to the State Security Service.

Different provisions of several laws creates the possibility the legitimacy of activities of the State Security Service to get beyond the legislative framework. Counterintelligence activities: secret audio-video-photo taping, use of secret tv cameras or other electronic devices don't need the court order. By the counterintelligence law in the judiciary control is defined only electronic surveillance and control of the postal correspondence. It should be underlined that this provision of the counterintelligence law covers activities not only of the State Security Service, but on all structures with the counterintelligence competence, including the Ministry of Internal Affairs and the Ministry of Defence. Under the counterintelligence law activities of the counterintelligence services (including the State Security Service) are not a subject of prosecution oversight. In the conditions, when the investigative and special competences are not separated and remain in one institution, the State Security Service, without effective mechanisms of accountability, governmental control, parliamentary, judicial and prosecution oversight, it is possible the concrete activities of the State Security Service or its personnel to get beyond the competence defined by the law and this may become systemic problem.

Attempt of creation the State Security Service as independent institution accountable to the high representative organ is given in the security service law. The law defined new procedure of appointment of the chief of the State Security Service, which ensures morfe inclusiveness of the Parliament.

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[106] Constitutional Law of Georgia on the Changes to the Constitution of Georgia, Legislative Herald of Georgia, 2, 06/02/2004.

[107] *Vashakmadze M.,* The Legal Framework of Security Sector Governance in Georgia, DCAF, Geneva, 2016, 10.

[108] Law of Georgia on the State Security Service of Georgia, Legislative Herald of Georgia, <www.matsne.gov.ge>, 08/07/2015. Articles 5 and 12.

[109] Law of Georgia on Counterintelligence Activities, Legislative Herald of Georgia, 49, 11/11/2005. Article 7.

According to the security service law[110], the chief of the State Security Service in nominated by the Prime-Minister for a consent of the Government. After the governmental support the candidate is presented to the parliament for approval. The parliamentary decision on the approval of the candidate of the State Security Service is made by the majority of MP's. At the final stage, having a parliamentary approval the candidate of the chairman of the State Security Service is assigned on the position.

In terms of enhancement of accopuntability of the State Security Service, it is important to remember the declaration of the security service law that the Chairman of the State Security Service is accountable and responsible to the Parliament.[111] Herewith, once a year the chairman reports to the parliament and it may continued by the motion of no confidence initiated by the one-third MPs. Regardless of improved mechanism of personal accountability and responsibility of the chairman, institutional accountability remains problematic. According to the security service law the State Security Service is accountable to the Government of Georgia. [112] In comparison of clear and concrete mechanism of personal accountability of the chairman, institutional accountability remains ambiguous and mostly points on the accountability to the government.

Concrete and clear legislative regulation of the security assurance system has particular importance for parliamentary oversight on this system. Competences of the State Security Service besides the law are defined by the bylaw, decree of the government. By the decrees[113][114] of the Government of Georgia all public institutions, special services together with other institutions are obliged to deliver instantly to the Counterintelligence Department of the State Security Service all and full information defined by "the nformational assurance directory of integrated counterintelligence activities". Herewith, in case of the request of the Counterintelligence Department, institutions are obliged instantly deliver additional and full information.

Due to the fact this competence of the Counterintelligence Department of the State Security Service is out of effective control of the prosecution and juriciary, this provision contradicts to the principles of freedom of information, personal, commercial and professional privacy, together with fundamental principles of non interference in private life, declared by the international acts and the Constitution of Georgia. According to the articles of 25 and 27 of the counterintelligence law, the subject of juriciary or prosecution control is only operative-technical activities. The activities defined in the Decrees of the Government are not operative-technic, therefore they are out of the control.

Limitation of the constitutional rights is permitted only by the law and participation of judiciary. In discussed case the Decree of the Government is not a law, parliamentary act. Therefore it is possible

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110 Law of Georgia on the State Security Service of Georgia, Legislative Herald of Georgia, <www.matsne.gov.ge>, 08/07/2015. Articles 7 and 9.

111 Ibid*,* article 9.

112 Ibid*,* article 46.

113 Decree of the Government of Georgia №343 on the procedures of share of information among institutions conducting counterintelligence activities and other state institutions as consequence of objective of state security assurance and management of information database, Legislative Herald of Georgia, <www.matsne.gov.ge>, 17/12/2013.

114 Decree of the Government of Georgia №344 on organization of unified counterintelligence activities and coordination of special services activities, Legislative Herald of Georgia, <www.matsne.gov.ge>, 17/12/2013.

anticonstitutional interferrence in the private, professional or commercial activities without a control of the judiciary.

In the "informational assurance directory of integrated counterintelligence activities", approved by the №343 decree of the Government of Georgia, are formulated some contradictory or dubious provisions. "Information of the marks of espionage, information of entry in foreign military service of citizens of Georgia, data about cooperation with separatists" – could not be understood similarly by the servants of the regional branches of the Ministry of Evnironment and Natural Resources, the Civil Registry and municipalities and the Counterintelligence Department. Herewith, we have to remember that the dual citizenship is guaranteed by the Constitution of Georgia. Accordingly, carrying military duty in his initial country of citizenship may serve as a base for limitations of his rights as the citizen of Georgia. In the Georgian legislation there is no definition of the term "separatist", therefore there is a possibility of wide interpretation (i.e. not only administrative institutions of occupied territories, but also the community or youth unions of citizens living there). It may result a limitation of the rights of the citizens of Georgia and foreigners living on the territory of Georgia.

As conclusion, it has to be identified as progress related to: a) the division of the State Security Service from the Ministry of Internal Affairs, b) rise a role of the Parliament of Georgia in the process of assignment and dismissal of the chief of the State Security Service. Together with progress, creation of due and legitimate system of special services with parliamentary or judicial oversight has to be put in the agenda of parliamentary discussions. Institutionally, remains actual, the problem of division of investigative and special services. Considering modern state of development, will be advisable separation of investigative function from the State Security Service.

3.3. Intelligence Service of Georgia

The Intelligence Service of Georgia conducts Intelligence and counterintelligence activities internally and outside of the territory of Georgia. [115] Also, The Intelligence Service is the main institution responsible for intelligence system coordination. The Intelligence Service is important part of the antiterrorism system.[116]

Based on the National Security Concept, the Intelligence Service elaborates national intelligence program. The national intelligence program defines the objectives, directions and priorities of intelligence activities and it is approved by the Prime-Minister.

According to the intelligence law oversight over the intelligence system is competence of the Prime-Minister. It means that oversight on all institutions (including the Ministry of Internal Affairs and the Ministry of Defence) is exclusive competence of Prime-Minister, but not the Government. In the new constitutional model of governance by the decrease of the competences of the President, the Government become stronger. Therefore, elaborating the mechanisms of oversight the institutional role of the Government should be strengthened. Actual situation has to be considered also, in terms of existence of

[115] Law of Georgia on the Intelligence Service of Georgia, Legislative Herald of Georgia, 24, 27/04/2010. Article 3.

[116] Law of Georgia on Fighting Terrorism, Legislative Herald of Georgia, 26, 27/06/2007. Articles 4 and 5.

resources and capacity. The Chancellery of the Government is only structure supporting the Prime-Ministers activities. The Cahcellery legally, administratively and practically is unable to take important function of effective control over the institutions of intelligence system.

Discussed in the previous chapters, the weakness of parliamentary, prosecutors and judicial control is characteristic for intelligence system and the Intelligence Service also. Additionally, according to the intelligence law the methods, tactics and organization of acqiring intelligence data is not a subject of of prosecutors oversight. It may have a meaning that use of force or other violences in the process of asquiring information may stay out of the effective control, also information acquired illegally will be used by the special services or investigative organs. This is not a democratic standard. Similar provisions of this law, intelligence law and counterintelligence law has important threats. Change of contradictory provisions and approximation to the democratic standards should be a subject of special discussions.

In the conditions of lack of clear and consistent legal base of competences, control and accountability of institutions of intelligence system the risk of violation of the framework defined by the law or vague competence. It turns intelligence services and activities illegitimate. [117]

For the control of the national security system of Georgia special importance has the case[118] and its results, which is under the discussion of the Counstitutional Court of Georgia. Authors of the constitutional appeal, human rights activists complying that under the counterintelligence law in the framework of counterintelligence activities without judge's permit may be executed:

a) Secret video-audio and photo taping, use of tv cameras and other electronic devices of surveillance,

b) Electronic surveillance (including phone and other communications surveillance) with consent of only one party of communication.

According to the plaintiffs, execution of these activities without judiciary control, contradicts to the Article 16 (Freedom of personal develompment), Article 20 (Privacy of Personal life) and Article 42 (Fair trial). The plaintiffs are requiring revision of constitutionality of articles 11.2. and 15 of counterintelligence law corresponding to the mentioned articles of the Constitution of Georgia. Appeal to the Constitutional Court of Georgia is demonstration of inclusiveness of civil society in the democratic-civilian control over the security sector of Georgia. Before the constitutional appeal, this issues were alanysed by the Atlantic Council of Georgia, in its Report of the Georgian Security Sector Review of 2014. In the Report, special attention is paid on the problem of nonexistence of effective judiciary, prosecution and parliamentary control of counterintelligence, secret activities. [119]

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[117] *Born H., Wills A.* (*eds.*), Overseeing Intelligence Services, Geneva, 2012, 25.

[118] Constitutional Appeal №690 (Plaintiffs – Sophiko Verdzeuli, Guram Imnadze, Human Rights Education and Training Centre – EMC, Defendant – The Parliament of Georgia. Subject of litigation: Paragraph 2 of Article 11, "a", "b", "c" and "d" subparagraphs of paragraph 2 of Article 9 and First paragraph of Article 15 of the Law on Counterintelligence Activities").

[119] Georgia's Security Sector Review Project,Final Report, Atlantic Council of Georgia, Tbilisi, 2014, 56, 59, 63 (in Georgian).

3.4. Ministry of Defence of Georgia

Ministry of Defence is an important institution of national security system of Georgia and institution of management of Military Forces of Georgia. The Ministry of Defence of Georgia is responsible for readiness, training and development of military forces.

Furthermore, competences of the Ministry of Defence is expanded by the different laws. The competence of the Ministry of Defence of Georgia is operative, intelligence[120], counterintelligence[121], investigative activities, border protection[122], military and armament export control, fighting terrorism[123], participation in the regulation of airspace.

In terms of defence management, the Ministry of Defence is responsible for elaboration of such an important documents as Defence Planning Decree, Defence Planning Manual, Programs of Military Development.[124]

The Ministry of Defence, as an institution of executive power is subordinated to the control of the Government of Georgia. Though, considering its military specifics, the Ministry of Defence of Georgia is also accountable to the President of Georgia, the Supreme Commander of Military Forces and to his advisory organ – the Natioonal Security Council of Georgia.

The lack of effective mechanisms of judiciary, prosecution and parliamentary control over the intelligence, counterintelligence and operative activities of the Ministry of Defence of Georgia is analogically problematic as in the cases of the Ministry of Internal Affairs, the State Security Service or the Intelligence Service. This has to be a subject of reform of national security system and improvement of its legal basis.

3.5. General Staff of Military Forces of Georgia

Legal basis of military management of the Military Forces of Georgia is given in the defence law.[125] Even though, a possibility to expand a mandate of General Staff[126] in the bylaws still remains. In the defence law is not defined effective mechanisms of accountability and parliamentary control.

The competence of the General Staff of Military Forces of Georgia is management of military forces, assurance of battle readiness, management of reserve of military forces, intelligence activities and other

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[120] Law of Georgia on Intelligence Activities, Legislative Herald of Georgia, 24, 27/04/2010. Article 7.

[121] Law of Georgia on Counterintelligence Activities, Legislative Herald of Georgia, 49, 11/11/2005. Article 7.

[122] Law of Georgia on the State Border, Republic of Georgia, 198, 17/07/1998. Article 32.

[123] Law of Georgia on Fighting Terrorism, Legislative Herald of Georgia, 26, 27/06/2007. Article 4.

[124] Law of Georgia on Defence Planning, Legislative Herald of Georgia, 16, 28/04/2006. Article 7.

[125] Law of Georgia on Defence of Georgia, Herald of the Parlaiment of Georgia, 45, 31/10/1997. Article 9.

[126] According to the Law on Defence of Georgia, this institution is named as Joint Staff of the Military Forces and its statute is adopted by the President of Georgia. Nonetheless of definition of defence law, the Government adopted the Decree of the Government of Georgia #298 in November 2013 on adoption of chapter of the General Staff of Military Forces of Georgia. It should be stated that in the Constitution of Georgia is not given regulations on organization of military forces, but in the paragraph 3, of Article 73, is used the term "the Chief of General Staff of Military Forces". This provision gives direction for development of legislation and terminology compliance.

functions defined by the statute of General Staff.[127] According to the defence law, the statute of General Staff of Military Forces is approved by the President of Georgia.[128]

The statute of General Staff of Military Forces of Georgia is approved by the №462 Decree[129] of August 8, 2007 of the President of Georgia, lately in 2013 the statute of General Staff was approved by the Government of Georgia[130] and in this statute is formulated different competences as defined in the defence law.

Expansion of competences which are defined in the defence law by the statute of general staff is systemic mistake of accountability and parliamentary oversight. As mentioned, expansion of the framework defined by the law without participation of supreme legislative institution consists important risks for democtaric development[131] and the system becomes illegitimate.[132] Considering that the Military Forces are greatest armed institution of the state, with the power of use of force, nondefinition of competences or expansion demonstrates a range of problem and threat for democracy.

As mentioned, special attention in the definition of legal basis of security system reform should be paid to the question of clear definition of competences of security institutions (including the General Staff of Military Forces) only by the law. Participation of supreme representative institution in the process of definition of mandate of security assurance institutions, has critical importance.[133] It ensures democratic and peaceful development of society.

We conclude, that the legislative framework of activities, accountability and parliamentary oversight of the General Staff of Military Forces requires revision. As in the cases of the Ministry of Internal Affairs, the Intelligence Service of Georgia or the State Security Service, intelligence activities and structures of the General Staff are out of the effective judiciary, prosecution or parliamentary oversight.

4. Parliamentary Oversight of National Security System by the Group of Confidence of the Parliament of Georgia

Parliamentary oversight on the national security assurance system and institutions has special importance in the democratic state. Parliamentary oversight is a tool for protection against authoritarian activities and excced of power of the governments. Considering periodicity and interval of elections, special importance has the effective mechanisms of parliamentary oversight over the government, as an

[127] Ibid, article 9.8.y.
[128] Ibid, article 9.5.
[129] Decree practically is annuled, because the Government adopted Decree of the Government of Georgia №298 in November 2013 on Adoption of Chapter of the General Staff of Military Forces of Georgia.
[130] Decree of the Government of Georgia №298 on Adoption of Chapter of the General Staff of Military Forces of Georgia, Legislative Herald of Georgia, <www.matsne.gov.ge>, 22/11/2013.
[131] *Born H., Wills A. (eds.),* Overseeing Intelligence Services, Geneva, 2012, 25.
[132] *Born H., Leigh I.,* Making Intelligence Accountable: Legal Standards and Best Practice for Oversight of Intelligence Agencies, Oslo, 2005, 3, 18.
[133] *Born H., Wills A.* (*eds.*), Overseeing Intelligence Services, Geneva, 2012, 25.

institution whithout direct electoral legitimacy.[134] Effective parliamentary oversight enhances a quality of accountability of national security assurance institutions and insure society from the arbitraty, improper and repressive governance.[135]

For evaluation of accountability and parliamentary oversight of institutions of national security system, parliamentary dependency quality on the government and security institutions is important. The parliament, as the organ representing peoples will, should have effective and legitimate mechanisms to influence on the activities of government and security intitutions. The problem of parliamentary oversight over the security assurance system is asymmetric dependence of the parliament on the government and the security institutions. The parliament and parliamentary oversight depends on the information generated and provided by the government and security assurance institutions. Therefore, if the parliament has no effective mechanisms for producing and chack of information, it becomes dependent on the institutions, oversight of which is main parliamentary obligation.[136]

In addition to the adoption of laws and oversight on the government, the competence of parliament is approval of state budget. The government could not spend money which is not authorized by the state budget, approved by the parliament. Inclusiveness in the process of budget adoption and its execution, is one of the strong mechanism for influence on the activities of the government and effective parliamentary oversight.

In Georgia exists two form of budgetary control over the government:

a) Control on spending of budgetary assignments authorized by the state budget (so called post-factum control), conducted by the State Audit Office,[137]

b) Inclusiveness in the process of budget planning and monitoring (so called preliminary control), which is implemented during the discussions of draft of state budget. This process is directed by the government, the Ministry of Finances and the parliament.

The monitoring of secret or special programs of government will not effective without existence of both form of control.[138] When budgetary spendings and activities of public institutions are transparent, gaining an information and oversight by the institutions of society, media and NGOs is possible. In case of special programs and secret activities the information is not public and may not be accessible.

This, most important function is in the mandate of the Group of Confidence of the Parliament of Georgia, small but representative group of parliamentarians. For a mobility of the Group of

[134] *Fluri P., Johnsson A.B., Born H. (eds.),* Parliamentary Oversight of the Security Sector: Principles, Mechanisms and Practices, DCAF, Geneva, 2003, 71.

[135] *Fuior T.,* Parliamentary Powers in Security Sector Governance, DCAF, Geneva, 2011, 1, 2.

[136] *Pataraia T. (ed.),* Evaluation of Parliamentary Powers Related to Oversight of the Defence Sector in Georgia, DCAF, Geneva, 2014, 33.

[137] State Audit Office is independent, constitutional institution. It ensures parliamentary control over the activities, spendings and use of recources by the Government of Georgia. Reports of State Audit Office is predsented for parliamentary discussions and this is demonstration of effective parliamentary oversight and accountability of the Government of Georgia.

[138] *Pataraia T. (ed.),* Democratic Control over the Georgian Armed Forces since the August 2008 war, DCAF Regional Programmes Series №4, Geneva, 2010, 31.

Confidence[139], it consists small number, 5 member. For accsess to the information and political participation, inclusiveness of parliamentary minority in the Group of Confidence is ensured.[140]

Unlike of formation of parliamentary committees, there are preconditions for a membership of the Group of Confidence. These preconditions are:

a) A member should be selected and nominated only from the members of the Committee on Defence and Security,

b) Candidate should give consent for a membership in the Group of Confidence and take responsibilities of protection of state secrecy,

c) A candidate should pass special verification, security clearance and have a positive conclusion.[141]

According to the Law on the Group of Confidence, during the budget discussions the information about the special programs, actions and expenditures should be disclosed to the Group of Confidence, whereas this information is not available to all other parliamentary committees. Having all necessary information the Group of Confidence issues positice conclusion to the Parliamentary Committee on Budget and Finances about the special expenditures and programs. This is important mechanism for influence and oversight over the government and security assurance institutions. Representatives of parliament are equipped with full information and have possibility for discussion of concrete issues, also organize debates about the special programs planned by the government and even issue a negative conclusion.

The issues covered by the competence of the Group of Confidence needs conclusion of the group and this is mandatory provision. Therefore, all special programs and their financial part, as the parts of state budget needs support of the Group of Confidence.

After the approval of state buidget, the members of government are obliged report to the Group once a year and in case of the request of the Group governmental institutions may provide information frequently.

In case the Group detects dubious action or circumstances, it has a possibility of putting question of administrative, political and criminal responsibility.[142] If this mechanism becomes ineffective, the Group of Confidence may initiate creation of parliamentary investigative commission for investigation activities of concrete high-rank public servants. Continuatuion of creation of parliamentary investigative commission may result the criminal, administrative and political responsibility of high-rank servants.

In the framework of reform of national security system, strengthening the competence of the Group of Confidence is important for strengthening of quality of accountability and parliamentary oversight on the national security assurance institutions. In parliamentary model of governance expansion of competence and equipment with complex oversight mechanism of the Group of Confidence will benefit effective governance and democracy development.

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[139] Law of Georgia on the Group of Confidence, Herald of the Parliament of Georgia, 13-14, 04/03/1998.

[140] Ibid, article 2.

[141] Ibid, articles 1 and 2.

[142] Law of Georgia on the Group of Confidence, Herald of the Parliament of Georgia, 13-14, 04/03/1998. Articles 8 and 9.

5. Conclusion

Determined by the nature of secret and non-public activities of national security assurance system, national security institutions are in conflict with liberties of individuals and open society. This system contradicts to the principles of transparency, oversight and accountability. Therefore, clear definition of competences by the laws and assurance effective oversight on the decisions is predominantly and more actual while in other spheres of governance.

Positive side of current national security reform of Georgia is its consideration in a wide context, separation of institution, implementation of principles of good governance and functional transformation. Together with progress in the process of approximation of national security assurance system to the democratic standards, unclear definition or nondefinition by laws of competences, also contradictory and ineffective legal framework of control and oversight on activities (particularly activities of secret nature and limiting human rights) remains as challenge.

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Provisional Measures in the Practice of European Court of Justice and European Court of Human Rights

Due to the Association Agreement between Georgia and the European Union and the diversification of trade relations, it is important to actively harmonize Georgian civil procedural legislation with the EU Civil Procedure Law. For this purpose, it is interesting to review the definitions of the European Court of Justice on the issues related to the recognition and enforcement of the provisional measures.

The role of the institute of provisional measure is great because the enforcement is an integral part of the fair trial. There are cases of adoption of provisional measures, cancellation of provisional measures and the denial of the provisional measures in the practice of the European Court of Human Rights. It is important to review the precedential decisions and the special definitions related to the provisional measures. In case the state submits a unilateral guarantee, the European Court of Human Rights shall cancel the provisional measure.

Keywords: *Provisional Measure, Interim Measure, Regulation, the Right to Fair Trial, European Court of Justice, European Court of Human Rights.*

1. Introduction

When approached from a national point of view, the notion of 'civil procedure' does not pose major difficulties. In principle, civil procedure governs the adjudication of civil cases before a court of law, but 'civil procedure' may have broader or narrower definition in different countries.[1] Georgia has taken a number of steps for the integration of the European jurisdiction.[2] Special attention should be paid to the Association Agreement signed between Georgia and the European Union on 27 June 2014, on which Georgia has been able to achieve gradual economic integration with the EU internal market through the creation of a deep and comprehensive free trade area. In turn, the prerequisite for such admission is the sustainable and all-round regulatory approximation with European legal mechanisms.[3]

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[1] *van Rhee C.H., Smits J.M. (ed.),* Civil Procedure, Elgar Encyclopedia of Comparative Law, Cheltenham etc., 2006, 120. <http://tcpbckup1.yolasite.com/resources/Elgar%20Encyclopedia%20of%20Comparative-%20Law%20By%20Jan%20M%20Smits.pdf> [22.03.2018].

[2] It is notable, that the approximation of the Georgian legislative system to the European standards was declared as a priority in 1997, which was reflected in the resolution №828, adopted by the parliament of Georgia on the September 2, 1997. According to that resolution every law and the normative act adopted from September 1, 1998, should be in accordance with the European Union standards and norms. See *Lakerbaia T.,* The Right of Withdrawal: Comparative Analyze of the Georgian and the European Contract Law, the dissertation work is presented for the academic degree of doctor, 2016, 9, <http://press.tsu.ge/data/image_db_innova/disertaciebi_samartali/tamar_lakerbaia.pdf>, [21.03.2018] (In Georgian).

[3] *Lakerbaia T.,* The Right of Withdrawal: Comparative Analyze of the Georgian and the European Contract Law, Dissertation Thesis, Tbilisi, 2016, 9. <http://press.tsu.ge/data/image_db_innova/disertaciebi_samartali/tamar_lakerbaia.pdf>, [21.03.2018] (In Georgian).

All human rights bodies surveyed, issue precautionary measures to protect the range of rights recognized in their constitutive documents.[4] Interim measures are urgent measures which, according to the Court's well-established practice, apply only where is an imminent risk of irreparable harm.[5] The procedures of use of precautionary measures is detailed explained in the Rule 39th of Rules of Court.[6]

The European Court of Human Rights and International Court of Justice in some cases grant possibility for a state to provide diplomatic assurances as an alternative to receiving a court order for provisional measures against it. At the same time, orders for provisional measures are now understood to also be legally binding; yet international courts will sometimes permit a state to substitute an assurance in place of an order for provisional measures. This emerging practice has brought the nature of a state as a sovereign capable of creating legal obligations that escape inquiry into reliability of outcome.[7]

2. Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters

The EU directives are mandatory for the Member States. They have the obligation to implement the regulations in the national legislation.[8] 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters has been very important document. The Convention originally only applied to the then six[9] member states of the European Community, but became more influential when the Community/Union expanded. The Brussels Convention has recently been converted in a European Regulation. This Regulation is applicable to all member states except Denmark.[10] In 1988, the parallel Lugano Convention was implemented. This Convention deal with international cases involving the member states of the European Union and the members of the European Free Trade Association.[11]

EU law makes day-to-day unification of the rules of international civil procedure law. EU adopted the directives on: Jurisdiction and the recognition and enforcement of judgments in civil and commercial

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4 Comparative Analysis of the Practice and Precautionary Measures Among International Human Rights Bodies, Submitted to Special Meeting of the Permanent Council of the Organization of American States by the Center for Justice and International Law (CEJIL) and International Human Rights Law Clinic, University of California, Berkeley, School of Law, Berkeley, California, United States of America, December 2012, 2. <https://www.law.berkeley.edu/files/IHRLC/Precautionary_Measures_Research_Paper-_(FINAL)_121210.pdf>, [12.02.2018].

5 <http://www.echr.coe.int/Documents/FS_Interim_measures_ENG.pdf>, 1, [12.02.1018].

6 <http://www.echr.coe.int/Documents/Rules_Court_ENG.pdf>, [12.02.2018].

7 *Worster W. Th.,* Unilateral Diplomatic Assurances as an Alternative to Provisional Measures (July 17, 2015), Law and Practice of International Courts and Tribunals, Vol. 15, No. 3, 2016, 1, <https://ssrn.-com/abstract=2632159>.

8 *Lakerbaia T.,* The Right of Withdrawal: Comparative Analyze of the Georgian and the European Contract Law, Dissertation Thesis, Tbilisi, 2016, 9. <http://press.tsu.ge/data/image_db_innova/disertaciebi_samarta-li/tamar_lakerbaia.pdf>, [21.03.2018] (In Georgian).

9 Belgium, France, Italy, Luxemburg, Netherlands and Western Germany.

10 *van Rhee C.H., Smits J.M. (ed.),* Civil Procedure, Elgar Encyclopedia of Comparative Law, Cheltenham etc., 2006, 121. <http://tcpbckup1.yolasite.com/resources/Elgar%20Encyclopedia%20of%20Comparative%-20Law%20By%20Jan%20M%20Smits.pdf>, [22.03.2018].

11 Ibid.

matters;[12] on Jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility;[13] on the service in the Member States of judicial and extrajudicial documents in civil and commercial matters (service of documents);[14] on cooperation between the courts of the Member States in the taking of evidences in civil and commercial matters;[15] on insolvency proceedings.[16]

The legal framework under EU law of the recognition and the enforcement of protective measures is not particularly detailed. As in other fields of EU law the jurisprudence of the ECJ[17] has developed further the legal framework and has provided some guidance as its interpretation. Some aspects are still not particularly clear.[18] Regulation (EU) No 1215/2012 entered into force on January 9th, 2013,[19] and Council Regulation (EC) No. 44/2001 was replaced. The procedure of the recognition and the enforcement of foreign judgments were simplified by the amendments of January 10th, 2015. According to the article 35 of the Regulation application may be made to the courts of a Member State for such provisional, including protective, measures as may be available under the law of that Member State, even if the courts of another Member State have jurisdiction as to the substance of the matter.[20]

2.1 The Review of Problematic Issues Related to the Enforcement of Court Decisions on Interim Measures to State to State in the European Union

2.1.1 Which Court Has Jurisdiction to Issue Interim Measure?

Discuss the ECJ cases on the recognition and the enforcement of the provisional measures.

Contractual relationship dispute between two parties, where contract contained arbitration clause excluding court jurisdiction. One party did not carry out their duties and arbitration was initiated while court in Nederland was tasked to issue protective measure. Other party opposed the courts in Nederland

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12 Council Regulation (EC) No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters.

13 Council Regulation (EC) No 2201/2003 of 27 December 2003 on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and the Matters of Parental Responsibility.

14 Council Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the Service in the Member States of Judicial and Extrajudicial Documents in Civil and Commercial Matters (Service of Documents).

15 Council Regulation (EC) No 1206/2001 of 28 May 2001 on Cooperation Between the Courts of the Member States in the Taking of Evidences in Civil and Commercial Matters.

16 Regulation (EC) No 1346/2000 on Insolvency Proceedings.

17 ECJ – European Court of Justice.

18 *Rozalinova E., Angelov A., Georgiev I.,* Jurisdiction, Recognition and Enforcement of Provisional and Protective Measures (International Cooperation in Civil Matters) (2012), Revista Forumul Judecatorilor, No. 4, 2012, 84. <https://ssrn.com/abstract=2224223>, [12.03.2018].

19 Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters. <http://www.wipo.int/wipolex/en/details.jsp?id=15134>, [26.02.2018].

20 Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, article 35.

have no jurisdiction since the contractual arbitration clause was agree d upon by both parties. ECJ established the distinction between the substance of the matter and issuance of protective measure. While jurisdiction of matter substance decision must be established by the Regulation articles, protective measure decision can also be guided by the jurisdiction of the national law. In this case no court has jurisdiction to decide the case while both parties agreed to exclude the court proceeding and entrusted dispute resolution via arbitration. According to Regulation no court would have jurisdiction to issue protective measure, however according to national legislation courts in Nederland have jurisdiction to issue protective measure while not assessing the matter substance.[21]

European patent dispute where one party filed both lawsuit and protective measure proposal to Dutch court. Opposing party opposed the claim validity but not the court Jurisdiction. ECJ ruled, protective measure decision does not affect the substance matter decision. Exclusive jurisdiction does not exclude the possibility to issue protective measure since it is not the decision in substance matter and does not affect the final outcome.[22]

Dispute between seller and buyer where seller is a company and buyer is natural person. Since buyer did not meet his obligation regarding payment, court in Nederland ruled about his payment obligation and asked court in Germany to execute the ruling. Objection was based on fact the buyer is a consumer and treaty was mostly arranged in Germany and only signed in Nederland, thus only German courts have jurisdiction. ECJ stated in its reasoning, protective measure can be issued by the court not having the jurisdiction over substance matter.[23]

2.1.2. What Conditions Must Be Met in Order to Issue Protective Measure?

Every procedural activity, including provisional measures has its precondition.

Dispute between two Belgian parties. One party suggested witness interrogation by the Dutch court. ECJ defined that the requested activity did not fulfill the requirements set for protective measures.[24]

ECJ defined payment can be regarded as protective measure only under the condition guarantee is made to return the payment in case of unfavourable court decision on substance matter. Court also stated in order to apply art. 35 of the Regulation (EU) No 1215/2012 a bond between protective measure substance and local court jurisdiction must be present.[25]

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[21] ECJ, Judgment **of the 17 November 1998, Van Uden Maritime BV, Trading as Van Uden Africa Line v Kommanditgesellschaft in Firma Deco-Line and Another, Case C-391/95.** ECLI identifier: ECLI:EU: C: 1998:543.

[22] ECJ, Judgment of 12 July 2012, Solvay SA v Honeywell Flourine Products Europe BV, Honeywell Belgium NV, Honeywell Europe NV, c-616/10.

[23] ECJ, **Judgment of the Court of 27 April 1999, Hans-Hermann Mietz v Intership Yachting Sneek BV, Case C-99/96,** ECLI identifier: ECLI:EU:C:1999:202.

[24] ECJ **Judgment of 28 April 2005** St. Paul Dairy Industries NV vs. Unibel Exser BVBA, **Case C-104/03,** ECLI identifier: ECLI:EU:C:2005:255.

JUDr. Kolban P., Mgr. Babickova K., Mgr. Potucky J., Selected Problems Related to Provisional Measures within Brussels I bis Regulation and European Court on Human Rights, THEMIS competition – 2017, 8. <http://www.ejtn.eu/Documents/Team%20CZ%20semi%20final%20C.pdf>, [24.03.2018].

Divorce proceeding where husband proposed execution of French court decision by German Court. Bank accounts and furniture manipulation should have been prohibited. Proposal was denied due to lack of proper documents and appeal was denied. ECJ ruled it is impossible to issue protective measure based on the Council Regulation (EC) No 44/2001 on matter substance falling outside of this Regulation scope.[26]

2.1.3. Which Procedural Stage Allows Issuing Interim Measure?

The procedural stage of the case is of little importance and protective measures can be issued whenever the need arise and the request meet the conditions of the protective measures.[27]

2.2. The Recognition and Enforcement of Court Decision by the Regulation (EU) No. 1215/2012

A judgment given in a Member State which is enforceable in that Member state shall be enforceable in the other Member States without any declaration of enforceability being required.[28] Before the enforcement procedure, the decision should be recognized by a Member, where the decision should be enforced.[29] A part who wishes to invoke in a member State a judgment given in another Member State shall produce a copy of the judgment which satisfies the conditions necessary to establish its authenticity.[30] Decisions do have in other Member States no effect if they suffer from any of the defects listed in Article 45. The Brussels Ibis Regulation contains the following reasons for refusing recognition, or enforcement: apparent disagreement with the public order of the state of recognition, serious procedural defects;[31] if the judgment is irreconcilable with a judgment given between the same parties in the Member State Addressed;[32] the judgment conflicts with the rules established by the regulations.

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[26] ECJ, **Judgment of 27 March 1979** Jacques de Cavel vs. Luise de Cavel, **Case 143/78,** ECLI identifier: ECLI:EU:C:1979:83.

[27] *JUDr. Kolban P., Mgr. Babickova K., Mgr. Potucky J.,* Selected Problems Related to Provisional Measures within Brussels I bis Regulation and European Court on Human Rights, THEMIS competition – 2017, 8. <http://www.ejtn.eu/Documents/Team%20CZ%20semi%20final%20C.pdf>, [21.03.2018].

[28] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, article 39.

[29] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, article 36.

[30] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgements in Civil and Commercial Matters, article 37.

[31] *JUDr. Kolban P., Mgr. Babickova K., Mgr. Potucky J.,* Selected Problems Related to Provisional Measures within Brussels I bis Regulation and European Court on Human Rights, THEMIS competition – 2017, 15, < http://www.ejtn.eu/Documents/Team%20CZ%20semi%20final%20C.pdf>, [21.02.2018].

[32] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, article 45.1.c.

3. The Cases of the European Court of Human Rights on Interim Measures

3.1. The Procedure of Granting Interim Measures by the Rules of Court[33] of the European Court of Human Rights

European Court of Human Rights issues interim measures in order to protect the rights declared in the article 2[34], 5[35], 6[36], 8[37] and 11[38] of the Convention for the Protection of Human Rights and the Fundamental Freedoms during the proceedings.[39] Article 39 of the Rules of Court regulates the procedures of using interim measures. According to the first paragraph of the article 39 - The Chamber or, where appropriate, the President of the Section or a duty judge appointed pursuant to paragraph 4[40] of this Rule may, at the request of a party or of any other person concerned, or of their own motion, indicate to the parties any interim measure which they consider should be adopted in the interests of the parties or of the proper conduct of the proceedings.[41] The Court grants such requests for an interim measure only on an exceptional basis, when the applicant would otherwise face a real risk of serious and irreversible harm.[42] Types of interim measures are not listed in the Rules of Court and on some stage it creates problems to granting the interim measures.

The court shall grant interim measure in the case where the applicant is exposed to the expulsion or extradition. In the case of Mamatkulov and Askarov v. Turkey,[43] the court made an important definition on the interim measure. The case was the following: Mamatkulov and Askarov were citizens of Uzbekistan and at the same time members of the opposition party. They were arrested in turkey on suspicion of murder and an attempted attack, and extradited to Uzbekistan in spite of an interim measure indicated by the Court under Rule of the Rules of Court. Thus Turkey was recognized as a violator of the European Convention.[44] In this judgment, the Court for the first time concluded that, by failing to comply with interim measures indicated under Rule 39 of the Rules of Court, a State Party[45] had failed to comply with its obligations under Article 34[46] of the Convention.[47] Any State to whom the interim

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33 Rules of Court.

34 Right to Life.

35 Right to Liberty and Security.

36 Right to a Fair Trial.

37 Right to Respect for Private and Family Life.

38 Freedom of Assembly and Association.

39 <https://www.ecre.org/wp-content/uploads/2016/05/RULE-39-RESEARCH_FINAL.pdf >, [12.02.2018].

40 The chairman of the court may appoint the deputy chairman to decide adoption of interim measure. See <http://www.echr.coe.int/Documents/Rules_Court_ENG.pdf>, [25.02.2018].

41 <http://www.echr.coe.int/Documents/Rules_Court_ENG.pdf>, [25.02.2018].

42 <http://www.echr.coe.int/Documents/FS_Interim_measures_ENG.pdf>, 1, [25.02.2018].

43 Mamatkulov and Askarov v. Turkey, <https://hudoc.echr.coe.int/eng#{"itemid":["001-68183"]}>, [25.02.2018].

44 *Naldi G. J.,* Interim Measures in the UN Human Rights Committee, 2004, International and Comparative Law Quarterly, 53(2), 445-454, 452.

45 The Convention for the Protection of Human Rights and the Fundamental Freedoms. <http://www.supremecourt.ge/files/upload-file/pdf/aqtebi5.pdf>, [25.02.2018] (In Georgian).

46 The Court may receive applications from any person, nongovernmental organization or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the

measure has been used shall permanently protect this measure and abstain from any action or inactivity which undermines the authority and effect of the court decision.[48]

The Court noted in particular that, under the Convention system, interim measures, as

they had consistently been applied in practice, played a vital role in avoiding irreversible situations that would prevent the Court from properly examining the application and, where appropriate, securing to the applicant the practical and effective benefit of the Convention rights asserted.[49] This precedent changed 10 year practice established by the case of Cruz Varas v. Sweden[50], where the Court held that in the absence of a provision in the Convention for interim measures, an indication given under Rule 36 (39) cannot be considered as to give rise to a binding obligation on member States.[51]

In the majority of cases, the applicant requests the suspension of an expulsion or an extradition. The Court grants such requests for an interim measure only on an exceptional basis, when the applicant would otherwise face a real risk of serious and irreversible harm.[52] The court does not justify the use of the interim measure, only briefly indicates the use of the measure. For example: to stop the enforcement of the decision of the National Court,[53] to stop eviction until such time as

the authorities assured the Court of the measures they had taken to secure housing for the children, elderly, disabled or otherwise vulnerable people.[54]

3.2. Analysis of the Court Practice in Case of Refusal to Grant the Interim Measure and Cancel of Granted Interim Measure

The Rules of court of the European Court of Human Rights does not include a list of type of interim measures. Also, it does not take into account the obligation of the court to prove the necessity of the use of the interim measure. On the basis of the application submitted by the applicant, the Court grants the interim measure. However, the court may also not comply with the applicant's motion and refuse to grant the interim measure. Refusals of the Court cannot be appealed.[55]

Human rights bodies generally prioritize efficiency over transparency when issuing precautionary measures. They do not publish their decisions on precautionary measures. Instead, these bodies usually

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Convention or the Protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right, article 34, see <http://www.supremecourt.ge/files/upload-file/pdf/aqtebi5.pdf>, [25.02.2018].

47 <http://www.echr.coe.int/Documents/FS_Interim_measures_ENG.pdf >, 10, [25.02.2018].

48 *Naldi G. J.,* Interim Measures in the UN Human Rights Committee, International and Comparative Law Quarterly, 2004, 53(2), 445-454, 452.

49 <http://www.echr.coe.int/Documents/FS_Interim_measures_ENG.pdf>, 10, [25.02.2018].

50 <http://www.refworld.org/cases,ECHR,3ae6b6fe14.html>, [25.02.2018].

51 <http://www.pict-pcti.org/matrix/discussion/echr/echr_interim.htm>, [25.02.2018].

52 <http://www.echr.coe.int/Documents/FS_Interim_measures_ENG.pdf >, 1, [25.02.2018].

53 Rustavi 2 Broadcasting Company Ltd v. Georgia, Application no. 16812/17.

54 *Remiche A.,* Yordanova and Others v. Bulgaria: The Influence of the Social Right to Adequate Housing on the Interpretation of the Civil Right to Respect for One's Home (December 22, 2012). Human Rights Law Review, 2012, Vol. 12 (4), 792, <https://ssrn.com/abstract=2705714>, [25.02.2018].

55 <http://www.echr.coe.int/Documents/FS_Interim_measures_ENG.pdf> , 1, [25.02.2018].

request that the State implement precautionary measures via a letter or a Note Verbal[56] (a diplomatic communication that is less formal than a note, is drafted in the third person, and is never signed). Human rights bodies do not publish the contents of these communications; however these decisions may become public if a party decides to publish the communication.[57]

There is an established practice, when the court cancels the granted interim measure, if the state presents assurances. There are different opinions on assurances. Experts of Human Rights are against it, because it may cause the violation of norms on prohibition of torture.[58] Part of the international organizations consider that assurances have legal force, as the assurances are „formal’’[59], „irrevocable’’[60] and „legally binding’’[61], the others think that assurances has no legal force.[62] As a fact assurances is not a mere piece of paper which some ordinary official could sign and then leave other to ignore[63], but its legal nature stays untypical. The European Court of Human Rights for the first time in the Yordanova case allowed the state to grant an assurance to cancel the interim measure[64] and in a few weeks after the implementation of the measure, Bulgaria's assurance was sufficiently considered to cancel the measure.[65]

Diplomatic assurances issued between states or to individuals are usually considered to not be legally binding and are essentially questions of fact, but unilateral assurances issued directly to an international court are questions of law, and usually legally binding.[66]

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[56] Note Verbale.

[57] Comparative Analysis of the Practice and Precautionary Measures Among International Human Rights Bodies, Submitted to Special Meeting of the Permanent Council of the Organization of American States by the Center for Justice and International Law (CEJIL) and Intranational Human Rights Law Clinic, University of California, Berkeley, School of Law, Berkeley, California, United States of America, December 2012, 10. <https://www.law.berkeley.edu/files/IHRLC/Precautionary_Measures_Research_Paper_(FINAL)_121210.pdf>, [25.02.2018].

[58] *Burduli N.,* Are Diplomatic Assurances Effective Guarantees against Torture, Journal of Law, №2, 2014, 333.

[59] Othman (2007) S.I.A.C. No. SC/15/2005 para. 283. <http://siac.decisions.tribunals.gov.uk/Documents/-QATADA_FINAL_7FEB2007.pdf>, [25.02.2018].

[60] Alzery v. Sweden, Comm. No. 1416/2005, para. 3.12, UN Doc.CCPR/C/88/D/1416/2005 available at <http://hrlibrary.umn.edu/undocs/1416-2005.html>, [25.02.2018].

[61] *Worster W. Th.,* Unilateral Diplomatic Assurances as an Alternative to Provisional Measures (July 17, 2015). Law and Practice of International Courts and Tribunals, II B, Vol. 15, No. 3, 2016. <https://ssrn.com/abstract=2632159 or http://dx.doi.org/10.2139/ssrn.2632159>, [25.02.2018].

[62] Alzery v. Sweden, Comm. No. 1416/2005, para. 4.11, UN Doc.CCPR/C/88/D/1416/2005 available at http://hrlibrary.umn.edu/undocs/1416-2005.html, [25.02.2018].

[63] Othman (2007) S.I.A.C. No. SC/15/2005 para. 501. <http://siac.decisions.tribunals.gov.uk/Documents/QATADA_FINAL_7FEB2007.pdf>, [25.02.2018].

[64] *Worster W. Th.,* Unilateral Diplomatic Assurances as an Alternative to Provisional Measures (July 17, 2015). Law and Practice of International Courts and Tribunals, IV , Vol. 15, No. 3, 2016. <https://ssrn.com/abstract=2632159 or http://dx.doi.org/10.2139/ssrn.2632159>, [25.02.2018].

[65] Yordanova v Bulgaria appl. no. 25446/06, judgment, para 4, <https://hudoc.echr.coe.int/eng#-{"itemid":["002-2155"]}>, [25.02.2018].

[66] *Worster W. Th.,* Unilateral Diplomatic Assurances as an Alternative to Provisional Measures (July 17, 2015). Law and Practice of International Courts and Tribunals, Vol. 15, No. 3, 2016. < https://ssrn.-com/abstract=2632159 or http://dx.doi.org/10.2139/ssrn.2632159 >.

In the Court’s case-law as it currently stands, Rule 39 of the Rules of Court is not applied, for example, the following cases: to prevent the imminent demolition of property, imminent insolvency, or the enforcement of an obligation to do military service; to obtain the release of an applicant who is in prison pending the Court’s decision as to the fairness of the proceedings; to ensure the holding of a referendum or to prevent the dissolution of a political party.[67] On 21 December 2007 the European Court of Human Rights issued a special statement and explained that the court grants interim measure only when there is the applicant's inevitable and irreparable harm.[68] The Court has never granted the interim measure of an event which implies the obligation to hold a referendum for the Government. According to the Court, access to the same content at the court is part of a managed campaign that does not have the possibility of positively solving and leads to the expenditure of court resources which could be distributed on more important issues.[69]

3.3. Provisional Measures as the Part of Right to a Fair Trial

The recognition of a violated right does not have any point if it is not enforced.[70] According to the article 2.1 of CPCG, everyone shall be guaranteed judicial protection of their rights. This statement of the law itself implies the legal consequence (in case of adequate prerequisites), which the plaintiff requires. The right to submit a claim to the court is not a theoretical right and does not only guarantee the right to acknowledge the right through final decision, but also includes a legitimate expectation that the final judgment will be enforced.[71] Any other interpretation of the law otherwise jeopardize the rights of the plaintiff, which in spite of the administration of justice, could not reach a decision and the execution of its lawful rights and interests of the restoration, which in turn, undermines the fundamental right to a fair trial guaranteed by the Constitution and the European Convention on Human Rights.[72]

Provisional measure is a very important part of civil procedure and is to create a guarantee so that the imminent judgment can be enforced successfully when it is time for the enforcement. Essentially, the need for security measures—such as seizure and injunction—in civil litigation is connected to two factors: the slowness of the ordinary civil trial and the tendency of some defendants to take so-called sabotage measures. As a matter of experience, it may take considerable time from the point when a dispute arises to the point when the dispute is resolved through a final judgment. There is thus a time-gap that provides ample room for a defendant to obstruct the plaintiff’s rights. On the side of the defendant, one could hide or sell the property in question, carry out competing commercial activities in breach of contract, take advantage of the inventions of the plaintiff, shirk one’s responsibility for a

[67] <http://www.echr.coe.int/Documents/FS_Interim_measures_ENG.pdf>, 2, [25.02.2018].
[68] <https://hudoc.echr.coe.int/eng-press#{"itemid":["003-2226998-2371975"]}>, [25.02.2018].
[69] Ibid.
[70] JSC „Sakgazi’’ and „Anajgupi’’ v. Parliament of Georgia, Judgment №1/14/184,228, July 28, 2005, Constitutional Court of Georgia, II-4 (In Georgian).
[71] Judgment, case N2/B-209-16, March 30, 2016, Kutaisi Court of Appeal (In Georgian).
[72] Judgment, case N1272780-19, March 9, 2016, Tbilisi Court of Appeal (In Georgian).

debt by emptying a company of its assets, etc.[73] Provisional measures serve to prevent these threats. Effective implementation in Civil Justice has a very important public interest, at the same time, the efficiency of justice is largely depended on the enforcement of the court's decision, therefore, legal mechanisms, which support enforceable decisions, has the most important legitimate purpose - to ensure the effective implementation of justice.[74]

The European Court of Human Rights emphasizes the importance of enforcing a final decision in its numerous cases. The Right to a fair trial includes the right to enforce the take decisions.[75] A person having a judgment in his/her favor and against the state, which is subject to compulsory enforcement, may not be the subject to enforced demands or other similar actions to enforce the judgment. Effective protection of the complaint and restoration of lawfulness implies the obligation of the administrative authorities to enforce the final decision of the domestic court.[76] It can be said that the European Court of Human Rights stress the State in the enforcement of a legally enforceable judgment when the judgment itself is taken against the state. The State is responsible for the enforcement of the final decision when the factors that hinder their full and timely enforcement are under the control of the relevant authorities.[77] At the same time, the winning party may be required to adopt certain procedural measures to ensure the enforcement of the decision, provided that the required formalities do not necessarily restrict or decrease the availability of the party to the enforcement procedure.[78] In any case, the above mentioned requirements should not be exempt the state from the obligations under the convention to take, on time and on their own initiative, special measures on the available information to implement the judgments against the State.[79] The obligation of ensuring the enforcement of a judgment against the State, first of all, is the responsibility of the state structures from the moment when the judgment is mandatory and enforceable.[80] Consequently, if the administrative authorities refuse, they are unable or delay the implementation of these obligations; the guarantee given by Article 6 in the proceedings of the Claimant Party loses sense.[81]

Article 6 of the European Convention on Human Rights provides the right to a fair trial to all persons. This right would be illusory if the domestic legislation of the Contracting State was to facilitate

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73 *Westberg P.,* Interim Measures and Civil Litigation, Scandinavian Studies in Law, 538. <http://www.-scandinavianlaw.se/pdf/51-25.pdf >, [21.03.2018].

74 „Broadcasting Company Rustavi 2„ Ltd and „TV Company Georgia'' Ltd v. The Parliament of Georgia, N1/5/675.681, Sept. 30, 2016, The Constitutional Court of Georgia, II-52 (In Georgian).

75 "Iza" Ltd and Makrakhidze v. Georgia, №28537/02, Sept. 27, 2005, European Court of Human Rights Judgments v. Georgia, The Supreme Court of Georgia Human Rights Centre, 2010, 57. <http://www.sup-remecourt.ge/files/upload-file/pdf/krebuli-saqartvelos-saqmeebze.pdf>, [21.03.2018] (In Georgian).

76 Dadiani and Machabeli v. Georgia, N8252/08, Sept 12, 2012, §44,< http://www.supremecourt.ge/files/-upload-file/pdf/dadiani,machabeli.pdf>, [21.03.2018] (In Georgian).

77 Sokur v. Ukraine, no. 29439/02, 26 April 2005, and Kryshchuk v. Ukraine no. 1811/06, 19 February 2009.

78 Kosmidis and Kosmidou v. Greece, no. 32141/04, §24, 8 November 2007; Rompoti and Rompotis v. Greece, no. 14263/04, §26, 25 January 2007; Apostol v. Georgia, no 40765/02 § 64.

79 Akashev v. Russia, no 30616/05, §22, 1 June 2008.

80 Ibid §45.

81 Antonetto v. Italy, no. 15918/89, §28, 20 July 2000.

the final and compulsory decision of the Court to be ineffective to one party.[82] The European Court of Human Rights granted provisional measure and prohibited the United Kingdom government to deport the applicant.[83] In the case of Abu Qatada,[84] the court for the first time explained that the expulsion of the applicant, until the Court's judgment would be a violation of Article 6 of the Convention.

4. Conclusion

The proceedings for granting interim measures of protection are one of the important parts of civil procedure.[85] Interim measures are meant to serve as a support to civil litigation and not a replacement.[86]

It is recommended that, the court be guided by international doctrine, when granting the interim measures in transnational relations disputes, according to which during the implementation of interim measures, decisive thing is considered in relation with the state legal system, where the enforceable thing is situated. It means that considering the purpose and aim of the institute of interim measures, the measures should be enforced in the legal system, where the property is, this gives opportunity to exclude all legal conflicts, between the granting and enforcing legal systems of interim measures.[87]

The right to a fair trial shall include not only the right to submit a claim, but the right to a public and fair hearing and also the right to enforce the decision. The non-enforcement of the court decision is equal to the absence of the right to a fair trial, as it makes deprives the person's ability to enjoy this right. The right to enforce a court decision as an element of the above-mentioned / fair trial / rights is protected and recognized by the Constitution of Georgia, according to which "the acts of the Court are obligatory for all state bodies and persons in the whole territory of the country",[88] the constitution's rule is imposed in the Georgian organic law on the "General Courts" and the Civil Procedure Code of Georgia.[89]

Domestic Courts of Georgia are actively using the judgments of the European Courts of Human Rights to adjudicate their judgments, which underlines the high qualification of court system.[90]

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[82] Hornsby v Greece, no. 18357/91, §40, 19 March 1997.

[83] The applicant was a citizen of Jordan Abu Qatada, who was suspected of having connection with al-Qaeda. According to Abu Qatada, his deportation would cause the violation of right to a fair trial <https://hudoc.echr.coe.int/fre#{"itemid":["003-3808707-4365533"]}>, [25.02.2018].

[84] Othman (Abu Qatada) v. The United Kingdom, §287, no. 8139/09, 09 May 2012.

[85] *Rozalinova E., Angelov A. and Georgiev I.,* Jurisdiction, Recognition and Enforcement of Provisional and Protective Measures (International Cooperation in Civil Matters) (2012). Revista Forumul Judecatorilor, №4, 2012, 82. <https://ssrn.com/abstract=2224223> ,[25.02.2018].

[86] *Westberg P.,* Interim Measures and Civil Litigation, Scandinavian Studies in Law, 539. <http://www.scandinavianlaw.se/pdf/51-25.pdf>, [25.02.2018].

[87] Judgment, case N2/B-352-2013, May 8, 2013, Kutaisi Court of Appeal (In Georgian).

[88] Article 82 of the Constitution of Georgia.

[89] Judgment, case N2/761-2015, §2.5, March 26, 2015, Batumi City Court.

[90] The court repeats, that the right to a fair trial includes the right to enforce the decision. This right would be unrealistic if the national legal system of the High Contracting Party would have made it possible that the final decision would not remain in force for one party. For the purposes of Article 6 of the Convention, the enforcement of any decision made by any court shall be deemed as an integral part of the "trial". See case N1272780-16, March 9, 2016, Tbilisi City Court.

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Dr. Joaquín Rodríguez Álvarez°

Social Challenges of Artificial Intelligence: The Case of Lethal Autonomous Systems**

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Artificial intelligence (AI) has the potential to transform our society in a way that is still difficult to predict but whose implications are going to be deeper than previous technological developments. For the first time in our history, we will be dealing with non-human intelligences, able to perform tasks with direct implications over our material reality with consequences that can even result in direct human casualties. Through this article, we will try to provide elements for the social debate that is structured around the future of AI and its relationship with humanity, by analysing some of the social challenges attached to its core, using the lethal autonomous systems as a paradigmatic manifestation of those risks. This article will present some of the main problems attached to the technology that underlines the urgent need for regulation and deeper analysis about its potential ramifications.

Keywords: *Artificial Intelligence, Social Challenges, Lethal Autonomous Systems*

1. Introduction

We are living in a historical crossroad defined by the massive incorporation of advanced technologies in our daily lives and routines. These technologies for the first time represent not only tools that can help us to develop complex tasks, but they are also able to take decisions without meaningful human control on critical phases of their life cycle[1] with direct consequences for our physical reality.[2] These technologies are able, for the first time, to connect the digital with the non-digital universe in a single plane of interaction, with the ability to gather new data to improve future actions. They even have the potential to determine the way we see and interact with the world, being necessary to rethink the roles that should be reserved for humans and the future of our species as well.[3]

We find ourselves lost in the midst of a fourth industrial revolution, a process that can radically transform both our material and cognitive realities; a transition time that anticipates a completely new holistic approach to a context, where the boundaries between the real and the hyperreal are practically

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1 *Winner L.,* Autonomous Technology: Technics-Out-of-Control as a Theme in Political Thought, MIT Press, 1978.

2 *Marx L.*, The Idea of "Technology" and Postmodern Pessimism, In Technology, Pessimism, and Postmodernism, Springer, Dordrecht, 1994, 11-28.

3 *Rodríguez J.*, La civilización ausente: tecnología y sociedad en la era de la incertidumbre, Gijón, Trea, 2016.

non-existing. This is a time that can give shape to the worst fears of Baudrillard[4] by generating a world where our perception is determined by technology, in a context where technology is able learn, react, and adapt itself to the necessities of a system that is shaped by them; a time that will be defined by the presence of non-human intelligences which are called to play key roles in crucial aspects of our lives such as safety and security, finance, learning, communication, etc.; a moment where our tools will be able to shape our reality in a way never before experienced, generating a perception scope that can limit our understanding of complexity, uncertainty, and social and psychological stability through normality. *"We shape our tools and, thereafter, our tools shape us."*—John Culkin (1967)

Besides, current development of the technological revolution theoretically implies a transformation of the "human condition" as it was understood and defined by Hannah Arendt,[5] providing new meanings to our system of social organisation and individual comprehension of the context. This transformation incubates to the post-human condition,[6] a moment when human and non-human intelligence co-exist evolving into a completely new reality. It is a new context where both intelligences can reshape each other through language by transforming meanings and signifiers,[7] generating new social forms and new lights and shadows, able to determine how we perceive the context. This is a new time that represents a dramatic change from the previous and in desperate need of tools that provide new frameworks of social cohesion and comprehension.

It is a time that fits in Gramsci's definition of "war of positions" when "the old world is dying, and the new world struggles to be born: now is the time of monsters".[8] In this war, our tools need to be renewed if we want to ensure a future of progress and wellbeing for human beings and other species that inhabit this planet. It has been a long time since the moment when Hobbes met Galilei, and the Leviathan was raised as our best attempt to generate certainty, not from an arbitrary system of values as the one provided by the Catholic Church in Western Europe, but from a deep understanding of nature through mechanistic thinking. The dream of Hobbes of finding a methodology that can create certainty in chaos by providing a rational framework, with the notion of causality and humanist ethics at its core,[9] is quickly fading while we feed this age of post-truth. Hobbes' time has passed and the law, understood as a technique[10] as well as a philosophical resource, is showing dramatic signs of exhaustion in its current comprehension while dealing with the new technological frameworks,[11&12] i.e., transformations

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[4] *Baudrillard J.*, Simulacra and Simulation Random House, London, 1994.
[5] *Arendt H.*, The Human Condition, University of Chicago Press, 2013.
[6] *Braidotti R.,* Posthuman, All Too Human: Towards a New Process Ontology, Theory, Culture & Society, 23 (7-8), 2006, 197-208.
[7] *Nietzsche F.,* On the Genealogy of Morals and Ecce Homo, Vintage, London, 2010.
[8] *Bates T.,* Gramsci and the Theory of Hegemony, Journal of the History of Ideas, 32(2), 1975, 351-356.
[9] *Pardo J. E.,* El desconcierto del Leviatán: política y derecho ante las incertidumbres de la ciencia, Marcial Pons, 2009.
[10] *Ellul J., Ellul J., Jurist P., Ellul J., Juriste P., & Ellul J.,* La Technique ou l'enjeu du Siècle, Paris, A. Colin, 1954.
[11] *Funtowicz S. O., Ravetz J. R.*, Science for the Post-Normal Age, Futures, 25 (7), 1993, 739-755.
[12] *Ravetz J. R.,* Scientific knowledge and its Social Problems, Transaction Publishers, 1973.

that raised questions related to one of the biggest challenges[13] *we have experienced in previous centuries in the rise of new forms of intelligence, or intelligence without consciousness, and how the public and the private must interact and relate to them.*

The present article's main objective is to explore the erosion of paradigms that have been produced in the recent years with the rise of some technological developments, as well as the potential result of their combination, by exploring those deeply affected key elements of our reality, which was never designed to deal with non-human intelligent actors, and how these actors should be comprehended.

It is a new path where philosophy of law is called to play a key role in the development of our theory. Only by understanding that it is precisely the "spirit of the law" of the Leviathan is the only possible way through which we can face the risk associated with the rise of non-human intelligent as an active actor in our society at the moment. It is also important to understand the potential side effects of these technological developments and how the promises of a bright future elaborated by the industry at this stage of development could easily transform into our worst nightmare.

We also have to take into account that we are working with technical developments that we do not fully understand. These developments are giving birth to technologies that have the potential to determine the future paths of development of humanity. The gears of these technologies are controlled right now by the private sector, and not by the public sector, making us question the hidden agendas that have been put in place to generate states of consciousness oriented to comprehend the human as a consumer but not as a citizen who is a subject of rights that protect him/her from deception and manipulation.

With this purpose, we would structure the present article into three sections: The context, where we define the characteristics of our system, the rise of artificial intelligence and the lethal autonomous systems where we would present those technologies. In the third section, we will focus on some of the challenges this technology represents and finally offer some recommendations for action in the last section of the paper.

2. Context

The systemic changes unleashed over the last decades have resulted in a profound reconfiguration of the pillars on which the old scientific, social, legal and other paradigms were based.[14] The old system has been eroded by chaos, contradictions, complexity and uncertainties[15] as was illustrated by Ilya Prigogine, Nobel Prize winner in physics. His research laid the foundations of chaos theory, stating, "Chaos makes life and intelligence possible. The brain has been selected to become so unstable that the slightest effect can lead to the formation of order.[16] "

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13 *Barrat J.*, Our Final Invention: Artificial Intelligence and the End of the Human Era, Macmillan, 2013.

14 *Sardar Z.,* Welcome to Post-Normal Times, Futures, 42 (5), 2010, 435-444.

15 *Funtowicz S. O., Ravetz J. R.,* Science for the Post-Normal Age, Futures, 25(7), 1993, 739-755.

16 Vid. el trabajo recopilatorio sobre la dignidad como derecho y como valor en *Barak A.,* Human Dignity, The Constitutional Value and the Constitutional Right, Cambridge, 2015. También vemos una exhaustiva

However, even the concept of life evolves, and it has lately been often understood as an object of consumption and a mechanism of production. Values intrinsic to the subject, such as human dignity, are no longer central to the system, but very often ignored or degraded. Life is quantified through algorithms,[17] the body is a vital unit of consumption within the production cycle and death is assumed as collateral in a field that extends from the war to the productive.

In addition, safeguarding the rights of the subjects is contingent to the fiscal balances of the large corporations, which determine their working conditions, not based on ethical or even legal criteria but simply based on economic criteria. However, this situation has led in parallel to the emergence of citizen movements in favour of disadvantaged groups to curb this trend. In the wake of such pressures, litigation, the outpouring of information, etc., little by little, minority rights have been recognised and business organisations have been forced to change their economic policies through corporate social responsibility.[18]

We are facing a phase of development of globalised capitalism in which we can observe a process of transition from Foucault's biopolitics[19&20] to Mbembe's necropolitics.[21] Therefore, the efforts of citizen movements and international organisations will be necessary to stop the crystallization of a form of power defined by its necessity of exercising control over life from both a material and utilitarian perspective (movement control, thought control, etc…). It is a form of power that is also used to avoid regulating those fields of development that clearly represent risks for the society. This is a phenomenon that brings us to the current phase of expansion of the system that is impregnated with the domain of the simulacra of hyperreality;[22] a context where new tools should be generated to adapt to the development of technology.

The structures of advanced capitalism unravelled by Jameson in his work, Postmodernism or the Cultural Logic of Late Capitalism,[23] and the concept of Casino Capitalism that Ballbé points out (almost more chaotic than in the origins of the anomic market[24]) are no longer limited to exercising repressive control over the subject of a form both physical (material) and ideological (subjective), but objectivise the domain over life and death while we appreciate a counter-reaction from deregulation to re-regulation (environmental, financial, labour, etc.) as the only existing hope.

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perspectiva interdisciplinar en *Düwell M. et al.*, The Cambridge Handbook of Human Dignity, Cambridge, 2014.

17 *Ray T., Liew K. M.*, Society and Civilization: An Optimization Algorithm Based on the Simulation of Social Behavior, IEEE Transactions on Evolutionary Computation, 7 (4), 2003, 386-396.

18 *Ballbe M., Martínez R.,* Law and Globalization: Between the United States and Europe, 2009, en *Robalino J., Rodríguez-Arana J. (eds.),* Global Administrative Law, Londres, Cameron May.
Ballbe M., Martínez R., Soberanía dual y Constitución integradora, Barcelona, Ariel, 2003.

19 *Foucault M.*, Discipline and Punish: The Birth of the Prison, Vintage, 2012.

20 *Paras E.*, Foucault 2.0: Beyond Power and Knowledge, Other Press Llc, 2006.

21 *Mbembé J. A., Meintjes L.*, Necropolitics, Public Culture, 15 (1), 2003, 11-40.

22 *Baudrillard J.*, Simulacra and Simulation, University of Michigan Press, 1994.

23 *Jameson F.,* Postmodernism, or, the Cultural Logic of Late Capitalism, Duke University Press, 1991.

24 *Ballbé M.,* Seguridad humana: del Estado anómico al Estado regulador, prólogo a *C. Hood et alii*:, El gobierno del riesgo, Barcelona, Ariel, 2005.

If such a change does not occur, a transmutation of traditional government will lead us to a private indirect management that does not destroy the state, but that transfers the exercise of coercive power to organised parastatal elites for whom the general interest is not a priority. From there, we will observe the rise of the establishment of a necropolitical order, based on the control and economic use of the power to kill; a system whose maintenance requires new and sophisticated social control systems.

In this phase, the system no longer seeks only to "Discipline and Punish[25]" through a complex legal-institutional system. But, as a result of the exponential growth of scientific knowledge, the state and the community are more aware of the associated life processes to cycles like consumption.

A present, in which the system knows that it chooses to decide who lives and who dies, is being configured. How such death will occur is also being planned through generating a complex eschatological strategy that can materialise in an ample menu of possible endings such as violence, war, illness, intoxication, exhaustion, high cost, etc. This is happening in a world that, despite considerably reduced physical distances, thanks to communication and transport technologies, still reproduces models of past exploitation through practices based on massive extraction of resources from peripheral countries and in restricting people's freedom of movement. Condemning many subjects to exploitation and death while the ecological exhaustion to which they have been subjected to certain territories increases the need for that freedom.[26]

Whole regions of the globe suffer from desertification and water impoverishment that impede access to water to entire communities that are forced to abandon their lands due to the impossibility of maintaining traditional farming activities, where artificial intelligence can be used to provide answers and solutions. Because, climate change is also responsible for other phenomena like ecological emigration[27] that throws thousands of people into the arms of human trafficking mafias[28] every year, generating successive humanitarian crises while developed countries apply active policies of border control and entry limitations.

We are before a new system, a new servitude of the glebe, where the West supports its consu-mption dynamics in a refined version of the idea of a vital space; it is no longer necessary to exercise effective control of a territory, but simply that of its economy. Extraction of materials is guaranteed while free movement of individuals is restricted. Millions of men and women are condemned to poverty, their human dignity is ignored and neglected and new forms of risk commercialisation, such as emission rights, illuminate sophisticated social and environmental erosions. This dynamic contrasts with those of the social classes of Western countries and the elites of the rest of the planet, who benefit from a complex system of privileges.[29]

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25 *Foucault M.*, Discipline and Punish: The Birth of the Prison, Vintage, 2012
26 *Balibar E., Wallerstein I. M., Wallerstein S. R. I.*, Race, Nation, Class: Ambiguous Identities, Verso, 1991.
27 *Beine M., Parsons C.,* Climatic Factors as Determinants of International Migration, The Scandinavian Journal of Economics, 117 (2), 2015, 723-767.
28 *Janashvili L.*, Human Trafficking: la nueva esclavitud [en prensa], 2018.
29 *Castells M.*, Power of Identity: The Information Age: Economy, Society, and Culture, Blackwell Publishers, Inc, 1997.

The model thus configured leads to a social and ecological exhaustion and requires new instruments of control and consent manufacturing based on the reconfiguration of the human being as a consumer stripped of all intrinsic dignity. And our time is configured around the deregulation of 2000, with a view to a chaotic and deregulated capitalism[30] that turns our own life and bodies into objects of consumption.

Production processes are relocated to places where ecological or labour regulations are virtually non-existent. Workers are not only exposed to unacceptable risks unthinkable in Europe, but also to extreme situations of labour exploitation bordering on slavery, including the use of child labour.[31] In this context, poorly applied artificial intelligence can play a key role as a tool for crystallising inequality and making humanitarian crises invisible. Examples like Cambridge Analytica and its role in the American presidential elections of 2016 give us clues about a model between Huxley and Orwell, in which the soma can be combined with high doses of repression, depending on the link of the chain in which individuals participate.

Life and bodies are not only referred to humans or anthropomorphs, but to all by taking into account the complex eco-systemic relationships of interdependence between species. Life "is a process capable of preserving its complexity and replicating itself. But what is replicated is not matter (made of atoms) but information (composed of bits) that specifies how atoms are arranged".[32]

This conception forces us to consider a kind of post-human security that acquires a new dimension with the appearance of artificial intelligence and wetware (which means the interaction between software and organic tissue) in complex inter-species relations of interdependence. Cross-sectional studies that focus on integral security (a concept coined by the United Nations) and thus overcome the current phase, which is sustained in the constant consumption of vital bodies and units, for medical, scientific, labour, etc., are hence important.

The technological development will probably begin in the next phases of expansion to occupy layers of the system that until now were reserved for humans, thanks to the development of different forms of artificial intelligence, accelerating the dissolution of the human in favour of the non-human or perhaps, with some luck, the post-human leading to life 3.0. A field of play is already being structured, in which the advances in robotics, nanotechnology and, especially, those related to so-called machine learning pose a challenge to global peace. A new context of impunity and lack of democratic control is already being generated in which conflict and war are developed based on a logic that has nothing to do with that which inspired the fundamental treaties that regulate war and its development, for example, The Hague Convention (1899 and 1907).[33]

It was Albert Einstein who, in an interview conducted by Alfred Werner in Liberal Judaism, stated the following: "I do not know with what weapons the third world war will be fought, but in the fourth

[30] *Arrillaga J., Bolle M. H., Watson N. R.*, Power Quality Following Deregulation, Proceedings of the IEEE, 88 (2), 2000, 246-261.

[31] *Wallison P. J.*, Deregulation and the Financial Crisis (No. 31059), 2009.

[32] *Tegmark M.,* Vida 3.0. Qué significa ser humano en la era de la inteligencia artificial, Taurus, 2018, 40.

[33] *Susntein C.,* The World According to Star Wars, Nueva York, Dey Street, 2016.

world war they will use sticks and stones." Today, we seem to be closer to offering an answer to the first question: if we do nothing to remedy it, the third world war will be fought with autonomous/independent weapon systems and its consequences, as anticipated by Einstein, can be disastrous for the species.

3. The Rise of AI and Lethal Autonomous Systems

Artificial Intelligence represents our next frontier, as space exploration in the 60's and 70's and decoding the human genome in the 90's and 00's, a new land of promises and dangers ready to be conquered. As happened with the previous technological developments, the concept has the ability to embody our wildest dream as pictured in Sci-Fi culture. Therefore, it is important to begin by offering a clear definition. Artificial intelligence "refers to systems that display intelligent behaviour by analysing their environment and taking actions – with some degree of autonomy – to achieve specific goals. AI-based systems can be purely software-based, acting in the virtual world (e.g. voice assistants, image analysis software, search engines, speech and face recognition systems) or AI can be embedded in hardware devices (e.g. advanced robots, autonomous cars, drones or Internet of Things applications). We are using AI on a daily basis, e.g., to translate languages, generate subtitles in videos or to block email spam. Many AI technologies require data to improve their performance. Once they perform well, they can help improve and automate decision making in the same domain. For example, an AI system will be trained and then used to spot cyber attacks on the basis of data from the concerned network or system.[34] On the other hand, Minsky simplified the concept by defining artificial intelligence as "the science of producing machines that can carry out tasks that require intelligence (if developed by humans).[35]"

The critical difference between AI and the other technological revolutions, is that even space exploration and genomic research required a new legal corpus such as the "Space Law Treaties and Principles"[36] or the Genetic Information Non-Discrimination Act of 2008. Those legal frameworks never were intended to deal with "man out-of-the-loop" situations in critical decision-making process. Therefore, we are facing a whole new way of understanding responsibility.

Our entire legal corpus, except for responsibilities derived from supervised persons or the possession of animals, is intended to regulate the social behaviour of adult self-conscious humans; even corporate law cannot be understood without this principle.[37] Being the first time in our history dealing with potentially critical situations conducted without meaningful human control, this provides us with a complete new framework in relation with assumptions of responsibility. There will be situations where algorithms will be fully responsible for actions that have deep implications for our material reality, from

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[34] COM (2018) 237 Final. Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions. Artificial Intelligence for Europe, Brussels, 25.4.2018.

[35] *Minsky M.,* Society of Mind: A Response to Four Reviews, Artificial Intelligence, 48(3), 1991, 371-396.

[36] UNOOSA, Out Space Law, <http://www.unoosa.org/oosa/en/ourwork/spacelaw/treaties.html>, [10 September 2019].

[37] *Zhi-peng H. E.,* Globalization and the Shift of International Law to Humanism [J], Jilin University Journal Social Sciences Edition, 1, 014, 2007.

selling stocks to directly killing people through the use of weapons, while a big temptation to recognise these new players as persons exists.[38] There will be a new layer of complexity that just adds risks to our equations.[39]

Another important thing that we should consider is that AI found its origins back in the 1930s when Alan Turing described the first artificial intelligence system. It was an abstract computer machine with unlimited memory and a scanner that moved back and forth through it, symbol by symbol, reading what it found and writing more symbols. The actions of the scanner were dictated by an instruction program that was also stored in its memory in the form of symbols. This opened the possibility that the machine would work while modifying or improving its own program.[40] Therefore, we can say that all modern computer systems are basically Turing machines.

A few years later, in 1952, the Turing test[41] was created to determine if a machine was really intelligent. To overcome it, the machine must be able to trick a human into thinking he/she was an equal, in a deeper way that the recent controversy related to Ashley Madison showed us.[42] Four years later, Minsky and McCarthy, with Shannon and Rochester, organised a conference in Dartmouth and published the term artificial intelligence.[43]

Thus, we face a system that has been evolving for more than 50 years and today those fields where AI has been already put in place are practically innumerable and its decisions-making has real, tangible and sometimes dramatic consequences. In this sense, an article published by The Atlantic entitled "How Algorithms Can Reduce Minority Credit Scores"[44] reveals how the massive use of artificial intelligence algorithms by financial entities can crystallise into marginalisation dynamics regarding minorities, making it necessary to include human controllers that can correct these biases. In the same way, The

38 *Willick M. S.*, Constitutional Law and Artificial Intelligence: The Potential Legal Recognition of Computers as "Persons", In IJCAI, 1985, 1271-1273.

39 *Perrow C., Normal* Accidents: Living with High Risk Technologies, Updated Edition, Princeton University Press, 2011.

40 *Turing A. M.,* Systems of Logic Based on Ordinals: Proceedings of the London Mathematical Society, s2-45(1), 1939, 161-228.

41 *Turing A. M.*, Computing Machinery and Intelligence, in *Epstein R., Roberts G., Beber G. (eds.),* Parsing the Turing Test, Dordrecht (Países Bajos), Springer Netherlands, 2009, 23-66.

42 Ashley Madison created more than 70,000 female bots to send male users millions of fake messages, hoping to create the illusion of a vast playland of available women.
Newitz A., **Ashley Madison Code Shows More Women, and More Bots, <https://gizmodo.com/ashley-madison-code-shows-more-women-and-more-bots-1727613924>, [10/09/2018].**
Dans E., **Ashley Madison: How Much AI do You Need to Trick a Horny Man? <https://medium.com/enrique-dans/ashley-madison-how-much-ai-do-you-need-to-trick-a-horny-man-b137f8c56002>, [10/09/2018].**

43 *Alandete D.,* Necrológica: John McCarthy, el arranque de la inteligencia artificial, El País, 27.10.2011. Vid. *Guillén B.,* El verdadero padre de la inteligencia artificial, OpenMind, 4.09.2016.

44 *Waddell J.*, How Algorithms Can Bring Down Minorities' Credit Scores, The Atlantic, 5 de junio York, 2018, <https://www.theatlantic.com/technology/archive/2016/12/how-algorithms-can-bring-down-minorities-credit-scores/509333>, [20-8-2018].

Guardian[45] warned about the appearance of "prejudices" related to gender and race in artificial intelligences due to the processing of natural language in open sources that alters the theoretical neutrality of artificial intelligence, something that was recognised by companies such as Facebook,[46] who promised to increase the phases under human control.

Algorithms also played a decisive role in the 2008 financial crisis, as explained in an article published in The Guardian,[47] entitled "Was software responsible for the financial crisis?," where it focuses on the manipulation of perceptions exerted by the algorithms and the subsequent domino effect that was triggered due to the automation of sales orders before certain events. The resultant consequences, approximately a decade of recession, offers us a good example of the magnitude of the problems that can arise due to the extensive use of artificial intelligence without meaningful human control, especially so when some countries are actively researching and designing lethal autonomous systems.[48] Some uses of AI represent some of the biggest risks humanity faces right now, whose implications can be dramatic for humanitarian law, the law of war, etc.

Among the vast range of technologies derived from artificial intelligence, its possible applications for military use will be the focus our attention in this paper due to the risks they represent for the evolution of the system itself and the guarantee of basic rights and freedoms. We focus specifically on our interest in lethal autonomous weapon systems (LAWS).[49] These systems are characterised by the integration of artificial intelligence in such a way that they have the intrinsic capacity to approach decision processes outside human control or supervision in a meaningful way.[50]

The main difference between the autonomous weapon systems (AWS) and the LAWS would be that the former are merely defensive in nature (anti-missile shields, for example), while the latter have the ability to identify and eliminate military objectives, including people, without significant human control in the process. This means a delegation of lethal capabilities to robotic entities.

The risks not only affect the very nature of the technology itself but also its social and political consequences. Appearance of a varied list of new weapons systems gives rise to a new arms race that can determine the course of conflicts not only of the future, but of the present; in some cases, they are fully operational (although not totally autonomous from human control). The Phalanx air defence system of the US Navy, which allows it to repel attacks in automatic mode is one such example.[51]

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[45] *Devlin H.,* AI Programs Exhibit Racial and Gender Biases, Research Reveals, The Guardian, 13 de abril de 2017 York, <https://www.theguardian.com/technology/2017/apr/13/ai-programs-exhibit-racist-and-sexist-biases-research-reveals>, [14-8-2018].

[46] *Lee D.,* Facebook Adds Human Reviewers After 'Jew Haters' Ad Scandal, BBC News, 20 de septiembre York, 2017, <https://www.bbc.com/news/technology-41342642>, [20-8-2018].

[47] *Dodson S.,* Was Software Responsible for the Financial Crisis?, The Guardian, 16 de octubre York, 2008, <https://www.theguardian.com/technology/2008/oct/16/computing-software-financial-crisis>, [14-8-2018].

[48] Future of Life Institute, Benefits and Risks of Artificial Intelligence, York, 2018, <https://futureoflife.org/background/benefits-risks-of-artificial-intelligence/>, [8-2018].

[49] *Waters R.,* AI Progress Sparks Cyber Weapons Fears, Financial Times, 20 de febrero York, 2018a, <https://www.ft.com/content/c54002ee-1668-11e8-9e9c-25c814761640>, [20-8-2018].

[50] *Roff H.,* Meaningful Human Control or Appropriate Human Judgment? Necessary Limits on Autonomous Weapons, documento informativo preparado para la conferencia de revisión de la UNCCW, 2016.

[51] *Horowitz M. C., Kreps S. E., Fuhrmann M.*, Separating Fact from Fiction in the Debate Over Drone Proliferation, International Security, 41 (2), 2016, 7-42.

In 2018 census, the International Committee of the Red Cross counted some 130 autonomous weapon systems in the world, although other studies estimate the number to be 300.[52&53] These would include semiautonomous weapon systems as they would be subject to human oversight at key stages such as selection of targets. This applies to Patriot or drone missiles like the Reaper model.

However, the current article does not focus on the analysis of weapons systems with remote human control (AWS or weapons with significant human control), but on the potential risks for the future posed by the deployment of a type of technology with strong artificial intelligence or without significant human control. These could be called lethal independent weapons systems (LIWS) or independent lethal weapons systems. Their regulation is urgent due to their possible hybridisation with other types of weapons, such as nuclear or biological, which together with AI are a real threat and more present than ever. Its emergence is framed, as we shown, in an increasingly unstable and unpredictable international scenario. As D. Mourelle says, "The world is making geopolitical tightrope walking about the abyss. But on this occasion, nothing guarantees that in the next nuclear crisis we will have as much luck as in the previous ones".[54]

Our analysis is focused in sum on those weapon systems capable of selecting and attacking targets without human intervention[55] and whose applicability is usually theoretically restricted to military objectives in non-populated areas. The rise of cybernetic systems capable of rapid development, high processing power and artificial intelligence forces us not to be naive and realise that there are no limits for their use as autonomous weapons in urban spaces, without a formal declaration of war. This is a technology that, if it reaches the hands of non-state actors such as terrorist organisations, can open a new scenario that conditions the development of artificial intelligence even in non-weapon applications.

One of the biggest challenges that we face, and that the United Nations wants to solve, is that there is no internationally agreed definition of autonomy or significant human control for the LAWS or consensus about the characteristics or traits to clearly identify them. It is necessary, then, to provide elements that allow us a classification that facilitates its regulation through a deeper understanding of their nature and AI itself.

More or less, we could understand that this type of independent weapons has three basic characteristics:

- They can move independently through their environment to places they choose arbitrarily. Its capabilities are: mobility, persistence, orientation and navigation;

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[52] *Sassoli M.,* Can Autonomous Weapon Systems Respect the Principles Of Distinction, Proportionality and Precaution?, 2014. Conferencia celebrada durante el comité de expertos Autonomous Weapons Systems: Technical, Military, Legal And Humanitarian Aspects, Comité Internacional de la Cruz Roja, Ginebra, Suiza.

[53] *Roff H.,* Meaningful Human Control or Appropriate Human Judgment? Necessary Limits on Autonomous Weapons, documento informativo preparado para la conferencia de revisión de la UNCCW, 2016.

[54] *Mourelle D.,* La amenaza nuclear del siglo XXI, *El Orden Mundial*, 27 de noviembre, York, 2017, <https://elordenmundial.com/2017/11/27/la-amenaza-nuclear-en-el-siglo-xxi/>, [17-8-2018].

[55] *Asaro P.,* On Banning Autonomous Weapon Systems: Human Rights, Automation and the Dehumanization of Lethal Decision-Making, International Review of the Red Cross, 94, 2012, 687-709.

- They can select and shoot against targets in their environment. Their capacities are: identification of objectives, discrimination to categorise objectives, prioritisation of objectives and selection of the type of weapon appropriate for the objective;[56] and

- They can create and/or modify their objectives by incorporating observation of their environment and communication with other agents. Its capabilities are: self-determination, self-commitment and autonomous communication with other systems.[57]

Here arises a question which we must face: what degree of artificial intelligence or intelligent behaviour is necessary for the legal system to consider the prohibition of AI? Whether they have significant human control during different phases of the lethal action process (implementation, validation and execution) will ultimately makes the difference.

If we look at the census prepared by the Future of Life Institute, there would currently be 256 systems categorised and qualified as autonomous.[58] However, to date, most states argue that everyone has human control or adequate human judgment at some time. That is, all the systems developed so far depend, or should depend, on human supervision or prior human judgment in at least some of its critical phases (selection of objectives or cancellation of the order). However, parallel systems are investigated and developed with total autonomy, which sooner or later must be analysed to check if they meet legal requirements. Because, the current situation of practical non-regulation of the LAWS allowed by the inactivity of the anomic can result in a competitive race between governments.

States justify AWS by assuring that they are not intended for offensive purposes but for defence, that is, simply as automatic weapons defence systems (AWDS).[59] But that seems more like a subterfuge to legitimise absolutely lethal systems endowed with the capacity to become independent of their creator and controller.

It is essential to develop an international regulation that allows for the restriction of its uses by not allowing the existence of communicating vessels between the development of defence systems and those whose purpose is lethal action against people. Otherwise, it could be attributed to a synthetic being, with humanity not having the power to decide, in a conflict, whom to target based on the general interest, that is, a license to kill that should be exclusive to the public power.

For this reason, several initiatives have emerged over recent years to generate an international ban on this type of weapon, such as the Stop Killer Robots campaign. It is a movement founded in 2013, made up of numerous non-governmental organisations that range from technology companies to human rights organisations. Its objective is to direct international normative processes towards the prohibition of

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56 *Bothmer F. von*, Robots in court: Responsibility for Lethal Autonomous Weapons Systems, en *Brändli S., Harasgama R., Schister R., Tamò A. (eds.),* Mensch und Maschine – Symbiose oder Parasitismus?, Berna: Stämpfli, 2014.

57 *Martinez R., Rodriguez J.,* Inteligencia Artificial y Armamento letal autónomo, El nuevo desafío para naciones unidas, TREA, 2018.

58 Future of Life Institute, Benefits and Risks of Artificial Intelligence, York, 2018, <https://futureoflife.org/background/benefits-risks-of-artificial-intelligence/>, [14-8-2018].

59 *Warren A., Hillas A.,* Lethal Autonomous Weapons Systems, Adapting to the Future of Unmanned Warfare and Unaccountable Robots, 12, 2017, 71-85.

autonomous weapons, considering that it represents a threat superior to that posed by nuclear weapons. It uses the report “Losing Humanity: The Case Against Killer Robots” to argue that lethal autonomous weapons do not meet the requirements of international humanitarian law and argues about what should be done with the blinding laser, viz., preventive prohibition of their use and development.

4. Main Problems Related to AI and Laws

One of the main characteristics of AI is its ability to gather new data to improve future actions through what is called machine learning. Therefore, deep learning defined learning techniques that combine layers of neural networks to identify the profiles of a set of data needed to make decisions. In this way, the existence of multiplicity of layers between the input data and the output data is recognised, configuring the outputs of the previous layers as inputs for the following, which generates what has been known as artificial neural networks.[60]

According to Marcus Shingles, the opportunities derived from these technologies are huge and include obtaining information from "the sleeping giants of the data,"[61] improving decision-making and "taking advantage of the collective wisdom of the community". Perhaps this last one embodies one of the promises of greater social interest associated with artificial intelligence, but, at the same time, has the intrinsic ability to draw dystopian scenarios in which social control and lack of privacy give shape to an authoritarian society.

This is fundamentally because data is the raw material, the blood, of the system. Without extensive sets of available data, development of artificial intelligence would be a mere chimera. As T. Rosembuj says, the data are "the main raw material of the algorithm, such as cotton, wheat or fuel in the last century. Data processing is the digital and virtual essence: without data there is no algorithm and without algorithm it is difficult to argue that there is artificial intelligence, digital goods or virtual goods”.[62]

Thus, the value of data lies precisely in its infinite reuse: "The value of the data is calculated on the basis of all possible ways in which they could be used in the future and not simply on the basis of their current use." In this way, the recombination of data, its accumulation and its extension are its real value and, therefore, the impulse for its accumulation by organisations such as Google, Facebook, Twitter, Amazon, Visa and a long list of other organisations.

The great paradox here seems to lie in the fact that the initial data is susceptible to being eternal, repeated and repeated continuously and applied systematically, which would facilitate processes of social evolution through a conservative vision of human and social progress by artificial intelligence. In addition, if personal data has been put in place, the subject will lose the trace of its identity due to the deprivation of personal rights. The origin of the data and the explicit consent of its owners for their use

[60] *Kaplan J.,* Artificial Intelligence, Oxford University Press, 2016.

[61] *ITU, XPRIZE,* AI for Good Global Summit Report, 2017, <https://www.itu.int/en/ITU-T/AI/Documents/Report/AI_for_Good_Global_Summit_Report_2017.pdf>, [14-8-2018].

[62] *Rosembuj T.*, Governing Artificial Intelligence, LLR, n.2, 2017.

for weapons purposes is, therefore, another main problem related to the development of laws that should be addressed immediately.[63]

Another problem that AI presents, at least theoretically, regarding the current state of development of technology is related to its potential development. The actual phase is dominated by what we know as narrow AI (specialised artificial intelligence, reduced or weak), which means that it is designed to perform a limited task (for example, only facial recognition, internet searches or driving a car) according to our current technical capabilities. However, the long-term goal of many researchers is to create what has been called artificial general intelligence or strong and independent Intelligence (SAI).[64]

The difference between the two concepts is that while reduced artificial intelligence can surpass humans in what would become a specific task, such as playing chess or solving equations, the SAI can perform any cognitive task as well as humans and even overcome them in what is called Superintelligence.[65] Therefore, the first objective of any state should be to develop a safe and beneficial AI whose objectives coincide with the wellbeing and progress of humanity, because *"if we stop being the most intelligent beings on the planet we may also lose control.[66]"*

A hypothetical development of the SAI would entail profound consequences not only for our society but for the same legal order, since it would advance in the generation of systems that would behave rationally, or the same systems of behaviour automation that in the theoretical plane would be linked to the phenomenon of technological singularity. This implies computer equipment, a computer network or robot that could improve itself recursively. It is said that the repetitions of this cycle would probably result in an out-of-control effect, an explosion of intelligence, as the mathematician Irving Good called it in 1965;[67] a very difficult phenomenon to predict and whose consequences could be dramatic, or not. This scenario, despite being recognised as highly unlikely in the short and medium term, cannot be ignored and it is necessary to generate contingency systems for the potential and non-potential risks that such technology could unleash as a weapon of mass destruction.

Therefore, for the first time, we are facing a technology that has the ability to act in both the digital and physical realities with unimaginable consequences. Furthermore, this technology can learn from each interaction, gathering new data that will allow it to improve its performance in the future and which in some cases even can learn without the necessity of data, as shown by AlphaGo Zero.[68]

A set of characteristics that represent a dramatic change over some of the current pillars of the philosophy of law like the social contract, as it was understood from its beginning, like a tool able to grant freedom because all members of society forfeit the same number of rights and the same duties.

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63 *Sharkey N.,* The Ethical Frontiers of Robotics, Science, 32(5909), 2008, 1800-1801.
— *Sharkey N.,* Saying No to Lethal Autonomous Targeting, Journal of Military Ethics, 4(9), 2010, 299-313.

64 *Goertzel B., Pennachin C. (eds.),* Artificial General Intelligence, Nueva York, Springer, 2007.

65 *Bostrom N.,* A History of Transhumanist Thought, Journal of Evolution and Technology, 14(1), 2005, 1-25.

66 *Tegmark M.*, Vida 3.0. Qué significa ser humano en la era de la inteligencia artificial, Taurus, 2018, 115.

67 *Chalmers D.,* The Singularity: A Philosophical Analysis, Journal of Consciousness Studies, 17(9-10), 2010, 7-65.

68 *Silver D. et al,* Mastering the Game of Go Without Human knowledge. Nature 550, 19 October 2017, 354–359.

Equality seems as humanity. What happens when critical decisions are not taken by humans? How deep can be the affectation, to the very root of the system?

In his time, Rousseau argued that it is absurd for a man to surrender his freedom for slavery; thus, the participants must have a right to choose the laws under which they live. But now, these relations could change because the rise of new players, whose lack of responsibility is complete, but whose consequences could have deep affectations in our material reality, even conditioning the way we perceive reality and act, as Cambridge Analytica has shown us.[69]

Although social contract imposed new laws, including those safeguarding and regulating property, there were theoretical restrictions on how that property can be legitimately claimed. As an example, land included three conditions, viz., land should be uninhabited, the owner claims only what is needed for subsistence and labour and cultivation give the possession legitimacy. But in the land of the AI and hyperreality, there are substantial doubts about the applicability of these ideas and how these restrictions should be put in placemaking, making it necessary to rethink social contract.

Presently, we are dealing with non-conscious intelligences, at least in the current phase of development where just soft-AI has been developed and put in place. However, theoretical future scenarios, like the ones imagined by Bostrom[70] among other intellectuals, where a self-conscious intelligence could rise due to the combination of deep machine learning algorithms and big data, should make us rethink the fundamentals of our social tools to grant a humanistic approach to the design of technology, avoiding certain scenarios that could result in dramatic transformations of society due to the rise of new actors operating with autonomy/independence. Technological developments like the lethal autonomous systems represent some of the biggest challenges of the last century as a consequence of the existing possibility to delegate lethal capacities to non-human actors.

Besides, if we take into account the classification of artificial intelligence typologies, in addition to the one that distinguishes the narrow AI from the strong AI or the limited from the general, the investigations carried out over the last decades have allowed to establish another that distinguishes four major approaches: systems that think like humans, systems that think rationally, systems that act like humans and systems that act rationally. The first typology corresponds to systems that have information and process it for understanding and predicting.[71] The second, machines work based on the laws of Aristotelian thought. The third one refers to machines that can perform functions of humans and require limited intelligence. Fourthly, we would have systems that automate intelligent behaviour and linked in the theoretical plane to the phenomenon of technological singularity.[72] The laws, in their current state of development, fall into the third category and they are really dangerous, but can be even more so in the fourth category in hypothetical futures.

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[69] *El País,* 17 demayode 2018, <https://elpais.com/internacional/2018/05/17/estados_unidos/1526514308_942521.html>.

[70] *Bostrom N.,* A History of Transhumanist Thought, Journal of Evolution and Technology, 14(1), 2005, 1-25.

[71] *Battistutti, Cairo O.,* El hombre artificial: el futuro de la tecnología, México DF, Alfaomega, 2011.

[72] *Chalmers D.,* The Singularity: A Philosophical Analysis, Journal of Consciousness Studies, 17(9-10), 2010, 7-65.

Hence, it is necessary to understand that the challenges this technology represents have critical implications for our legal systems and the philosophy that they are based on. The rise of AI opens us to a brave new world that has the inherent ability to transform humanity itself, because it has the potentiality to produce changes with deeper implications than the first industrial revolution or even the agricultural revolution during the Neolithic era. When our ancestors evolved from a nomadic existence to the conquest of the physical space, building the first villages and giving a starting point to the urban phenomena, a phase of our history that still evolves is giving place to new geographies, physical and symbolic, in a century where half of the human population of the planet lives in cities.

The agricultural and urban revolution changed the way we organised our tribes, our systems of beliefs and our comprehension of the otherness. It represented a new time for humanity, where we developed new technologies and techniques to deal with the growing complexity of the social-fabric, due to the needs of specialisations required by the evolution of technological frameworks and the needs to provide common sense and meaning to human existence.[73] The rise of religion as an ideological system able to provide certainties in substitution of magic is a good example of how technology and human reasoning operate to solve those spiritual needs linked with the control strategies put in place by the dominant elites to generate social order.[74] A process of transformation could seem organic, just as a natural evolution of the ethics and aesthetics of the tribe associated with the needs generated by technology. But the truth is that this process can never be understood as neutral,[75] because technology is just an amplifier of human will, especially the will of those who are in charge and whose aim is to maintain the status to perpetuate the system of privileges they benefit from.

In this sense, it is necessary to be extremely careful while analysing the potential impact of disruptive technologies such as AI, IoT, or Blockchain over our society, because their development is not neutral at all but respond to specific agendas and interests,[76] which are more aligned with those of the shareholders of the companies that master newer techniques than those of general population that could be described as common interest.[77] This reality used to be a hidden layer of promises of brilliant futures that take us to a technological utopia[78] where humanity is finally able to discharge itself from all those painful and mundane activities necessary for our survival, being able to relegate these tasks to other intelligent beings without consciousness.[79] It will finally break the course that expelled us from Eden's Garden, a historical moment where it will no more be necessary to "earn our bread with the sweat of our work", a moment where even the Marxist maxima of "work dignifies"[80] will lose its sense, because of radical transformation of the human condition.

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[73] *Ellul J., Ellul J., Juris, P., Ellul J., Juriste P., Ellul J.,* La technique ou l'enjeu du siècle. Paris: A. Colin, 1954.

[74] *Frazer J. G.*, The Golden Bough, In the Golden Bough, Palgrave Macmillan, London, 1990, 701-711.

[75] *Heikkerö T.*, Ethics in Technology: A Philosophical Study, 2012.

[76] *Marx L.,* The Machine in the Garden,. The Green Studies Reader: From Romanticism to Ecocriticism*,* London, Routledge, 2000, 104-108.

[77] *Mumford L.*, The Pentagon of Power, Vol. 274, Harcourt, 1974.

[78] *Postman N., Riggenbach J.*, Technopoly, Blackstone Audio Books, 1994.

[79] *Jasanoff S., Jasanoff S.,* Science at the Bar: Law, Science, and Technology in America, Harvard University Press, 2009.

[80] *Marx K.,* The Poverty of Philosophy, Nueva York, Cosimo, 2008.

However, the reality is much more complex and reproduces some patterns that have been observed previously in history by configuring what it could be described as a chiasmic society where the techno-scientific industrial complex is able to promise the fulfilment of new scenarios of wealth and comfort in order to explore disruptive technological frameworks that could generate new patterns of social control by crystallising the power of the ruling elites.[81] We have several examples along the last century where industries, like nuclear power, promise us bright futures of clean and cheap energy able to produce a new way of progress by allowing everyone in the planet to have access to energy, something that was far away from reality. One such example is generating a technological development that not only was unable to produce clean and safe energy but was even responsible for some of the biggest monsters created by humanity such as the Manhattan project. This was because we were developing what we comprehend today as a double-use technology, a technological framework that could be used both in the civil and the military sectors. As a result of the paradigm of the mutually assured destruction during the cold war, an entire generation grew up in fear despite the promises of bright futures. This is a technology that for the first time gave us the power not only of destroying our species, but also to completely transform life on the planet as understood before.

Nuclear power is not the only example of the powers of destruction that human ingenuity has put in place in our planet in the middle of promises of social progress and human development. In the 90's, for example, the genetics industry promised a new age of food security for humanity through transgenic crops that can provide food in all kinds of ecosystems, growing by resisting all kind of threats (from insects to plagues). However, the manifestation of the technology was very different from its original promises, generating a system of capitalistic exploitation that has ended food independence of whole countries like Haiti, where, after an earthquake and the resultant massive destruction, Monsanto offered free seeds, without advising that the seeds were manipulated with the "terminator gene". The genetic modification of the seeds disabled the reproduction of the plant by avoiding the generation of new seeds, making Haiti a captive to Monsanto products for its survival.[82] The green revolution of India has concluded with suicides of thousands of farmers who have lost their way of economic survival[83] because of the genomic industries' strategies of economical exploitation and dependency generation. This is another example of the chiasmic dynamics where promises of utopia can easily evolve into a dystopic scenario where dreams and nightmares coexist as two faces of the same coin.

Maybe this is a lesson that the historic-cultural systems that preceded ours were always very aware of. Janus, the Roman god of technology, was the only one in the Roman pantheon with two faces,[84] representing the forces of good and evil that technology is able to unchain. A deep comprehension of technology can deliver deep changes that can go in the opposite direction than the intended course. Furthermore, there is something that is even more important to the social fabric, viz., any kind of

[81] *Rodríguez J.*, La civilización ausente: tecnología y sociedad en la era de la incertidumbre, Gijón: Trea, 2016.
[82] *Mazzeo J.*, Assistance or Corporate Interest?, 2012.
[83] *Sebby K.,* The Green Revolution of the 1960's and Its Impact on Small Farmers in India, 2010.
[84] *Ellul J., Ellul J., Jurist P., Ellul J., Juriste P., & Ellul J.,* La Technique ou l'enjeu du Siècle, Paris, A. Colin, 1954.

knowledge comes with a price. “Deep machine learning” and “artificial neural networks”, despite the categorisation into different kinds of concepts, potential applications, and phases of development, gave us the impression of having everything under control, when reality seems to be very different.[85] It is necessary to fully understand that we are dealing with a technology that we are unable to fully comprehend, and whose risks are also beyond our current understanding.

One of the key points that to be addressed in this article is precisely the recognition of incomplete knowledge about the technological frameworks we are dealing with. Understanding that we are giving birth to a kind of society that could easily be described as an “algorithmic society” where in its current phase of development algorithms do not try anymore to fit the necessities of the social fabric or the human. To the contrary, we are passing through a phase where human activity tries to adapt itself to the necessity of algorithms,[86] producing changes in how we think and act to facilitate this kind of ethereal governance of human activity through automatisation in a system that represent a huge advantage in relation with the previous ones. Looking at all its implications, from the social, legal, ethical and technological challenges, we come to the conclusion that reliability is one of the key concepts related to the implementation of the technology.

Elon Musk, co-founder of SpaceX and Tesla, has warned that "in the age of artificial intelligence we could create an immortal dictator from which we would never escape.[87]" He also warned that "the competition for the development of artificial intelligence has become the greater risk for a third world war, since the country that leads the research in artificial intelligence will come to dominate the global affairs.”

The next problem that we are going to present is related to the side effect of massive uses of artificial intelligence, viz., we, as humans, do not have any inherent mechanism that allow us to automatically distinguish between reality and fiction. For centuries, even millennia, different systems of beliefs rose and fell, linked to the destiny of cultures and civilisations and their technical capabilities. We have believed in magic, gods, the old ones and the new ones and we have thought that the earth was flat. Even in a highly scientifically developed context like ours, some of these ideas have shown extraordinary persistence, being believed by broad layers of population.

In addition, perception represents an enormous inconvenience to establish relations of any kind based on a common truth.[88] It does not matter how many times science proves itself worthy by curing illnesses, allowing us to launch satellites, making our smartphones work or turning on our home appliances. There are always going to be doubts, conspiracy theories or other kinds of attempts to provide answers, without considering their quality or applicability to daily life. This problem finds its roots in the very essence of human reason, which most of the time works as a justification method for

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85 *Yudkowsky E.,* Artificial Intelligence as a Positive and Negative Factor in Global Risk, Global Catastrophic Risks, 1(303), 2008, 184.

86 *Postman N., Riggenbach J.*, Technopoly, Blackstone Audio Books, 1994.

87 *Browne R.,* Elon Musk Warns A.I. Could Create an ‘Immortal Dictator from which We Can Never Escape’ CNBS, <https://www.cnbc.com/2018/04/06/elon-musk-warns-ai-could-create-immortal-dictator-in-documentary.html>.

88 *Ricoeur P.,* The Function of Fiction in Shaping Reality, Man and World, 12(2), 1979, 123-141.

our actions, providing a cohesive history while disregarding its feasibility. Organised religions are a good example of these intellectual efforts that are in clear dissociation with the laws of nature.

Numerous philosophers through the ages had analysed these problems and their conclusion is that reason by itself is not enough for comprehending the nature of our context.[89] Experiences, individual as well the collective, are necessary to give factual sense to our analysis.

However, experience also represents several theoretical problems. The metaphor of Plato's cave is a good example to illustrate it, comprehending the possibility of perceiving not reality itself but just projections of reality, shadows that are hardly sufficient to help us to explain our context and our very own nature. The problem of experience has been deeply analysed and we can observe several answers to the problem. There are those who admit that our perception is conditioned by our own capability of senses; and then there are those who advocate that even perception based on senses can be wrong. We have to accept a common base for analysing reality. In other words, if you, I and all the people we share space with see that it is raining, we should accept it as a correct assumption.[90] But even in this point we face another conflict, as developed by Nietzsche. In "The Genealogy of Morals,"[91] he presents words as a prison that needs to be broken in order to generate a new code that truly allows expressing our context without the meaning and symbols attached to the current significance. The words we use go beyond the meaning that we want to apply to them in a very precise moment, because they carry all their history in relation with the collective, and even with the individual remembering the past experiences associated with the word.

This is something that can also happen to those algorithms that use natural language as basic data, being able to develop patterns that could be described as racism.[92] Words as gay, woman or black gave us good reference of this process as we have recent examples of the role of AI crystallising dynamics of marginalisation. We have to take into account that learning process could condition its reliability and be a major problem in the field of LAWS.

Our morals, as a codification of traditional values, act in a very similar way, being necessary to re-establish the basic parameters we work with to adapt to a new human condition brought by the massive incorporation of technologies in our daily lives. This technology is able to have direct impact over our language and the way we communicate within a moment.[93]

Also related to the problem of perception is the inherent ability that AI can develop to deceive people. The recent demonstration of Google Duplex, the new Google assistant, shows its ability to make people believe that they were interacting with another human, a clear must not from an ethical

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89 *Hegel G. W. F.,* Fenomenología del espíritu, Buenos Aires: Fondo de Cultura Económica, 1966. *Schopenhauer A*., The World as Will and Representation, Seattle (Estados Unidos), University of Washington, 1959.

90 *Bhaskar R*., Reclaiming Reality: A Critical Introduction to Contemporary Philosophy, Routledge, 2010.

91 *Nietzsche F*., On the Genealogy of Morals and Ecce Homo (ed. Walter Kaufman), Nueva York, Vintage, 1989.

92 *Crawford K.,* Artificial Intelligence's White Guy Problem, The New York Times, 2016, 25.

93 *Zadan N.,* The Future of Human Communication: How Artificial Intelligence Will Transform the Way We Communicate, <https://www.quantifiedcommunications.com/blog/artificial-intelligence-in-communication>, [12/09/2018].

perspective. Therefore, no AI should be allowed to interact with humans without identifying itself as one and must ask for explicit consent to gather data from an interaction. The future is at stake and we should hurry developing legal tools capable of protecting our societies from dystopic evolutions of the technology.

Finally, the last challenge is related to power, its dynamics and how AI can be a determinant for the maintenance of the current status quo or be at the root of deep changes in the structure of the power relations. Technology has the ability to radically modify the sources of collective meaning.[94] There is an interdependent relationship between material culture and cognitive process; our material capacities shape our worldviews. At the dawn of civilisation, old traditions and magical adorations disappeared and organised religion was born, which replaced the sorcerer by the priest and broke the ancient links with nature. From a system that professed its ability to modify the laws of nature through magic, it passed onto another in which nature was simply the playground in which the caprice of a pantheon of gods whose favour was to be won was manifested. This generated a new power structure for whose extension cities were a key element.

It was in the city where the temple stood, from whose peak the high priests monopolised the relationship with the gods and acquired immense power. They too were a technological class[95] that gained its power through knowledge; knowledge that could be scientific. Think of the Mayan rulers who went to the top of a pyramid and threatened their people with a solar eclipse and the fear that those people must have experienced at the moment when the Sun disappeared.

That knowledge can provide such power also explains the gimmicky ways and barriers to access that almost all societies in history have used to seek to protect the holders of this fundamental knowledge[96] from the threat that a generalisation could represent for them. The complexity of the Egyptian and Mayan hieroglyphics offers a good example of this purpose of structuring knowledge in such a way that it would be difficult for ordinary people to access.

From antiquity to today, the role of technology has never diminished in importance; and this importance is easily traceable throughout history, manifested in the emergence of certain inventions that had the ability to profoundly transform the societies that created them. Lin White explains, for example, how the new war machine that was the stirrup that gave birth to feudalism.[97] The combination of a man, a horse and a sword gave rise to a new hegemony on the battlefield and the training needs of these new elite soldiers forced them to abandon their traditional ways of life (agriculture, crafts, etc.) and being full-time knights, becoming a third technical class between the monarchy, the church and the common people and weaving around them the feudal relationships typical of this system that runs through the Middle Ages. It is just one example; the industrial revolution, the communications revolution, etc., all of them reproduced the same mechanism later. Any new technology can provoke a drastic reversal of the internal

[94] *Ellul J., Ellul J., Jurist P., Ellul J., Juriste P., & Ellul J.,* La Technique ou l'enjeu du Siècle, Paris, A. Colin, 1954.
[95] *Veblen T.*, Teoría de la clase ociosa, Madrid: Ariel (3.ª edición), 1944.
[96] *Veblen T.*, The Place of Science in Modern Civilisation and Other Essays, Nueva York, Huebsch, 1919.
[97] *White L.,* Tecnología mundial y cambio social, Barcelona, Paidós, 1973.

equilibrium of a system. Let us also think about what the invention of the Gutenberg printing press, closely linked to Luther's Protestant revolution, meant for the power of the Catholic Church, the ideological monopoly of the Vatican over Europe, proposing a relationship with god without intermediaries and a direct and wider access to religious arcana.

Any given community needs constant technological progress to perpetuate itself in a context of competition with others, strong control over the technological system to preserve the internal status quo, as well as a belief system that gives a collective meaning to the community while justifying the social order. In relation to all this, we can affirm that a more complex technological system needs more complex tools of government and that a more complex system of government in turn requires beliefs that are also complex. Everything is interrelated as Marx affirmed that "the hand mill will give us society with the feudal lord; the steam mill, with the industrial capitalist.[98]"

We could talk about a tragedy in three acts that is repeated again and again. First act: a new technology appears and, linked to it, a new technical class associated with the knowledge necessary to implement it. Second act: those who hold power *stricto sensu* open the decision-making process to the technological class in response to an operational need of the system.[99] Over time, knowledge can be extended to a large part of the community because it is necessary for the evolution and perpetuation of the system, bringing it closer to democratic participation and the provision of quality of life, security and order to broad sectors of society.

However, a situation may also arise that scientific progress begins to develop outside the margins of state control and a new technology that can destabilise the fragile equilibrium established between the technical class and the dominant class appears on the horizon, generating a shock as described by philosophers such as Gramsci,[100] Pareto or Mosca.[101]

This situation can lead to two different main scenarios, viz., a new democratic opening of the decision-making process or an authoritarian re-concentration of the control of the material and symbolic means of production in a more closed group of people, which does not necessarily end democracy but erodes it or limits it.[102] In relation to democracy, we must understand that we are, as Nietzsche said, slaves of our own words,[103] and also that this neither in theory nor in practice designates a one-way system. Democracy must be understood in a wide range of possible applications that can be very different from each other, some of which can be, and in fact are, compatible with the people in charge, different techniques oriented to control, the manipulation of public opinion through education, the media, and so on.

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[98] *Marx K.,* The Poverty of Philosophy, Nueva York, Cosimo, 2008.

[99] *Nye R.,* The Anti-Democratic Sources of Elite Theory: Pareto, Mosca, Michels, Nueva York, Sage, 1977.

[100] *Gramsci A.,* Further Selections from the Prison Notebooks, Saint Paul (Estados Unidos), University of Minnesota, 1995.

[101] *Nye R.,* The Anti-Democratic Sources of Elite Theory: Pareto, Mosca, Michels, Nueva York, Sage, 1977.

[102] *Pareto V.*, The Rise and Fall of the Elites: An Application of Theoretical Sociology, Nueva York, Transaction, 1991.

[103] *Nietzsche F.,* On the Genealogy of Morals and Ecce Homo (ed. Walter Kaufman), Nueva York, Vintage, 1989.

Artificial intelligence represents a radical redefinition of organisational and cognitive processes of the construction of otherness, the mechanisms of the state, the symbols that give collective meaning to our society and, in general, the relationship of the human being with its context. Again, we are facing a technology capable of transforming our material reality and called to form new elites, either to deconstruct existing systems of privilege or to crystallise them even more. We face, therefore, the challenge of foreseeing the transformations to come, preparing our communities and defining frameworks that allow new decision-making processes.

In the specific case of the AI weapon application, we are faced with the advent of a new dystopian order. The delegation of the ability to kill in a system, whose future behaviour we are barely able to predict and whose reliability cannot be guaranteed 100% in terms of execution of orders or whether it is in compliance with international law. A delegation of lethal capacities that cannot be justified from an ethical point of view (neither the efficiency, nor the cost, not even the protection of own soldiers), it is a suicide walk towards the abyss that we will only avoid if we are able to equip ourselves with binding legal guarantees that human life cannot be stolen by non-human entities. Certain applications must be restricted while others are strengthened for the purpose of socialising the technology to make it accessible to broad layers of the population in a way that helps to build an open and plural society.

5. Ways for Action

As it has already been exposed, artificial intelligence represents a new phase of the domain of technology over reality, since it can act both digitally and materially in a way that is unprecedented. This requires a multidisciplinary approach that allows evaluating its implications in a holistic way. To do this, it must begin by paying attention to key aspects such as the information on which the system has been built and the data that contributed to its development. In this sense, it is necessary to depart from D. J. Solove's definition of privacy, viz., not a preservation of personal interest against the social interest, but the protection of the individual based on the values of society. He explains, "You cannot fight for an individual right against the most important social good. Privacy issues imply a balance of social interests on both sides of the scale".[104] This notion of privacy and protection of the personal implies a property of the data on the part of the subject that, in case of being transferred, must be done through an explicit consent. Thus, those civilian companies that collaborate in military projects must inform their users if their data has been used in any way in the development of algorithms that may have military use. Explicit consent must be requested even if it is derived from technologies that no longer include the original data sets. This measure could be effective to reduce the incentives that these companies may have to make their technology available for military use.

Another issue that needs attention is the new military escalation that weapons systems can produce, very similar to the one that at the time caused the atomic bomb. This did not lead humanity to its end, thanks to the mechanism of mutual nuclear deterrence, but nothing guarantees that this mechanism will work again with the AWS.

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[104] *Solove D. J.,* I've Nothing to Hide and other Misunderstandings of Privacy, San Diego L. Rev., 2007, 44, 745.

Those giants, who provide the LAWS with artificial intelligence with the necessary data to feed their metacognition, do so that they may end up having the most lethal discretionary decisions in their hands. As The Economist has pointed out, "the most valuable resource in the world is no longer oil, but data", and administrative law must act to prevent these monopolistic threats to security and privacy.

Consequently, and considering the last report of the International Human Rights Watch (HRW) and Harvard Law School's article "Heed the Call: A Moral and Legal Imperative to Ban Killer Robots" of August 2018, it is urgent to carry out simultaneous actions of control and regulation of this type of weapons, such as:

- Clearly define the concept of a completely autonomous lethal system;
- Reiterate the general principle that all weapons systems must respect international humanitarian law, the principle of distinction and proportionality, and always with sufficient human control;
- Signing of international agreements on arms control and prohibition of research and development of such systems, as was done with the proliferation of nuclear or chemical weapons;
- Signing of international agreements to verify non-experimentation with weapons with total lethal autonomy;
- Signing of international conventions on the compatibility with international humanitarian law of the development or acquisition of autonomous weapons with human control, in compliance with Article 36 of Additional Protocol I of the Geneva Conventions;[105]
- Approval of state laws to restrict such experimentation and innovation in private centres on these issues under administrative and criminal sanctions;
- Approval of state laws to establish the obligation to have inspectors and compliance delegates in the centres of experimentation and innovation of artificial intelligence.
- Promote multidisciplinary AI research; and
- Promote a general code of ethics for AI.

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Stephan Schmitt [*]

Importance of Judicial Communication in Civil Proceedings in Germany

Two fundamental changes were introduced into civil procedure law at the beginning of XXI century with respect to the obligation of a judge to give directions and strengthening of the position of a mediator judge, meaning the authority of a judge to influence the parties to judicial proceedings and drive them to a settlement agreement. As a result of two new regulations the communication was strengthened both between a judge and the parties and the parties themselves. Hence, the role of a judge is no more limited only to leading the proceedings in accordance with established procedure and adoption of a well-reasoned decision, based on substantive law. A judge has more intensive communication with the parties before the resolution of a dispute, be it through a court decision or a settlement agreement reached between the parties.

This paper is an attempt to describe the main consequences of the new regulations and explain the new role of a judge.

The paper offers the justification that the terms of reference of a judge should be redefined through the expansion of the scope of his activities, what becomes particularly important in the sense of impartiality. The expanded scope of activities of a judge bears certain risks as well: on the one hand a judge is required to have direct communication with the parties and on the other - the parties are entitled to refuse this communication with a view to protection of their own interests - for instance, when a judge offers settlement conditions to the parties generating negative attitude of the parties towards him in doing so. The law offers a solution - to involve a dispute-reviewing judge and a mediator judge as different persons at different phases of case proceedings.

The paper will also discuss the financial benefits of judges' decisions based on party consensus.

***Key words**: new regulation of the duty to give directions, new regulation of the institute of a mediator-judge, bias and scope of activities of a judge, delimitation between a dispute-reviewing and a mediator judge, financial benefits of closure of proceedings through settlement, image of a judge, judicial power, legal education.*

1. Introduction

A civil law judge leads civil proceedings and establishes the rightfulness of the claims of the parties through his decisions based on the law in force and regulations. However, judge's communication with the parties is not limited to such "declarative" communication.

The fundamental difference from criminal law is that in civil proceedings a judge is required to speak to the parties about his potential decision. The scope of communication has been extended, posing the new requirements before a judge, for the fulfilment of which only the perfect knowledge of law is not sufficient.

During one of the newspaper interviews the Chairman of Criminal Panel of Federal Court of Justice of Germany, Fisher was asked (interview with the newspaper Die Zeit, 30.10.2010), whether what the current law students were lacking in his opinion. Fisher's answer was as follows:

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"In most cases - the skills, i.e. social and psychological abilities. Practically, there things are not taught: the competences necessary for the conduct of proceedings can never be acquired during the studentship, most of the students lack communicative sympathy."

The answer to the next question - why was that important:

"Jurisprudence is the science, which is mainly based on speech. During their carrier they (the students) will have to make their professional speeches, protect the interests of the parties, resolve the conflict situations, and also they should be able to feel empathy towards the strangers."

The abovementioned two changes strengthened judge's communication during court proceedings, expanded its scope and also, changed its essence.

The first change is related to Section 139 of the Civil Procedure Code of Germany. As a result of the reform of the Civil Procedure Code in 2000, now a judge is required to give wide directions to the parties to proceedings and also, to ensure the conduct of court hearing. Under Section 139 of the Civil Procedure Code of Germany[1]:

1. To the extent required, the court is to discuss with the parties the circumstances and facts as well as the relationship of the parties to the dispute, both in terms of the factual aspects of the matter and of its legal ramifications, and it is to ask questions. The court is to work towards ensuring that the parties to the dispute make declarations in due time and completely, regarding all significant facts, and in particular is to ensure that the parties amend by further information those facts that they have asserted only incompletely, that they designate the evidence, and that they file the relevant petitions.
2. The court may base its decision on an aspect that a party has recognisably overlooked or has deemed to be insignificant, provided that this does not merely concern an ancillary claim, only if it has given corresponding notice of this fact and has allowed the opportunity to address the matter. The same shall apply for any aspect that the court assesses differently than both parties do .
3. The court is to draw the parties' attention to its concerns regarding any items it is to take into account ex officio.
4. Notice by the court as provided for by this rule is to be given at the earliest possible time, and a written record is to be prepared. The fact of such notice having been given may be proven only by the content of the files. The content of the files may be challenged exclusively by submitting proof that they have been forged.
5. If it is not possible for a party to immediately make a declaration regarding a notice from the court, then the court is to determine a period, upon the party having filed a corresponding application, within which this party may supplement its declaration in a written pleading.

Hence, the court is required to dive directions. When a party has evidently overlooked an important point of law or essence, or considered it of minor importance - say, has improperly interpreted a point of law or legal status - the court is required to pay party's attention to such a mistake. Otherwise the court would have been found contradicting the right to fair trial guaranteed by the Constitution (Constitution of the Federal Republic of Germany, Article 103, Para. 1), meaning that without the above-

[1] The new version of the Civil Procedure Code as a result of reform - 27.07.2001 (BGBl. I S. 1887) m.W.v. 01.01.2002.

mentioned directions the judge would have made his decisions on the basis of circumstances, the parties to the proceedings had not taken into account (the so-called inadmissible unexpected decision). By the end of oral hearing, when court finds, that the duty to give directions was violated, it is required to resume oral hearing (Civil Procedure Code, Section 156, Para.(2)1) and issue legally important directions. As per Section 139 of the Civil Procedure Code of Germany the duty to give directions covers not only to legal opinion, but also the content of the facts, that are important from legal point of view, and also the consequences of striking of evidences. The court is also required to study presented evidences both from legal and factual points of view[2]. The court directions aim as revealing ambiguities, flaws, and errors and their presentation in a transparent manner. Consequently, the judges are required to discuss the deficiencies revealed during the presentations of the parties specifically and purposefully. At the same time, the parties should be able to present their opinions regarding court directions and interpretations (court hearing), what makes civil procedure of dialogue type.[3]

The new regulation of Section 139 of Civil Procedure Code makes reference to the type of authority of a judge, which implies the possibility of judge's communication with the parties at the crucial moment of dispute resolution. A judge, who acts only according to own neutrality principle, is isolated, secluded from the parties, is no more concurrent with new challenges and is not desirable for the legislator either. The relevant directions, given by a judge, are quite important even behind indicative legal transparency. Judge's speech makes civil proceedings dynamic from other point of view as well: based on the directions the parties are in the position to influence the flow of the proceedings from quite a new angle; as a result of judge's directions the parties may engage in the discussion of some other matters as well and during this communication it is possible for judge's judgement to become the benchmark for the revaluation of risks by the parties. The negotiations between the parties may acquire quite a new meaning, what may lead them to new, alternative offers, with due consideration of neutral opinion of the judge, no matter it is will be uphold from legal point of view or not, but will rely on the presumption, that the decision will be based on this opinion. Consequently, judicial communication with regard to a case is not limited only to provision for a fair decision. More qualitative decision with regard to disputed matters can be made only under more intensive involvement of the parties in dispute resolution. In this case the quality of judge's communication speaks for his transformation into a mediator-judge.

Under the first sentence of Para.1 of Section 139 of the Civil Procedure Code the necessity of bilateral communication determines the reasonability of a settlement agreement instead of a decision made with regard to a legal dispute.[4] The duty of bilateral communication, provided for by the first sentence of Para.1 of Section 139 of the Civil Procedure Code is further specified by settlement process,

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2 *Wieczorek/Schütze-Smid*, ZPO, 4.Auflage 2013 Rn 71 zu § 139 ZPO.

3 *Wieczorek/Schütze* a.a.O. Rn 75. Federal Court of Justice of Germany in its decision of 02.10.2003, Az.: V ZB 22/03, published in BGH NJW 2004, 164, speaks about an "open dialogue" between the court and the parties or attorneys.

4 So ausdrücklich *Wieczorek/Schütze-Smid* .a.a.O. Rn 77. This link between the new regulation of the duty to give directions and the efforts of a judge to reach a settlement agreement is discussed in: *Prütting/Gehrlein*, ZPO, 6. Auflage 2014, Rn 44 zu § 42 ZPO, so gesehen.

discussed in Para.1 of Section 278 of the Civil Procedure Code, where the "program" of the legislator becomes apparent under the new regulations: saving time and resources, closure of a dispute through conflict settlement agreement, backed up with personal responsibility of the parties, what leads us to expedited legal peace.[5]

The second amendment of the Civil Procedure Code was conditioned by the adoption of the Mediation Law of 21 July, 2012,[6] which was concurrent with the EU Mediation Directive of 21 May, 2008[7] and provided for new regulation of Section 278 of the Civil Procedure Code.[8]

1. In all circumstances of the proceedings, the court is to act in the interests of arriving at an amicable resolution of the legal dispute or of the individual points at issue.

2. For the purposes of arriving at an amicable resolution of the legal dispute, the hearing shall be preceded by a conciliation hearing unless efforts to come to an agreement have already been made before an alternative dispute-resolution entity, or unless the conciliation hearing obviously does not hold out any prospects of success. In the conciliation hearing, the court is to discuss with the parties the circumstances and facts as well as the status of the dispute thus far, assessing all circumstances without any restrictions and asking questions wherever required. The parties appearing are to be heard in person on these aspects.

3. The parties shall be ordered to appear in person at the conciliation hearing as well as at any other conciliation efforts. Section 141 (1), second sentence, subsections (2) and (3) shall apply mutatis mutandis.

4. Should neither of the parties appear at the conciliation hearing, the proceedings shall be ordered stayed.

5. The court may refer the parties for the conciliation hearing, as well as for further attempts at resolving the dispute, to a judge delegated for this purpose, who is not authorised to take a decision (Güterichter, conciliation judge). The conciliation judge may avail himself of all methods of conflict resolution, including mediation.

6. A settlement may also be made before the court by the parties to the dispute by submitting to the court a suggestion, in writing, on how to settle the matter, or by their accepting, in a corresponding brief sent to the court, the suggested settlement made by the court in writing. The court shall establish, by issuing a corresponding order, that the settlement concluded in accordance with the first sentence has been reached, recording the content of same in the order. Section 164 shall apply mutatis mutandis.

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[5] Justification of law RegE BT-Dr. 14/14722 S.2.

[6] According to the law on the process of mediation and settlement of other extra-judicial conflicts 21.07.2012 (BGBl. I S. 1577) m.W.v. 26.07.2012.

[7] The EU Directive on certain aspects of mediation in civil and commercial matters of 21.05.2008 (2008/52/EG) obliges national legislatures to bring into force the laws, regulations, and administrative provisions necessary to comply with this Directive before 21 May 2011. Already on 16.10.1999 the Council of Europe obliged the Members States to create alternative extra-judicial process. The second paragraph of Article 3 of the EU Mediation Directive explicitly requires regulation - "mediation by judge".

[8] At the same time Section 278a provides for the option for dispute reviewing judge to suggest that the parties pursue mediation or other alternative conflict resolution procedures (e.g. arbitral tribunal) and order the proceedings stayed if parties agree to his suggestion.

According to these regulations, subject to judge's communication is not only a legal case, but also a conflict between the parties, which should be managed by a judge to the extent practicable. Resolution of a dispute does not only mean a claim filed with a judge, but rather a legally binding principle. Furthermore, a judge, reviewing legal disputes, gets involved during the settlement process, occurring in the course of dispute resolution (Civil Procedure Code, Section 278, Para.2) or by way of situation, during the dispute resolution, when judge identifies settlement chances and options (Civil Procedure Code, Section 278, Para.1). *Ex altera parte*, a dispute-reviewing judge acting as a mediator judge by virtue of Para.5 of Section 278 of Civil Procedure Code, is entitled to try to settle the conflict between the parties through employment of various methods, including mediation. Para.5 of Section 278 of Civil Procedure Code is based on voluntary participation of the parties and allows for a mediator judge to converse with each party to the extent that the parties have given their consent to this end.

The new regulation corresponds to the principle of respect of public values of civil proceedings. The opinion, that the main task of dispute-reviewing judge is just to make decisions, is strongly criticised; instead the skills of the judge to lead settlement process and allow the parties to resolve their dispute through settlement, come forward.[9] Based on the foregoing Federal Court of Justice of Germany ruled in 2007:

"In a rule-of-law state closure of a dispute through settlement should essentially prevail over the adjudication of a legal dispute.“[10]

Federal Court of Justice of Germany also stresses the importance of co-operational relations between the parties and hence places judge's efforts regarding settlement and judge's decision during litigation proceedings side by side from normative point of view. Federal Court of Justice of Germany regards both activities as the main task of a judge reviewing civil disputes.

"The experience shows that amicable settlement of a dispute is of paramount importance for judicial practice. Like a court decision, a ruling, it is also the core task of a judge and it should be accorded to the scope of main judicial activities of a judge like judge's decision.“[11]

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[9] *Von Bargen*, Gerichtsinterne Mediation. Eine Kernaufgabe der rechtsprechenden Gewalt, 2008, S. 192; *ders.*: Der Richter als Mediator, in: *Haft/von Schlieffen*, Handbuch der Mediation, Verhandlungstechnik, Strategie, Einsatzgebiete, 2. Auflage 2009, S. 946; *Voßkuhle*, Rechtsschutz gegen den Richter: Zur Integration der Dritten Gewalt in das verfassungsrechtliche Kontrollsystem vor dem Hintergrund des Art. 19 GG, 1993, S. 93 f.; *Tochtermann*, Die Unabhängigkeit und Unparteilichkeit des Mediators, 2008, S. 32 m. w. N. *Schmitt*, Recht jenseits des Rechts, 2012; ders.: Stufen einer Güteverhandlung: Lehre einer imperfekten Gerechtigkeit, 2014.

[10] Federal Constitutional Court of Germany - BVerfGE NJW-RR 2007, 1073; By decision of Federal Constitutional Court of Germany of 14.02.2007 (Az. 1 BvR 1351/01) the negotiations are meaningful when the situation is *prima facie* hopeless: "Successful closure of negotiations between the parties should not mean that conciliation process under the participation of a third person will again be hopeless. This is apparent even when during civil proceedings a dispute is resolved through settlement." The same goes true with a settlement agreement as resolved by Hanover Labour Court 1.2.2013, Az.: 2 Ca 10/13, published in: ZKM, 2013, S. 130 f.; *Greger/Weber,* Das neue Güterichterverfahren. Arbeitshilfe für Richter, Rechtsanwälte und Gerichtsverwaltung, in MDR, 2012, S. 9.

[11] BGHZ 47, 275 (287).

According to the above decision the main task of a civil judge is the resolution of a conflict and dispute through reaching consensus.

Every judge is committed to law and justice. Both are associated with the goal to secure legal peace, and ultimately the social peace. Legal peace of the parties between themselves and also with the society and the State. Legal peace, or to be more precise, social peace requires:

- fair trial,
- party disposition, and
- protection of the society, its interest and laws.

This paper aims at discussing reasonable judicial negotiations, initiated by judges.

Advanced training of judges on this subject will change their attitude towards negotiations in the course of dispute resolution. The judges should not use judicial proceedings only for making references to normative expectations of law, its protection and sanctions for their breach. They should search for communication context in conflicts underlying disputes based on the experience gained in similar conflicts, find how to better approach the parties in order to overcome the existing blockage through concerted efforts. In consequence of such communication experiences a judge will learn and comprehend what to do: one the one hand, the judge will be strictly consistent when the case concerns normative assessments; in this case he will be able to defend himself against other possible ways of case-handling. On the other hand, he has to demonstrate empathy and compassion during the communication with the parties in the course of settlement; in this case the judge will be able to learn how to influence parties in favour of settlement, for them to reach a settlement agreement, preserving their autonomy.

It is an open secret for judicial practice that civil courts will not be practically able to cope with their workload without settlements and, respectively without potential saving resources and time this way. According to Reinhard Gregor - the former federal judge, co-author of Zöller's large Commentary on CPC and former mentor of the model of mediator judge of Bayern and Thüringen federal lands - only 40% of civil proceedings throughout German Federal Republic ended with adjudication and 60% - through settlement ofr similar co-operational procedures (withdrawal of a claim, recognition, amicable resolution). The foregoing evidences that settlement and amicable agreement are always the most desired solutions in the light of efficient resolution of disputes.

We hope, this paper will assist Georgian colleague judges to reach settlement agreements more efficiently in numerous cases under their review. It is beyond doubt, that attorneys and parties should also be involved in the process and give their consent; thus the paper also targets the attorneys and parties to disputes, to lead them to settlement agreements. According to recent statistics oral hearing - which allows for settlement - is the crucial factor. Oral hearing, opposed to written proceedings, increases party readiness for settlement by almost 27%, and more large-scale is a oral hearing, more efficient it is.[12]

[12] *Berlemann/Christmann/Focken,* Lassen sich Vergleiche und Berufungen vorhersagen?, in: DRiZ 2016, 62-65, hier: 63.

3. Limits of judicial communication

a. Impartiality of a judge

In the minds of the parties the above discussed connection between judicial communication with the parties and reaching a settlement agreement guarantees both the impartiality and independence of the judge and the principle of personal responsibility of the parties, and particularly the principle of party disposition. However, within the framework of this conception the account should be taken of the limits of judicial competence with regard to parties and attorneys.

The boundary of judicial communication is judge's impartiality, which in the case of occurrence of situations, envisaged by Section 42 of CPC, constitutes grounds for challenging the judge. The grounds for challenging a judge should be necessarily compatible with the duties of interpretation, sympathy and direction, envisaged by Section 139 of the CPC. Hence, based on the practice of Federal Court of Justice, the performance of a judge should not be considered biased if the interpretation given by him is compatible with Sections 139, 273, 278 para.2, 522 and Article 103, para.1 of German Constitution, or to be more precise, meets their requirements.[13] If law requires transparency from a judge, as mentioned above, provision of contextual or legal interpretations during litigations cannot be presumed as biased, prejudiced behaviour of the judge.

In certain cases this means that communication of his legal opinion by judge to the parties with regard to the case concerned does not constitute ground for his challenging for his bias. Exempted would have been only that case, when judge is so convinced is his opinion, that judgments, presented by the parties do not matter for him anymore.[14] In practice, the "temporariness" of judge's opinion means that he is supposed to stress the preliminary nature of his decision. However, according to judicial practice of federal courts stressing such reference is not mandatory, [15] but is applied for unambiguous interpretation of the matter. As a general rule, the judge's initiatives like directions, requests, explanations, advise and recommendations, do not constitute grounds for challenging him.[16] The situation is a bit different, when judge advices the claimant to expand the claim or the range of the parties.[17]

Disputable is the direction, like solicitation or reference to opposite rights, say statute of limitation (BGHZ 156, 269), set-off and the right to retain a thing. In any case, under the first sentence of paragraph 2 of Section 139 of the CPC if any of the parties is clearly mistaken the judge is required to provide the legal interpretation. E.g., when a party is not filing a defence, which can be accepted by the court only after its filing by a party (e.g. statute of limitation, set-off, retention of a thing), this can be

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[13] *Prütting/Gehrlein*, ZPO, 6. Aufl. 2014, Rn 44 zu § 42 ZPO; *Stein/Jonas*, ZPO, 22.Aufl. 2004, Bd. 2, Rn11a zu § 42 ZPO m.w.N.; BVerfGE 42, 88.

[14] Higher Regional Court, Karlsruhe NJW-RR 2013, 1535.

[15] Higher Regional Court, *Munich* MDR 2004, 52.

[16] *Zöller-Greger*, ZPO, 31. Aufl. 2016, Rn 26 zu § 42 ZPO.

[17] Higher Regional Court, Brandenburg, NJW-RR 2009, 1224, Higher Regional Court, Rostock NJW-RR 2002, 576.

presumed as party disposition and not as a "mistake" thereof[18]. The situation is quite different, when is apparent from the declaration of the party, that the latter tries, to discuss specific issues but is not explicitly presenting a defence.[19] In this case giving explanations and directions by the judge to the party is the mandatory principle and should not be criticized.

The discussions demonstrates, that the scope of judicial action in the course of dispute resolution is limited by the following principles::

- awareness of the parties (with regard to circumstances),
- maximum disposition of the parties (at legal level),
- sympathy of the judiciary towards the parties,
- neutrality of the judges, and
- equal tools of the parties.

For better visualization some cases from judicial practice of Federal and regional Courts of Justice are offered below:

Case of Federal Court of Justice (BGH):

The judge submits the justification of claimant's claim to the respondent and gives written directions to the claimant, the copy of which note is submitted to the respondent:

"As per the fourth sentence the statute of limitation of the claim could have been expired under the seventh sentence, if the respondent pleads for the statute of limitation".

The Federal Court of Justice found the challenge of the judge to be justified on the grounds of the argument that a judge is not entitled to make reference to the application of independent offensive and defensive means with separate legal grounds.

Paying attention to temporary waiver of the right to perform by the judge already means the communication of the decision in advance. The Federal Court of Justice explains, that the legislator has upheld this opinion in the new version of Section 139 of the of CPC through the reformation of civil procedure. The new regulations for conducting substantive law proceedings (CPC, Section 139, para.1), based on their essence and interpretation, provide that the courts are required to give more specific and detailed directions than in times of application of the earlier existing law. Section 139, para.1 of the CPC stresses that during the open discussion with the parties the court is required to explain matters, that are crucial and essentially important for decision-making and should act for the benefit of the proceedings to maximum practicable extent. This stipulation of law also introduces principle, that judge should not aim at revealing grounds for a new claim, motion or statement through his questions or explanations, which are not based, at least on the declarations of disputing parties. The absence of these explanations, the

[18] *Baumbach/Lauterbach/Albers/Hartmann*, ZPO, 73. Auflage 2015, Rn 43 zu §2 ZPO: „Die Fürsorgepflicht des Gerichts steht nicht über der Parteiherrschaft.“

[19] E.g. a party declares that the situation is too protracted and it should come to an end. With regard see *Prütting/Gehrlein* a.a.O. Rn 49 zu § 42 ZPO, The question of the judge, whether the party was challenging the statute of limitation, was not regarded as a demonstration of bias as the foregoing was concurrent with the requirements of Section 139 of the CPC. See also *Zöller-Greger*, ZPO, 31. Aufl. 2015, Rn 17 zu § 42 ZPO.

[20] Federal Supreme Court NJW 2004, 164; also Humm Higher Regional Court MDR 2013, 1121.

necessity of which does not exist due to above reasons, does not embody the decision with unexpected content under para.2 of Section 130 of PCP.[20]

Decision of Frankfurt Higher Regional Court:

After oral hearing the court issued the following verbal direction: "The problem of legalisation of the right-holder can be resolved through assignment of the right."

Due to the foregoing the representative of the respondent party considered the judge biased.

Frankfurt Higher Regional Court found:

The court is not entitled to provide a party with essential justification of his suit and thus violate the adversarial principle; it is prohibited to make reference to otherwise justification of the suit and thus prepare a base for the claimant to win. Respectively, the court is not entitled to reveal the new ground of the suit. By virtue of the above reference the claimant could have imagined that the judge would have considered the application of faulty legitimacy of the right-holder unjustified and thus would have given momentum to the claimant to avoid the abandonment of the suit.[21]

Decision of Frankfurt Higher Regional Court with contrary legal opinion:

For the establishment of the bias of the judge, it is not sufficient for the respondent to have impression due to given direction, that the judge tries to save the claimant from the abandonment of the suit only for the absence of his (claimant's) legitimacy as an right-holder. Every direction/ explanation made in the course of civil proceedings with regard to either party, should protect the addressee against any negative procedural consequence. The bias against one of the parties can be established only when such explanation was not conditioned by the flow of the proceedings, position of the party or substantive-law circumstances. The above case was the manifestation of the foregoing. Particular complexity of the case concerned in the light of substantive law justified the judge in giving directions even to the party, who was represented by the attorney and thus, in the case of reasonable evaluation of the situation the respondent party had no doubts about the bias of the judge. The judge explains to the claimant, that he has not legitimised himself as the holder of the right as yet and advices him to have the third party assign the claim in his favour.

During the other proceedings the court examined evidence through interrogation of a witness to clarify whether the claim was assigned to the claimant or not. Based on the foregoing the court made a decision and rejected suit due to the lack of legitimacy of the claimant. Furthermore, it explained, that the claimant's legitimacy was not satisfactory.

Federal Court of Justice considered judge's behaviour as faulty and breaching Section 139 of the CPC. Federal Court of Justice believes that through striking of the evidences the court demonstrated that is has considered claimant's declaration as well-substantiated.

Based on the foregoing the court should have made relevant reference to the absence of claimant's

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[21] Frankfurt Higher Regional Court NJW 1970, 1884; Frankfurt Higher Regional Court MDR 2007, 674, *Schneider*, NJW 1970, 1884: only admissible, important for the case explanations on the part of the judge.

legitimacy and rejection of the suit on this grounds before making its decision.

The explanations are mandatory when the court wants to announce a opinion, dissenting from already made court decision/order. Otherwise there is no solution to the case, when suit lacks subject competence and it should be recognised as unjustified when it could have been concluded on the basis of an order striking of the evidence, that the suit was recognised as well-founded and particularly when the legitimacy of the claimant was evident.[22]

In other decisions the proceedings developed as follows:

The suit was not satisfied by ruling of the regional court of first instance. The claimant appealed the decision. The oral hearing at regional supremen court was scheduled for 5 September, 2012. The day before the trial the challenged judge contacts defendant's attorney by phone and communicates his legal opinions to him. Along with the other matters the telephone conversation concerned the testimonies of witnesses as well, about which testimonies the challenged judge and the attorney were of different opinon. The judge explained that the case might not even come to adjudication as the evaluation of the facts of the case were against the defendant. He also mentioned, that he would discuss his opinion in more detailed manner during the scheduled session and at the same time would make an offer regarding settlement. Furthermore he advised the attorney to inform the defendant or, to be more precise, his insurance agent anout this offer before the scheduled date. The challenged judge debriefed the claimant's attoney as well about this conversation.

During the oral hearing the defendant challenged the judge on the grounds of his biased attitude.

Fear for bias is not justified in this case as the judge's behaviour falls within the framework of the CPC. Under the first sentence of para.4 of Section 129 of the CPC the court is required to give the necessary directions at earliest opportunity. Under para.1 of Section 278 of the CPC in any circumstances the court is required to be oriented on the resolution of a dispute through settlement. By virtue of the reform of the CPC of 27 July, 2011 the legislator specifically stressed, that the settlement agreement should be reached between the parties at earliest possible stage.[23] The court is free is selecting medium. Along with oral hearing the directions can also be made either in writing or through telephone communication.[24] The merit of judge's behaviour is that the attorney was given opportunity to communicate judge's legal opinion to the party before the scheduled dated of proceedings. These directions may concerns the legal and economic modes of further conducting the proceedings. The attorney may take account of these opinions when getting ready for oral hearing. The fact that the judge did not agree to legal assessment of defendant's attorney and has not changed his position even during the telephone conversation, does not justify otherwise qualification of the matter. The judge made references to specific points of law and at the same time offered settlement. Accounting for that, even before the oral hearing the defendant was aware of legal and factual circumstances, what allowed him to

[22] Federal Court of Justice, NJW 2007, 2414.

[23] BT-Drucks. 14/4722, S. 58

[24] Bremen Higher Regional Court NJW-RR 2013, 573; Federal Court of Justice NJW 2006, 60, 62. *Zöller/Greger*, ZPO, 29. Aufl., § 139 Rn. 12; *MünchKommZPO/Wagner*, 5. Aufl. 2016, § 139 Rn. 56.

defend his legal position at oral hearing in accordance with the foregoing. It should be stressed, that the content of the conversation clearly demonstrated, that there was no focus on final decision, but rather the judge said during this telephone conversation that he was going to explaine his directions at the session.

At one of judicial proceedings the attorney would state the court had sufficient grounds to believe that the judge was biased as one month prior to trial the judges of regional court, including the challenged one, had agreed on uniform approach to all parallel proceedings, including proceedings concerned, according to which approach the defendant was to be informed about intentional deceit. In the opinion of defendant's attorney, this agreement was against the defendant, constituted willful and immaterial action and aimed at avoidance of the scrutiny of evidences. According to attorney's statement the foregoing was proved by the representation made by the judge concerned within the framework of the other case, under which representation he was not going to change his opinion (the agreed one). Furthermore, in other parallel proceedings the challenged judge resolved the material for the dispute point of law in accordance with the agreement. The judge made an announcement about his (concurrent to the agreement) position at the proceedings concerned as well.

By decision of Karlsruhe Higher Regional Court, there was no bias on the part of the judge. Sharing legal opinions at oral hearing even when they were voiced via decisions or opinions at other parallel proceedings does not allow for finding grounds for biased attitude. The same goes true, when civil panel reviews a multitude of similar cases and the case-reviewing judge tries to find a common line, direction in resolving a specific matter.[25]

The below case was modeled after a decision of the Federal Court of Justice:

After the scrutiny of the evidences the court offers settlement to the parties, what is rejected by the defendant. The Panel issues recommendations with this regard. The chairperson notifies the parties that the suit was not satisfied by decision of the Panel, howeverm he still makes reference to a settlement agreement, earlier offered by the court. The judge provides the parties with already drafted, but not-signed text of the decision and then starts the discussion of the settlement agreement. The defendant's representative challenges judge for being biased.

In this case one may definitely speak about the bias of the judge as the court clearly declares, that if parties fail to come to an amicable agreement, the draft decision will become a decision and relevantly they will not have any other change to present their arguments and legal opinions, even if the oral hearing is not yet closed.[26]

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[25] Karlsruhe Higher Regional Court NJW-RR 2013, 1535.

[26] Federal Court of Justice NJW 1966, 2399 (mit Anmerkung).

During the oral hearing the judge explains to the claimant that the defendant is not liable to him, i.e. the claimant has incorrectly chosen him as a respondent. The court offers the claimant to file a suit against a real defendant, respectively the cases come the expansion or substitution of the party.

This advice of the judge is so far-reaching, that bias may be found in this case.[27] The same goes true with the case, when court offers one of the parties to file a new claim, a new suit or counter-motion.[28]

The Court of Appeals contact the appellant by phone and advises him to withdraw his appeal as he has no prospective to win.

Based on common judicial practice, no bias is implied here, as the court discusses legal consequences based on its legal opinions.[29]

b. Hazards of judicial communication

The failure of a judge to fulfil the statutory duty about giving directions as required is regarded not as his bias but rather a procedural mistake of a judge, which can be corrected through appealing it with the court of appeals (CPC. Section 529, Para.2(2).[30] The situation is different when judge gives directions that are not allowed by law, e.g. the judge informs the party about the option of submitting a defence due to the statute of limitation despite the fact that it was not clear for the court whether the parties were willing to file such motions. The same goes true with the directions like expansion of claim, continuation of proceedings against or together with the other persons. In this case, as a general rule, the bias of a judge is clear. The forgoing excludes the possibility fo the judge, who issued directions, to be decision-making judge. However, quite often this is a sham victory of the party, who challenged the judge. The party may enjoy the right to raise a question of statute of limitation with the new judge, but this will not make good the unlawful action of the previous judge.[31] The same goes true with inadmissible directions of the judge, like amendment of a claim, expansion of the range of the parties or their substitution. Even when a judge is successfully disqualified from the case, it is impossible to withdraw, correct the communication, made by him, which was not justified under CPC Section 139. It is also possible for the communication of the judge to become detrimental for the parties during the settlement process, which damage cannot be prevented by judicial system. E.g. Under Para. 1 and 2 of CPC Section 278 an "induced" reconciliation may occure during the resolution of a dispute, meaning that the judge may "induce" the parties to reconcile or act in a patriarchal manner. In this case the parties

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[27] *Baumbach/Lauterbach/Albert/Hartmann*, ZPO, 73. Aufl. 2015, Rn 41 zu § 42 ZPO.

[28] *Baumbach/Lauterbach/Albert/Hartmann*, ZPO, 73. Aufl. 2015, Rn 40 zu § 42 ZPO.

[29] Stuttgart Higher Regional Court, MDR 2000, 50; for differentiation see: *Baumbach/Lauterbach/Albert/ Hartmann*, ZPO, 73. Aufl. 2015, Rn 42 zu § 42 ZPO: There is no bias, when court approves the motion for withdrawal of an appeal, by the bias is evident, when the court advices to withdraw the appeal. This differentiation is rather formal.

[30] Decision of Federal Court of Justice 29.10.2012, Az.: V ZB 286/11; *Prütting/Gehrling* a.a.O. Rn 50 zu § 42 ZPO.

[31] The principle of a "fruit from forbidden tree" does not apply here.

suppose, that refusal of settlement, offered by judge may result in negative consequences for them during the decision-making process. Hence in such cases the maxim, which is based on the experience, is in play: "The one, who opposes is the one to lose".

In the case of communication on settlement agreement there are complication from the perspective of a judge as well: a dispute-reviewing judge, who makes every effort to reconcile the parties has to fight with his own self, his emotions and negative attitude towards the party, who refuses settlement. Longer and more intensive are the efforts of the judge to reconcile the parties, more negative is his attitude towards the party, who is the reason of non-reaching the agreement.

As for the party, who refuses settlement, he has the impression that even if judge does not objectively "oppress" the party refusing settlement, in the case of losing the case he will still think that the judge was "upset" and "angry" with him because he rejected settlement. In such cases the judge cannot prevent the impression of the party, who refused settlement, that he was "punished" by judge for his "disobedience" - even if this impression is groundless.

The foregoing evidences that judicial communication has its risks: when judge speaks about his actions and decisions, thus exceeding permitted limits, at least one party may be prejudiced, what cannot be either corrected or withdrawn by an oversight authority. Bias/impartiality of a judge in the case of failed settlement can hardly be avoided. Here PCP Section 278, para.5 may turn helpful, which says, that during long and tedious negotiations it is important for the case to be reviewed by another judge, who does not review legal disputes in general.

The reforms of civil procedure law in German law, which strengthen judges communication with the parties irrespective of certain risks, demonstrate institutional confidence in process-relevant communication of a judge. Confidence, of course, may lead to the abuse of power and disappointment, but at the same time may give rise to trust and thus strengthen the reputation of judiciary.

3. Cost Advantages of Court Settlement in Germany

The German law employes an incentive system, meaning granting financial advantages to parties and attorneys if they close their cases through settlement.

For example, if an attorney negotiates a settlement agreement under Appendix 1 to Section 2, Para.2 of RVG KV N1000 (List of Fees under the Lawyers' Remuneration Act), he will be additionally entitled to the agreement fee. This additional fee is added to his basic remuneration. This fee is not calculated from the value of either the dispute or the subject of the dispute, but rather based to the value of the interest embodied in the settlement agreement. E.g. two brothers are disputing about the will. One of the brothers demands 10 000 Euros from the other and at the same time, the parties agree upon the collection of books, worth of 5 000 in the course of dispute resolution. Although this collection was not subject matter of the dispute, it will still be regulated by settlement agreement and the remuneration of the lawyers will be as follows:

- Fee for the settlement of the dispute, worth of 15000 Euros.

- As per KV №.3104 - (1,2 times) fee for participation in judicial proceeding from 15 000 Euros.[32]
- 1,3 times proceedings fee from the subject matter of the dispute under KV №.3100 - in this case from 10.000 Euros.
- 0,8 times difference fee under KV №.3101 №.2, from additional amount of settlement - from 5.000 Euros.[33]

The same plinciple applies when oral hearing was planned, but parties negotiated a written settlement agreement without holding it.[34]

When parties reach a settlement agreement in the course of case proceedings, the court duty is reduced for the parties: as a general rule there are three types of court duties in every legal dispute, caluculated according to the subject of the dispute concerned (Section 3, para.2 (court fees) GKG, Nr. 5110, Appendix 1). In the case of withdrawal, recognition, abandonment of a suit or court-based settlement, the above three types of court fees are reduced to one, respectively the amount of two other fees is returned to the parties. As shown in the above example, if additional issues are settled during the dispute resolution, which issues do not constitute the main subject of the dispute - in our case worth of 5 000 Euros - 0,25 times of court fees are calculated from this additional amount to be additionally paid to the court.

4. Conclusion

The above analysis demostrates that as a result of procedure-law novelties the communication equity was introduced in civil proceedings along with procedural and substantive equity, creating the new paradigm of judicial actions. This expansion requires the creation of the new type of judge, new competences of the judge with regard to parties and their specific interests. Respectively, the education/training of judges and all the other persons participating in judicial proceedings requires new focus. The attention should be paid to this very aspect.

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33 *Gerold/Schmidt-Müller-Rabe*, Rechtsanwaltsvergütungsgesetz, 19. Auflage, Rn 75 zu VV 3101. Of course, the difference fee is limited: at most, a lawyer will receive 1,3 times of fee for the participation in proceedings from the value of the subject matter of the dispute, plus the amount, subject to additional agreement, i.e. in the case concerned from 15000 Euros. *Gerold/Schmidt-Müller-Rabe*, Rechtsanwaltsvergütungsgesetz, 19. Auflage, Rn 80 zu VV 3104.

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