Transition from Soviet to Liberal Labour Law: Labour Standards in Georgia

Zakaria Shvelidze
PhD Student
Ivane Javakhishvili Tbilisi State University, Law Faculty
Tbilisi
Georgia

z.shvelidze@hotmail.com
July 2012

Zakaria Shvelidze, PhD Student at Tbilisi State University, Law Faculty

Introduction

The resumption of independence of Republic of Georgia in 1991 resulted the beginning of new era of political, economic, social and legal reforms. In 1995, the new Constitution entered into force. The need of transition from planned to market economy found its crucial role in the process of state's development. European integration was declared as the central direction for Georgian nation. Partnership and Cooperation Agreement (PCA) between Georgia and the European Communities and their Member States entered into force on 1 July, 1999.[1] Parties to the PCA view the approximation of Georgian legislation with that of the European Union as an important condition for strengthening economic links. In 1997, Georgian Parliament adopted Resolution according to which all laws and other normative acts adopted by the Georgian Parliament from 1 September, 1998 shall be compatible with standards and rules established by the European Union. PCA identified the fields where the exact planning of the approximation process should be conducted. Among them, the legislation regulating the labour sector was introduced.

Regardless of the collapse of the Soviet Union, employment relationships in Georgia were still regulated by the Soviet Labour Code (1973). In 1997, changes were made to the Labour Code. However, the existing labour legislation still contained soviet elements that were inconsistent with the principles of market economy.

After the "Rose Revolution" (November, 2003), the Georgian government radically changed its view on country's economic development. The political agenda was constructed on the principles and values of liberal economy. Putting all its legislative efforts of minimizing state restrictions and barriers for business activities and promoting free market and industry, Georgian government aimed to establish free liberal economy and attractive climate for foreign investments.[2]

In 2006, Georgian parliament adopted the new Labour Code. Soon later, international and local organizations, scholars, experts labeled the newly adopted legislation as strictly oriented on employers' priorities and interests. It was expected that promoted labour legislation could be in the list of EU oriented fields, but the reality drew different picture. According to the EU

[1]Published in the Official Journal of the European Communities (OJ), L/205 of 4 August 1999.

[2]For example, out of twenty-one taxes under the former Tax Code, only six exists today by force of new Tax Code (2005). In virtue of the new Law on "Issuance of Licenses and Permits" (2005), the overall number of licenses and permits has been reduced by 84%, etc. The rankings of World Bank project – Doing Business (measures of business regulations) helps to give the full illustration of liberal orientation of ruling political party. In accordance with mentioned report, in the list of 183 economies in 2009 Georgia ranked 16th place and 11th place in 2010 per se the criteria on the ease of doing business. Turning the overall list of countries into the region of Eastern Europe and Central Asia, Republic of Georgia holds the first place.

Commission's Progress Report on "Implementation of the European Neighbourhood Policy in 2007" (Georgia) the 2006 Labour Code is not in line with the ILO standards and contradicts EU standards. Progress report directly requested revision of the Code.[3] However, no efforts were made.

In light of these developments, the article analyzes and evaluates general characteristics of new Georgian Labour Code. The paper highlights important novelties that are offered by the newly adopted labour legislation. The introduction of existing labour standards is offered in parallel of comparative discussion between pre-existing Soviet Labour Code and European Union Directives (EU Directives). Discussing the soviet-based labour standards (effective before enactment of 2006 Labour Code), the paper analyzes the transition to the new regulatory model. Additionally, the paper provides the discussion on compliance of effective labour standards with the EU Directives. As a result, concluding remarks evaluate the affects of transition and address future prospects.

1. Contractual Freedom and Labour Standards

1.1. Freedom of labour

By virtue of Georgian Labour Code employment relations are originated on the basis free will and equitability of parties. Contractual freedom as a fundamental principle of private law is maintained in employment relations. Similar to European practice, freedom of contract in the field of labour law is understood to be a concept required and backed by the Constitution.[4] Freedom of labour is proclaimed by the Georgian Constitution (article 30). The constitutional provision ensures that an employee is free to choose his job and his employer and has the consequent freedom to conclude an individual labour contract.[5] Freedom to work also involves a free choice of the type, place and time of work.[6]

Georgian legislation had erroneously formulated the freedom of labour back in the soviet era. The duty to work was considered as essential element of Communist legal system and was explicitly set forth in the Constitution of Soviet Union, arisen from the edict, "thou shall work or thou shall not eat".[7] In fact, individuals who did not work could be prosecuted under the soviet

[3] http://ec.europa.eu/world/enp/pdf/progress2008/sec08_393_en.pdf

[4] *Weiss M., Schmidt M.*, Federal Republic of Germany, *International Encyclopedia for Labour Law and Industrial Relations*, Editor in Chief *Blanpain R.*, Vol.6, The Hague. London. Boston, 2000,50 (94).

[5] *Blanpain R.*, Belgium, *International Encyclopedia for Labour Law and Industrial Relations*, Editor in Chief *Blanpain R.*, Vol.3, The Hague. London. Boston, 2001,33(21).

[6] *Matey M.*, copy editions assistance *Millard F.*, Poland**,** *International Encyclopedia for Labour Law and Industrial Relations*, Editor in Chief *Blanpain R.*, Vol.11, The Netherlands, 1988, 68 (119).

[7] *Ziskind D.*, Finger-Prints on Labor Law: Capitalist and Communist, *Comparative Labor Law & Policy Journal*, Spring, 1981, 5.

criminal law.[8] Unlike soviet law, now neither party can be forced to conclude an employment contract.[9]

Freedom of an employer to enter into an employment contract is also not limited.[10] It is up to the parties to decide whether, with whom and under what conditions they conclude a labour contract.[11] Moreover, according to article 5.8 of the Labour Code the employer is not required to substantiate his/her decision for not recruiting an applicant. By force of previous labour legislation, employer was obliged to specify the particular ground for not hiring a candidate, as groundless refusal to hire an employee was strictly prohibited. Initiated principle entitles employers with important flexibility in recruitment, as obligating entrepreneurs to prove each negative hiring decision might obstruct recruitment process. On the other side, article 5.8 significantly increases the risk of discrimination at pre-contractual stage. Evaluating the compliance of Labour Code with Right to Organize and Collective Bargaining # 98 Convention, International Labour Organization's (ILO) Committee of Experts on the Application of Conventions and Recommendations (CEACR) concludes in its 2008 and 2010 Reports that the application of article 5.8 of the Labour Code in practice might result in placing on a candidate an insurmountable obstacle when proving that he/she was not recruited because of his/her trade union[12] activities. For this reason, CEACR in 2008 and 2010 Reports requests Georgian Government to amend the article in question.[13]

1.2 Boundaries for contractual freedom and labour standards

In general, labour law can be regarded as having an 'imperative' nature,[14] for the main reason that it is aimed at protecting the worker as the weaker part of labour relationship. Labour regulations set minimum standards of treatment which can therefore be improved by private agreement.[15] Bearing in mind the necessity of remedying the lack of balance between two parties to the contract, the legislator has deemed it necessary to intervene by framing public law provisions which oblige the employer to observe certain rules. Thus, the law-maker intervenes in

[8] *Bliss A.*, Proletariat to Perestroika: A Comparison of Labor law in The Soviet Union and The Russian Federation, *Comparative Labor Law & Policy Journal*, Winter, 1997, 3.

[9] *Adeishvili L., Kereselidze D.,* Draft labour code of Georgia and some basic principles of labour law in continental European countries, *Georgian Law Review*; vol 6. N 1, 2003, 13.

[10] Georgian Labour law does not include general policy aiming to remove barriers to employment and achieve measureable improvement in recruiting and hiring for particular group of society (e.g. disabled individuals).

[11] *Weiss M., Schmidt M.*, Federal Republic of Germany, *International Encyclopedia for Labour Law and Industrial Relations*, Editor in Chief *Blanpain R.*, Vol.6, The Hague. London. Boston, 2000, 49 (94).

[12] Here it can be considered the risk of discrimination based on any other discriminatory ground.

[13] 2008 Report, pages 129-130, http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_090991.pdf; 2010 Report, pages 145-146, http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_123424.pdf.

[14] *Blanpain R.*, Belgium, *International Encyclopedia for Labour Law and Industrial Relations*, Editor in Chief *Blanpain R.*, Vol.3, The Hague. London. Boston, 2001,39(33).

[15] *Treu T.*, Italy, *International Encyclopedia for Labour Law and Industrial Relations*, Editor in Chief *Blanpain R.*, Vol.8, The Hague. London. Boston, 1998, 20 (20).

favour of the weaker party to the contract.[16] For this reason, sometimes labour law is called as a law with protective functions[17] as it sets minimums standards for employees' protection. Modification of these standards shall be acceptable only for the benefit of an employee.[18] In other words, the parties cannot deviate from the law either by individual or collective agreement, except when the law sets only minimum standards which can be improved upon.[19]

The abovementioned principle is insufficiently integrated in the Georgian Labour Code. It offers significant freedom to parties' will, which itself has higher legal force over labour standards. In support of this approach, the legislative clause "*unless otherwise addressed by the employment agreement*" is frequently used by the Labour Code. Namely -

Article 12:

> *employer is entitled to change temporarily job location of an employee for the period not exceeding 45 calendar days per annum (business trip). The employer shall fully compensate expenses related to business trip. The provisions stipulated by this article shall apply unless otherwise addressed by the employment agreement*.

Article 14:

> *unless otherwise addressed by the employment agreement, the regular working hours are up to 41 hours a week.*

Article 31:

> *remuneration shall be paid once a month, at the workplace. In case of delay of any remuneration or settlement, the employer shall additionally pay 0.07 percent of the overdue amount for each delayed day. The conditions defined by this article shall apply only in occasion when the employment agreement does not set otherwise.*

Article 32:

> *unless otherwise addressed by the employment agreement, employee shall receive full amount of remuneration in case of employee's coercive suspension for the reason of the employer.*

Considering the theoretical approach on labour law's protective scope, it may be argued that all above-mentioned provisions shall be changed and interpreted by the employment contract only in favor of an employee (e.g. working time below 41 hours, 35 calendar days business trip, payment of 0.10 percent of the overdue amount for each delayed day, etc.). But this hypothesis is not grounded with respective legislative clause. Labour Code does not contain any general imperative norm that could restrict decadency of labour standards by individual agreement. The

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[16]*Berenstein A., Mahon P.*, Switzerland, *International Encyclopedia for Labour Law and Industrial Relations*, Editor in Chief *Blanpain R.*, Vol.13, The Hague. London. Boston, 2001, 30 (31).

[17]*Gimpu S., Ticlea A.*, Romania, *International Encyclopedia for Labour Law and Industrial Relations*, Editor in Chief *Blanpain R.*, Vol.12, The Hague. London. Boston, 1988, 22 (28).

[18]*Adeishvili L., Kereselidze D.*, Draft labour code of Georgia and some basic principles of labour law in continental European countries, *Georgian Law Review*; vol 6. N 1, 2003, 11.

[19]*Blanpain R.*, Belgium, *International Encyclopedia for Labour Law and Industrial Relations*, Editor in Chief *Blanpain R.*, Vol.3, The Hague. London. Boston, 2001,39(33).

Soviet Labour Code contained different approach, whereby a clause in a contract that worsened an employee's status compared to the clause provided for by the Labour Code was deemed null and void.

Thus, provision "*unless otherwise addressed by the employment agreement*" open spaces for employers to establish deteriorative conditions, but such contractual deviations will not be held as null and void. The only exception is regulation of minimum annual paid leave. Under the Labour Code, *an employee is entitled to fully paid leave of not less than 24 working days and unpaid leave of not less than 15 calendar days per year. An employment agreement may define terms and conditions different from those addressed in the present article, which shall not worsen employee's condition*. This special provision unconditionally excludes modification of minimum paid leave term worsening an employee's condition compared to Labour Code's standard.

It is noteworthy that soviet-era Labour Code did contain regulation on minimum wage that was equivalent to subsistence wage, defined by President's Order. Now by force of the Labour Code the *amount of remuneration is determined by the employment agreement* as there is no statutory minimum wage legislated.

1.3 Employer's right to change agreed employment conditions

Employment conditions are subject of negotiation. The employee is under obligation to perform his duties at the time agreed upon, in the place agreed upon, and in the manner and condition agreed upon.[20] Departing from general contract law theory, negotiated and agreed conditions shall be changed only by mutual consent. However, pursuant to the Labour Code under the auspices of right to "instruct", employer is entitled to increase the duration of working day and change job location unilaterally, without employees' consent. Namely, in accordance with article 11, *employer is permitted to give instruction to the employee in order to specify particular conditions of the work performance that shall not amend the terms of an agreement substantially. Insubstantial amendments of an employment agreement shall be considered when employer changes the agreed job location of an employee, if it takes employee not more than three hours per day to get to the new work place from his/her residence and back, and at the same time does not incur unreasonable costs*. Here it shall be noted that Soviet Labour Code did require employee's consent on employer initiative to change job location. Additionally, under the new Labour Code employer can increase *the start and end time of a working day for not more than 90 minutes*.

[20]*Blanpain R.*, Belgium, *International Encyclopedia for Labour Law and Industrial Relations*, Editor in Chief *Blanpain R.*, Vol.3, The Hague. London. Boston, 2001,142 (259).

As it is generally acknowledged, an employee is obliged to work under the command, authority and control of the employer.[21] An employee is obliged to be at the employer's disposal, to follow and complete his orders.[22] Consequently, employee is obliged to obey the employer's orders and carry out work in accordance with the instructions of employer. If particular employee declines to work e.g. on increased hours or at the changed job place, such conduct from employee may be qualified as violation of contractual duties.

2. Forms of Employment Contract

2.1 Definite term employment contract

By force of article 6 of the Labour Code, an employment contract may be made for a definite period. After adoption of new Labour Code, definite term employment contract became very popular at the Georgian Labour market. Employers and employees frequently conclude one month or 3 months duration employment contracts while the whole period of employment relationship exceeds a year or two. Thus, Labour Code does not provide any limitation with regard to successive fixed-term employment contracts.

Establishment of non-restricted fixed-term employment contracts constitutes significant benefit for employers, as contracts concluded for definite period are terminated upon expiration of the term. Employers conclude renewable fixed-term contracts with employees for a long-term employment relationship in order to evade contract termination procedures. When the term of employment contract is expired, employer depending on its personal will decide whether renew or not employment contract with particular employee. Additionally, if employment relationship is terminated based on expiration of the term of employment contract, employer does not bear the obligation of severance payment. Evidently, from employees' point of view, employees with fixed-term employment contracts may be considered as less protected. However, it shall be also noted that fixed-term employment contracts respond, in certain circumstances, to the needs of both employers and employees.[23]

Fixed-term contracts at EU level is regulated by Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP.[24] In the general consideration of ETUC-UNICE-CEEP framework agreement, employment contracts of an indefinite duration are acknowledged as the general form of employment relationships that contributes to the quality of life of the workers concerned and improves performance. It is also admitted that the use of fixed-term employment contracts based

[21]Ibid 36(29).
[22]*Mrachkov V.*, Bulgaria, *International Encyclopedia for Labour Law and Industrial Relations*, Editor in Chief *Blanpain R.*, Vol.4, Deventer. Boston, 1995, page 28 (37)
[23]*Foster N.*, Blackstone`s Statutes EC Legislation, 17th Edition, 2006/2007, Oxford, University Press, 2006, 371.
[24]Directive puts into effect the framework agreement on fixed-term contracts concluded on 18 March 1999 between the general cross-industry organizations (ETUC, UNICE and CEEP). The agreement is annexed to Directive.

on objective reasons is a way to prevent abuse. Clause 5 of the framework agreement defines that to prevent abuse arising from the use of successive fixed-term employment contracts or relationships, Member States shall, where there are no equivalent legal measures to prevent abuse, introduce in a manner which takes account of the needs of specific sectors and/or categories of workers, one or more of the following measures: (a) objective reasons justifying the renewal of such contracts or relationships; (b) the maximum total duration of successive fixed-term employment contracts or relationships; (c) the number of renewals of such contracts or relationships.[25] Since none of those requirements for fixed-term contracts are stipulated by Georgian Labour Code, it is simple to observe that Labour Code contradicts with 1999/70/EC Directive.

2.2 Oral employment contract

For the first time in the history of Georgian labour law, the new Labour Code permits verbal employment relationship. Employer and employee are free to conclude oral employment contract without any documentary declaration. Establishment of oral form of collaboration is justified by legislator's aim to promote flexible labour market. Deregulated form of employment contract may positively affect hiring ratio. However, it may result in less protection of employees.

The issue in question at EU level is regulated by the Council Directive 91/533/EEC of 14 October 1991 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship. The regulation provided by the Directive is considered necessary, firstly to inform employees of their rights and secondly, to provide greater transparency on the labour market.[26] It shall be noted that the 91/533/EEC Directive allows Member States to exclude a limited group of employment relationships from the scope of the Directives. Namely, the Directive applies to employees having a contract or employment relationship with a total duration exceeding one month.

Pursuant to 91/533/EEC Directive, an employer shall be obliged to notify an employee of the essential aspects[27] of the contract or employment relationship. Employer shall notify an

[25] *Foster N.*, Blackstone`s Statutes EC Legislation, 17th Edition, 2006/2007, Oxford, University Press, 2006, 374.

[26] *Szyszczak E.*, EC Labour Law, Europian Law Series, Series Editor *Usher J.*, Longman, Pearson Education, 2000, 128.

[27] As specified in article 2.2 of the Directive, the information shall cover at least (a) the identities of the parties; (b) the place of work; (c) the title, grade, nature or category of the work for which the employee is employed; or a brief specification or description of the work; (d) the date of commencement of the contract or employment relationship; (e) in the case of a temporary contract or employment relationship, the expected duration thereof; (f) the amount of paid leave to which the employee is entitled or, where this cannot be indicated when the information is given, the procedures for allocating and determining such leave; (g) the length of the periods of notice to be observed by the employer and the employee should their contract or employment relationship be terminated or, where this cannot be indicated when the information is given, the method for determining such periods of notice; (h) the initial basic amount, the other component elements and the frequency of payment of the remuneration to which the employee is entitled; (i) the length of the employee's normal working day or week; (j) where appropriate: the collective agreements governing the employee's conditions of work or in the case of collective agreements concluded outside

employee defined mandatory information not later than two months after the commencement of employment, in one of the following forms: written employment contract, a letter of engagement, written document containing at least the identities of the parties, the place of work, nature or category of the work, remuneration and working hours.[28]

Similar to EU 91/533/EEC Directive, article 6.5 of Labor Code defines that employer shall issue a certificate of employment specifying the information on performed work, remuneration and duration of employment contract. However, employer bears this obligation if employee requests written information evidencing the terms and conditions of employment. Additionally, upon employee's request, employer shall explain in writing any limitations of employee's rights and freedoms (article 46.2). Based on mentioned articles the employer is not imperatively obliged to issue an employment certificate. Obligation on issuance of employment certificate exists only when employee exercises the right on written information. In practice, when more and more employees are characterized with the low level of legal rights awareness, the risk of non-execution of mentioned guarantee is high. The individuals may not have information that they are entitled to obtain employment certificate, whereas this benefit appears to be the essential defending tool from unfaith oral labour practice. From this point of view, it can be concluded that the principle of oral employment contract is not in line with 91/533/EEC Directive.

3. Prohibition of Employment Discrimination

3.1. Employment discrimination at recruitment process

Prohibition of employment discrimination shall be considered as one of the most important novelties introduced by the new Labour Code. Until 2006, Georgian legislation did not contain the regulation prohibiting employment discrimination. Although in 1995 and 1996 Georgian Parliament ratified ILO #100 Equal Remuneration Convention and #111 Discrimination (Employment and Occupation) Convention, the issue of national anti-discrimination regulation remained outstanding as ILO Conventions are not, in general, self-executing, and ratification of them only entails an obligation on the part of particular State to adapt respective legislation.[29]

Article 2.3 of the Labour Code provides a general restriction of employment discrimination. In accordance with mentioned article, any type of discrimination due to race, color, ethnic and social category, nationality, origin, property and position, residence, age, gender, sexual orientation, disability, membership of religious or any other union, family conditions, political or other opinions are prohibited in employment relations. Direct interpretation of the wording of

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the business by special joint bodies or institutions, the name of the competent body or joint institution within which the agreements were concluded.
http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1991:288:0032:0035:EN:PDF.

[28] Ibid.

[29] *Blanpain R.*, Belgium, *International Encyclopedia for Labour Law and Industrial Relations*, Editor in Chief *Blanpain R.*, Vol.3, The Hague. London. Boston, 2001,90(144).

provided article allows to conclude that any type of employment discrimination are prohibited only within employment relationship – originating from the moment of conclusion of the respective employment contract. Consequently, the elimination of discrimination does not apply to pre-contractual relationship - recruitment (hiring) process. This issue is scrutinized by CEACR in 2009 Report, where CEACR notes that by referring to discrimination "in employment relations" it does not appear to prohibit discrimination that occurs during selection and recruitment, including job advertisements. Recalling article 5.8 of the Labour Code whereby, the employer is not required to give reasons for his or her decision when a candidate is not hired, the CEACR is concerned that this provision may effectively bar candidates from successfully bringing discrimination cases.[30] To some extent, this legislative gap may be revoked by Article 1.1 of the Labour Code providing that "the present Code regulates labour and associated relations throughout the territory of Georgia". One could argue that "associated relations" cover the recruitment - selection process thus ensuring application of non-discriminatory regulation to pre-contractual stage.

3.2. Indirect discrimination

Another significant omission of existing legislation is lacking of definition of indirect discrimination. Non-regulation of indirect discrimination is additionally discussed by CEACR in its 2010 Report, where CEACR strongly recommends that the existing non-discrimination provisions of the Labour Code be amended: (i) to provide for a clear definition of direct and indirect discrimination; and (ii) to clarify that the prohibition of discrimination also applies to recruitment and selection, in accordance with the Convention".[31]

3.3. Burden of proof

Important shortcoming in the context of labour discrimination concerns to burden of proof. In employment discrimination cases Georgian courts as usually follow the basic rule of the Georgian Civil Procedure Code, whereby the claimant is required to prove the facts on which the claim is based. In contrast, in the EU, the rule "actori incumbit probation", namely that a plaintiff has to prove his or her point, had been reversed long time ago.[32] Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex underlines that when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.[33] The

[30]2009 Report, pages 378-379, http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@relconf/documents/meetingdocument/wcms_103484.pdf
[31]2010 Report, pages 417-418, http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_123424.pdf.
[32]*Blanpain R.*, Equality and Prohibition of Discrimination in Employment, *Comparative Labour Law and Industrial Relations*, Second Revised Edition, Editor *Blanpain R.*, Kluwer Law and Taxation Publishers, 1985, 468 (46).
[33]*Foster N.*, Blackstone`s Statutes EC Legislation, 17th Edition, 2006/2007, Oxford, University Press, 2006, 297.

Directive applies to all previously adopted 75/117/EEC[34] and 76/207/EEC[35] directives thus establishing the general principle of burden of proof in employment discrimination cases. Article 8 of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin[36] provides the same rule on burden of proof in a discrimination case. Indeed, based on EU Directives, the European Court of Justice has established respective practice, whereby once the plaintiff has put forth a prima facie case of discrimination, the burden shifts to the employer to establish that objective reasons exist to justify the apparent discrimination.[37]

Considering the existing legislation and practice in respect of burden of proof, Georgian case law probably is the unique example, where even not a single case can be quoted admitting the breach of equal treatment principle. In all employment discrimination cases, as usually judges rule that plaintiff failed to prove the existence of discrimination. The exception is 2011 June Supreme Court Judgment where Supreme Court concluded, "in cases related to dismissal, it is necessary to investigate whether or not the reason of termination was discrimination based on one of the grounds indicated in Article 2, in addition, the employer bears the burden of proof. Namely, where the employee argues that termination of employment relationship was a discriminative action, the employer shall prove legitimacy of his will on dismissal and existence of nondiscriminatory grounds for termination. Otherwise, the person's dismissal shall be deemed illegal." Supreme Court's such approach evolves expectation that this latest encouraging judgment can serve to be a locomotive for creation of uniform practice pertaining to burden of proof in discrimination disputes.

4. The Regulation of Working hours

4.1 Maximum weekly working hours

According to article 14.1 of Georgian Labour Code, the regular working hours are up to 41 hours a week, however the parties are free to agree a different regular working hours under the employment contract. The Labour Code has maintained 41 hourly threshold previously ruled by the Soviet Labour Code. However, provided article entitles parties to the employment relationship to arrange a different number of hours in their employment contract. Accordingly, Labour Code fails to set imperative upper limit for working time and therefore, parties are free to agree on weekly working time exceeding 41 hours per week. In contrast, Article 6 of Directive

[34]Council Directive of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women. Please see *Foster N.*, Blackstone`s Statutes EC Legislation, 17th Edition, 2006/2007, Oxford, University Press, 2006, 271.

[35]Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions. Please see *Foster N.*, Blackstone`s Statutes EC Legislation, 17th Edition, 2006/2007, Oxford, University Press, 2006, 272.

[36]Ibid 371.

[37]*Sands R.*, France, *Employment Law, The Comparative Law Yearbook of International Business*, General Editor *Campbell D.*, Volume editor *Alibekova A.*, Special Issue, 2006, Kluwer Law International 2007, 188.

2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time (hereinafter "Working Time Directive") requires that the period of weekly working time shall be limited by means of laws or by other admissible legal instrument. Furthermore, according to Article 6, the average working time for each seven-day period, including overtime, should not exceed 48 hours.[38]

4.2 Rest period

Old Labour code did not set the exact duration of daily rest break, but the maximum period for rest break was limited at four hours. The new Labour Code does not regulate employees' right for rest break during workday, whereas Article 4 of Working Time Directive standardizes that where the working day is longer than six hours, every worker is entitled to a rest break.[39]

According to Soviet Labour Code, employees as a rule worked 5 days per week (other two days where statutory rest days). However, in the establishments where 5 days workweek was not reasonable, the 6 days workweek was operated. Employees were prohibited to work on Sundays. Unlike its predecessor, the new Labour Code does not provide the minimum rest period for working week. Working Time Directive provides that per each seven-day period, every worker is entitled to a minimum uninterrupted rest period of 24 hours plus the 11 hours' daily rest.[40] Thus, the Labour Code does not guarantee employees with the rest break for workday and rest period for workweek. As it appears, the determination of all those essential components of employment relationship is subject of parties' free will.

Labour Code provides statutory maximum for a working day that derives from the regulation on daily minimum rest period. According to article 14.2 of the Labour Code, the length of rest time between the working days (shifts) shall not be less than 12 consecutive hours.[41] Since employee enjoys right to request at least 12 consecutive rest hours over a 24-hour period, the daily limit for working time is set at 12 hours. It is noteworthy that establishing minimum daily rest period at 12 hours, the Labour Code offers higher standard rather than Working Time Directive, which sets a daily rest period of at least 11 consecutive hours over a 24-hour period.[42]

[38]*Foster N.,* Blackstone`s Statutes EC Legislation, 17th Edition, 2006/2007, Oxford, University Press, 2006, 384.
[39]Ibid.
[40]Ibid.
[41]Old Soviet Labour Code contained following scheme on minimum daily rest period: For 5 days workweek, daily working hours was established by the manual which was agreed between employers and trade unions. For 6 days workweek: (i) when the working week was limited at 41 hours, daily working hours was restricted at 7 hours; (ii) when the working week was limited at 36 hours, daily working hours was capped at 6 hours; (iii) when the working week was limited at 24 hours, daily working hours was restricted at 4 hours. Additionally, length of working time on the day before the rest day and official holiday was shortened by one hour.
[42]*Foster N.,* Blackstone`s Statutes EC Legislation, 17th Edition, 2006/2007, Oxford, University Press, 2006, 384.

As legislation does not provide regulation of statutory daily rest break and minimum rest period for workweek, hypothetically one is allowed to work 7 days a week with 12-hour working days, which adds up to 84 hours of maximum statutory weekly working hours allowed by the Labour Code. Accordingly, the Labour Code indirectly caps the maximum weekly working time to 84 hours.

4.3 Overtime labour

As general, the old Labor Code prohibited overtime labour. The employer could use overtime labour under trade union's consent and only in particular circumstances.[43] The limit for overtime work during two consecutive working days was set at four hours. Annual limit for overtime work was defined at 120 hours. Overtime labour in first two hours was compensated with one-half of the hourly rate, while the next consecutive hours were remunerated in the double amount. Overtime remuneration was allowed to be replaced by time-off in lieu. Now by force of the new Labour Code, the terms and conditions of overtime work may be agreed between parties to the employment contract. As a result, the conditions of overtime labour are subject of parties' free will and employer bears the obligation to remunerate overtime work when parties have made such agreement. Thus, the Labour Code does not provide any imperative regulation as regards remuneration for overtime work or its maximum duration.

4.4 Annual leave

According to the Labour Code, the employee is authorized to take a paid leave – not less than 24 business days per annum - to which the employee becomes entitled after the first eleven months of occupation. The rule on paid annual leave fully comply with Working Time Directive, as pursuant to Article 7 of that Directive, every worker shall be entitled to paid annual leave of at least four weeks. Article 7.2 of the same Directive specifies that the minimum period of paid annual leave may not be replaced by an allowance in lieu, except where the employment relationship is terminated.[44] Old Soviet Labour Code contained same direct restriction declaring that replacement of annual leave with monetary compensation was not allowed except when a dismissed worker was not able to take regular leave. Such provision now cannot be found in existing labour legislation. Additionally, Labour Code makes no provision for compensating any unused portion of annual leave upon termination of employment. Interestingly, this statutory omission is successfully mended by Georgian Court practice establishing the rule that when the employer terminates the employment contract, the employee is entitled to compensation for unused days of annual leave. Courts such approach is grounded by ratified ILO #52 Holidays with Pay Convention.[45]

[43]It was prohibited to employ the pregnant, breast-feeding female, female taking care of an infant under twelve months, adult up to eighteen years, active tubercular, employee who studied in parallel of work.
[44]*Foster N.*, Blackstone`s Statutes EC Legislation, 17th Edition, 2006/2007, Oxford, University Press, 2006, 384.
[45]Article 6 of mentioned Conventions spells out that "a person dismissed for a reason imputable to the employer before he has taken a holiday due to him shall receive remuneration in respect of every day of holiday due to him".

5. Termination of Employment Contract

According to old Labour legislation, when employment contract was terminated under employee's initiative, employee was obliged to make two-week prior written notification. Employee was also entitled to terminate employment contract by observing three days notice period, when there was justifiable reason for termination. On the other side, employer was required to observe one month (sometimes even two months) notice period for contract termination. Additionally, employer could terminate an employment contract only after trade union's consent. The law also stipulated the circumstances when trade union's consent on employee's dismissal was not required. The amount of severance pay ranged between one to two months' salary amount.

In 2006, initiation of the new rule on employment contract termination resulted heterogeneous reaction due to its liberal approach. Termination of employment contract may be considered as the central pillar in constructing employer-beneficial legislation. According to the newly established rule, employee shall make thirty-calendar days written notification prior to termination of employment contract. If the employment is terminated at the initiative of the employer, the employee is only entitled to a severance pay equivalent to at least one month's salary amount. By force of Georgian Labour Code the employer is not obligated to make advance notification having unrestricted right to terminate employment at its absolute discretion. As a result, the Labour Code authorizes the employer to terminate the employment contract without notice for good cause or bad cause, for any reason or for no reason.[46]

If we compare previous and existing labour legislation with regard to employment contract termination procedures, we may conclude that the new Labour Code offers flexible opportunities for employers, but declines employees conditions for two reasons: notification period on contract termination for employees has been increased from two weeks to one month and employer may terminate contract for any reason without advance notification.

Furthermore, the old Labour Code contained the rules on preferential right for particular group of persons to maintain the job.[47] Moreover, transfer of the ownership right of an undertaking or

[46]The analogy of Georgian model on employment contract termination can be found in the US system of employment-at-will doctrine, whereby, either party can terminate the employment relationship at any time. According to this view, the employment relationship then exists only so long as it creates sufficient value for both the employer and the employee. When the value created is insufficient for just one of the parties, the relationship can be terminated with no required notice. Please see *Block R., Berg P., Roberts K.,* Comparing and Quantifying Labor Standards in the United States and the European Union, Presented at the 13th World Congress of the International Industrial Relations Association, Berlin, 8-12 September 2003, 22; Accessed at http://www.ilo.org/public/english/iira/documents/congresses/world_13/track_3_block.pdf . The difference between Georgian model and US at-will doctrine can be found in the important factor, as by force of at-will doctrine both employers and employees are free from notification obligation, whereas in Georgia, employees still bear obligation on 30-day prior written notification.

[47]The sole wage earner in the family, the employees with the most seniority at the enterprise, etc.

company's reorganization did not result termination of employment contract and employment relationship could be continued only after employees' consent. Neither of all those employee beneficial provisions are now seen in the Labour Code. Moreover, the Labour Code remains silent on the issue of collective redundancies and establishes identical procedures for collective and individual dismissals. For this reason, Georgian Labour Code contradicts EU labour law which itself set special procedures for collective redundancies under Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies.[48]

Conclusion

Clearly, the difference between the two regulatory models is substantial. The 2006 reformation process was mainly composed by the diametral modification of preexisting legislation. Transitional vector was focused on radical changes from state regulation towards deregulation. The role of previous Labour Code was to regulate and centralize the labour market. The policy itself preferred an extensive intervention in the employment relationship having exclusive focus on workers' protection. As opposed to the Soviet Code, the new liberal legislation minimizes the regulatory restrictions and refrains from standardized provisions. The new Labour Code gains the mark of essentially `liberal` character, where state intervention in labour market is minimized. The new law aspires towards deregulation and thus employment relationships become subject of market regulation. Emancipated from governmental limitations, Georgian Labour market now tends to be competitive wherein employers enjoy significant support from labour legislation. The policy on decentralization is obvious even from a quantitative context, while in comparison with preexisting soviet 250-article Labour Code, the new Labour Code is composed by 55 articles.

Indeed, the policy on deregulation negatively affects protective quality of labour law. The labour standards are now decreased and employees' employment conditions are worsened. Such approach may be justified by the aim to establish investment attractive and state control free economic environment. In that respect, the existing economic situation and unemployment rate shall also be considered. It is true that the process of labour law (re)formation cannot be dealt with in the abstract without consideration of actual economic circumstances. Transformation from one system to another cannot work properly if the political situation, institutional arrangements and socio-economic condition are not taken into account. It is accepted that labour law aims at monitoring economic developments. It is self-evident that law, as the force regulating employer-employee relationship needs to follow the economic developments closely if it wants to remain relevant and adequate. There is indeed a growing demand by the enterprises for less regulation and for more flexibility. For this reason, as usually, governments fear that high level of social protection may discourage investors.[49] According to the analytical evidence, strict employment protection legislation for example reduces the number of dismissals but decreases the entry rate from unemployment into work. Analysis suggests that although the impact of strict

[48]*Foster N.*, Blackstone`s Statutes EC Legislation, 17th Edition, 2006/2007, Oxford, University Press, 2006, 363.
[49]*Blanpain R.*, European Labour Law, Sixth and revised edition, Kluwer law international, 1999,23-24.

employment protection legislation on total unemployment is limited, it can have a negative impact on those groups that are most likely to face problems of entry into the labour market, such as young people, women, older workers and the long-term unemployed.[50]

Considering the social, economic and political situation in the country and the actual material potential of business sector, the new developing state like Georgia may not afford high cost social protective legislation. This understanding can be proved from experience of industrialized market economies, where as a response to the economic crisis, the general trend was towards deregulation, or what might be called market regulation rather than state regulation. Indications of this trend were the introduction of greater flexibility in the use of fixed-term contract, the reduction of employer's obligations in respect of notice periods, etc.[51] From this viewpoint, governmental decision on adoption of liberal Labour Code appears reasonable for this particular time.

On the other side, Georgia bears the obligation of harmonization of national labour law with EU standards. From that perspective, the new Georgian liberal approach stays remote from EU standing, while gets approximate to the US model, where the presumption of competition is consistent with the view that the government should intervene as little as possible so as not to upset this competitive balance between price takers - employers and employees. The acceptance of the competitive labor market presumption implicitly supports the idea that terms and conditions should be established by employers and employees with minimal government involvement and will efficiently and fairly protect both employers' and employees' interests. In contrast, the EU Directives and respective labour standards serve as a form of social regulation of the labor market. By placing certain constraints on employers, or by introducing some sort of minimum mandatory rules, the EU in a sense, attempts to artificially construct a set of terms and conditions of employment that might exist if the parties had equal bargaining power.[52]

Emphasizing the specific provisions, the paper demonstrated the incompliance of Georgian Labour Code with EU Directives. Thus, the issue of labour law harmonization remains unsettled and needs further reforms. Meanwhile, Georgian Labour Code has found its niche as essentially employer friendly legislation, being expected to influence economic development and decrease unemployment rate.

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[50]Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, "Towards common principles of flexicurity: More and better jobs through flexibility and security", Brussels, 27.6.2007; Accessed at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2007:0359:FIN:EN:PDF

[51]*Hepple B.*, Security of Employment, *Comparative Labour Law and Industrial Relations*, Second Revised Edition, Editor *Blanpain R.*, Kluwer Law and Taxation Publishers, 1985, 475 (5).

[52]*Block R., Berg P., Roberts K.*, Comparing and Quantifying Labor Standards in the United States and the European Union, Presented at the 13th World Congress of the International Industrial Relations Association, Berlin, 8-12 September 2003, 23; Available at http://www.ilo.org/public/english/iira/documents/congresses/world_13/track_3_block.pdf