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Giorgi Davitashvili*

The Object and the Objective Element of Crime and Causation in Georgian Customary Law

The article is dedicated to the object and the objective element of crime and causation under Georgian customary law. These topics are examined based on materials from Svan and Khevsur customary law. According to these sources, the object of crime encompassed both public and private interests, while criminal responsibility arose only where a causal link existed between the criminal act and the resulting consequence. The principle of objective imputation, preserved in Khevsur law, is an important factor in analysing these topics. The materials further indicate that, in certain cases, the time, the place and the weapon used in committing the crime constituted qualifying elements.

Keywords: *Georgian customary law, object of crime, objective element of crime, causation.*

1. Introduction

The object and objective element of crime have not been studied within Georgian customary law. This article shall briefly address the main aspects of these matters. Consideration of the topic is possible on the basis of materials from Svan and Khevsur customary law, as in these two mountainous regions of Georgia, even in the twentieth century, the local unwritten customary law, originating from a distant past, survived in a fairly complete form, including through the institution of blood feud and the system of compositions (monetary compensation) prescribed for offences.

2. General Aspects of the Object and the Objective Element of Crime in Georgian Customary Law

According to the materials of Georgian customary law, the object of crime could be either a public interest (that of the community – village, clan, or inter-clan association) or a private interest (that of an individual, a family, or a kinship unit), or a protected interest. For example, public goods safeguarded by customary law included the freedom of the community, communal property, public order and others. Private goods comprised human life, health, property rights, dignity and similar interests.

It must be emphasised that, in all cases, the object of crime infringing private interests was the dignity of the family or clan (a kin-group). Any offence constituted an affront to the injured party (to the victim's family or clan). Specifically, acts such as murder, wounding or maiming, theft, burglary

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and other offences, in addition to encroaching upon a specific good (life, health, property), also implied the humiliation of the victim's dignity. The injured party felt ashamed, offended and defeated.

From the perspective of the objective element of crime, Georgian customary law recognised offences committed through both action and omission. Most offences were committed by action; however, crimes committed by omission were also encountered. An example of an offence committed by omission was the avoidance of a common public duty. For instance, if, during the construction or repair of a village road, any village resident avoided the work, they would be sanctioned by the community assembly.[1]

In Georgian customary law, the criminal result was of essential importance, particularly where the principle of objective imputation was of decisive significance (especially in Khevsureti). The result of the offence could be either material or non-material. Under Georgian customary law, the criminal result predominantly assumed a material character. Examples include property-related consequences such as encroachment upon or destruction of property, as well as harm caused to human life or health. The non-material result was primarily expressed in the violation of a person's honour and dignity. From this perspective, offences such as insult were notable, manifested in various forms, for example: verbal abuse, disparaging references to the deceased, unlawful entry into another's home and similar acts.[2] In Svaneti, it was considered a serious insult to remove a woman's headdress or cut her braid, as well as the desecration of the hearth – specifically, by kicking it, overturning it, pouring kerosene onto the hearth fire, or dragging the hearth outside.[3] Such desecration of the hearth constituted a severe humiliation of the family and a violation of its dignity, and was subject to a rather severe property sanction under Svan customary law. The non-material criminal result manifested in the violation of honour and dignity also appears in cases such as unlawful marriage, abandonment of a spouse without a legitimate reason (in the Svan language, "*tsvarob*"), abduction of a woman, adultery and similar offences. Under Georgian customary law, the non-material result also took the form of disturbance of public order. Violation of public order was expressed through public cursing and swearing, causing disturbance, engaging in fights and similar behaviour. Interestingly, in Khevsureti, the disruption of public order was perceived as particularly offensive when committed by a woman, and women were fined publicly by the community and cult servants for sowing discord, "screeching and yelling" and similar conduct.[4]

3. Causation in Georgian Customary Law

Under Georgian customary law, the imposition of criminal responsibility required a causal link between the criminal act and the resulting consequence. In certain cases, the question of whether such a causal link existed between the act and the criminal result could become contentious (this is recorded

1 *Davitashvili G., Types of Offences in Georgian Customary Law*, Tbilisi, 2017, 418-422 (in Georgian).
2 Ibid., 523-527.
3 *Nizharadze B.,* Historical-Ethnographic Essays, Tbilisi*,* 1962, 111, 120 (in Georgian); *Chartolani M.*, *From the History of the Material Culture of the Georgian People,* Tbilisi, 1961, 135-139 (in Georgian).
4 *Ochiauri A.*, *Calendar of Georgian Folk Festivals, Khevsureti II (Bude-Khevsureti, Shatili-Mighmakhevi)*, Tbilisi, 2005, 251 (in Georgian).

in Khevsureti). Under Georgian customary law, establishing this connection was a necessary precondition for the imposition of responsibility. According to Khevsur customary law, only the person who directly inflicted the fatal wound on the victim bore responsibility for the killing.[5] In Khevsureti, it was said: "the payment for murder and blood follows the hand" *(„დრამა და სისხლისთვის გაძღოლა ხელს მოსდევს“)*.[6] This meant that the person with whose hand the killing had been directly committed was responsible for paying the property compensation ("*drama*") for murder and for fulfilling the obligations established in connection with it. It was essential to determine who had inflicted the fatal wound on the deceased. The injured person might die sometime after being wounded, and during that period could have been wounded by someone else as well, or might have received multiple wounds from different opponents during a group fight. It was necessary to establish precisely which wound had been fatal, so that, under Khevsur customary law ("*rjuli*"), responsibility for murder would be imposed on the person who had inflicted it. Therefore, in Khevsureti, criminal responsibility for murder was attributed solely to the person whose act bore a direct and immediate causal connection with the result, and whose conduct was a *conditio sine qua non* for the criminal outcome. An accomplice or aider to the perpetrator did not bear responsibility for the murder under Khevsur customary law; they could be subjected only to a certain payment, the so-called *"khelchasamrtao"*, and only if they had inflicted a non-fatal (even a minor) wound on the deceased. During group conflicts, each assailant bore responsibility only for the wound personally inflicted.[7] Such rules of responsibility in Khevsureti were determined based on the principle of objective imputation.

According to Svan customary law, it was possible for a person who initiated the fight that resulted in a killing or wounding to bear a certain degree of responsibility for the offence. This responsibility was significantly less than that imposed on the person who directly committed the murder or inflicted the injury.[8] For example, in a specific case recorded by Professor Mikheil Kekelia in Svaneti, the *morvs* (mediators serving as judges) determined that 16,000 roubles[9] were to be paid in favour of the injured party for an eye injury sustained during a fight. Of this amount, 12,000 roubles were imposed on the person who directly caused the injury, whereas the remaining 4,000 roubles were imposed on the instigator of the conflict.[10] In this case, the responsibility of the instigator was based on

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5 *Merebashvili J.*, Materials on Khevsur Customary Law, *Ethnographic Notebook*, 1988, 47, 75 (in Georgian);
Kekelia M., Materials on Khevsur Customary Law, *Ethnographic Notebook*, 1988, 42 (in Georgian). This article uses materials, gathered through field ethnography in various regions of Georgia by Professor Mikheil Kekelia of Tbilisi State University and members of the "Laboratory for the Study of Georgian Customary Law," founded by him (operating in 1986-1994). The materials were recorded in various ethnographic notebooks.

6 *Ochiauri A.*, Blood Feud and Inflicting Wounds in Khevsureti, Tbilisi, 2019, 87 (in Georgian).

7 *Merebashvili J.*, Materials on Khevsur Customary Law, Ethnographic Notebook, 1988, 75 (in Georgian).

8 *Kekelia M.*, Materials on Svan Customary Law, Ethnographic Notebook No. 4, 1968, 70 (in Georgian); *Kekelia M.*, Materials on Svan Customary Law, Ethnographic Notebook No. 7, 1970, 53 (in Georgian).

9 The incident occurred during the Soviet period, and the reference is to Soviet roubles prior to the 1961 monetary reform.

10 *Kekelia M.*, Materials on Svan Customary Law, Ethnographic Notebook No. 7, 1970, 53 (in Georgian).

the causal connection between their conduct in initiating the conflict and the resulting harm, despite the fact that the instigator had not directly participated in the act of killing and had no intention for such a result to occur. From the perspective of Svan customary law, had the instigator not provoked the conflict, the murder or injury would not have occurred at all. In other words, the act of initiating the conflict in Svaneti was perceived as a necessary condition for the criminal result, which justified the imposition of a certain level of responsibility. Accordingly, in Svaneti, the primary responsibility for murder, wounding, or maiming was borne by the person who committed the act directly, whose conduct had a direct causal connection with the result. In addition to this, a substantially lesser responsibility was imposed on the instigator or provocateur of the conflict that led to the commission of the offence. The lesser degree of responsibility applied to the instigator – specifically, the lower amount of compensation payable to the injured party – was due to the fact that their conduct was not the immediate cause of the criminal result.

In Khevsureti, certain responsibility for a killing was also imposed on the person who supplied the weapon used in the murder, as well as on the person whose carrying of tales provoked the killing. Responsibility was imposed even where the provision of the weapon or the use of inflammatory words was not intended to incite the killing. It should be noted that neither the bearer of the word nor the supplier of the weapon bore responsibility for the killing itself and, accordingly, did not bear responsibility for participation in the murder. They were required to pay the so-called "*arbiti*" in the amount of five cows,[11] which did not form part of the compensation prescribed for murder. Such responsibility arose because the Khevsurs recognised a certain causal connection between, on the one hand, the provision of the weapon or the provoking words and, on the other hand, the resulting consequence. In the absence of such connection, no responsibility would arise. Payment of "*arbiti*" under Khevsur customary law was required even where the killing was not committed as a result of inflammatory words nor by means of another person's weapon. In such cases, "*arbiti*" was paid by the person who had provoked the conflict – specifically, the one who initiated the fight or caused others to fight, subsequently withdrew, and the killing or wounding occurred as a result of the conflict. If the offence was committed without the involvement of such factors, "*arbiti*" was imposed on the person who did nothing to prevent the conflict that led to the criminal result. In particular, A. Ochiauri notes that in such cases "*arbiti*" was imposed on the person who was present at the conflict and did not

[11] n Khevsureti, the primary equivalent of property compensation was the cow. The "*drama*", meaning property compensation, was calculated in cows. A distinction was made between compensation paid in the form of a "**handed**" cow ("*kheliti dzrokha*") and a "**hoofed**" cow ("*pekhiti dzrokha*"). A "hoofed" cow referred to the payment of the composition directly in livestock, that is, cattle. A "handed" cow referred to compensation paid in copper utensils such as cauldrons, pans, basins, drinking containers, leather flasks, jugs, ladles, woven carpets, silverware, belts, weapons, a distillation cauldron, storage vessels, and various household items excluding bedding and clothing. In Khevsureti, when assessing "*drama*", it was specifically the "handed" cow that was implied. Most of the items used for the "*drama*" were pre-evaluated against the cow as the basic unit of exchange. For example, under Khevsur customary law, one "handed" cow corresponded to 4 kg of copper. Thus, compensation within the "*drama*" was provided through copper utensils, including copper cauldrons, basins and other such items. Some household objects were pre-assessed and did not require weighing. For instance, a "*tulukhi*" (a container used for carrying water) was valued as equivalent to one "handed" cow.

intervene to separate the parties. The same is confirmed by R. Kharadze.[12] In Khevsureti, anyone who witnessed a conflict was obliged to intervene and separate the fighters. Avoiding involvement and failing to intervene was considered a great shame. If no such person existed, "*arbiti*" would be imposed on the individual who, at the time of the conflict, was at home in the village, with the door open, and did not come out to help resolve the situation – which, in modern Georgian criminal law, would be considered complicity.[13] It is likely that, in such cases, the obligation to pay the "*arbiti*" was imposed because the person was deemed to have been aware of the ongoing feud. The open door of his house – to which A. Ochiauri expressly draws attention – excluded the possibility that they had no knowledge of the altercation taking place in the village, in their immediate vicinity. Accordingly, it was assumed that they could have intervened, separated the disputants, and thereby prevented the harmful outcome. Their failure to act was therefore regarded as a condition that contributed to the criminal result. Thus, Khevsur customary law recognised a certain causal link between the bystander's inaction and the serious consequence arising from the feud. A person who did not intervene to separate the fighters, even though they were present at the scene or were at home in the village with their door open, incurred a degree of responsibility in the form of the "*arbiti*". Avoiding intervention was considered unmanly and shameful and served as a ground for imposing the "*arbiti*" only if no other potential "*arbiti-bearer*" was present – such as the word-bearer, the person who had supplied the weapon to the perpetrator, the instigator of the fight, or any other provocateur.

In Georgian customary law, particularly in Svaneti and Khevsureti, any act (including omission) was regarded as the cause of a criminal result if it constituted a necessary condition for its occurrence. This referred to actions without which, according to traditional understanding, the criminal outcome would not have taken place. All conditions that contributed to the criminal result were considered equivalent in nature. For every act constituting a condition for the occurrence of the criminal result, a certain degree of responsibility was prescribed. A higher degree of responsibility was imposed for conduct that directly caused the result than for conduct that did not serve as its immediate cause.

The issue of causation in Khevsureti and Svaneti could arise even where an individual had not directly or actively participated in causing harm to the victim, yet under certain circumstances still bore responsibility under customary law. This occurred when the individual concerned sent another person somewhere or took them along, and that person died or suffered some form of damage for reasons independent of the respondent and without resorting to force.

In Khevsureti, a certain degree of responsibility could be imposed on an individual even in cases where no one was at fault for the death, no one had killed the person, yet the injured party demanded accountability from someone whose hand had not caused the death but who was nevertheless somehow connected to the occurrence of the harmful outcome. This occurred, for instance, where one person sent another somewhere or took them along, and the latter died completely by chance, for reasons independent of the sender or the accompanying person. Information on this can

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12 *Ochiauri A.*, Customary Law of Khevsureti, 1945, personal archive, Notebook No. 3, 36 (in Georgian). Alexi *Ochiauri'*s personal archive is preserved in the Archive of the Ivane Javakhishvili Institute of History and Ethnology, Tbilisi State University; *Kharadze R.*, Customary Law of Khevsureti, Chronicles, Vol. 1, 1947, 188 (in Georgian).

13 Ibid.

be found in materials collected by A. Ochiauri: "If a person dies in such a way that blame is imputed to someone else, though he did not die by that person's hand, the deceased's family demands that he 'accept the blame'[14] and if he refuses, saying, 'his death is not my fault', and the dispute[15] becomes public, for example, if someone sent or took the deceased somewhere and he died accidentally on the way, the deceased's family says: 'Had he not sent him, he would not have died.' He must accept the blame; otherwise, 'I will kill him'. A mediator[16] becomes involved and refers the case to '*rjuli'*.[17] In such a case, '*rjuli*' concludes (decides) the *'samarkhi'*. *Samarkhi* means that the defendant must pay sixteen cows as '*drama'*. The mediators deliver the '*drama'* to the injured party and then bring the defendant to their house with livestock and drink, and the reconciliation takes place."[18] As A. Ochiauri notes, in such situations the injured party may demand that the accused "accept the blame", meaning the responsibility envisaged for murder, threatening to kill him if he refuses. The accused, naturally, denies the obligation to "accept the blame", since under Khevsur "*rjuli"* the *mekhele* (the killer) – and thus the person responsible for murder – is the one by whose hand the person was directly killed. In this case, however, no murder has taken place at all: the person dies entirely accidentally, without the sender or escort having caused, or being at fault for, the death. Nevertheless, "*rjuli"* (the mediatory court) still imposes upon the individual the so-called *"samarkhi"* – the payment of sixteen cows as "*drama"*. It appears that "*rjuli"* partially acknowledges the position of the injured party, at least to the extent that, had the deceased not been sent or taken, he would not have died. However, the mediatory court does not treat the sender or escort as a murderer and assigns responsibility not for the offence (murder), but rather in the form of "*samarkhi*". In Khevsureti, "*samarkhi*" refers to the funeral expenses. These constitute the material loss suffered by the deceased's family, and such expenses were borne by the person who had sent or accompanied the deceased. It appears that the amount of "*samarkhi*" in Khevsureti was set at sixteen cows.[19]

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[14] To accept blame "*tavis dadeba"* – in Khevsureti, the imposition of full responsibility for homicide under Khevsur customary law, including all forms of responsibility and the complete property compensation owed for the killing.

[15] *Saardaraod* – "into dispute, into contention" meaning "to become a matter of dispute/to become contested."

[16] *Kats-shuakatsi* – a mediator in Khevsureti whose role was to reconcile opposing parties or blood-feuding families. It was the *kats-shuakatsi* who persuaded the disputing sides to agree to the conduct of the mediatory court, known as "*rjuli*". The mediatory court in Khevsureti served as the key remedy for achieving final reconciliation between the parties.

[17] *Rjuli* – the mediatory court in Khevsureti. In Khevsureti, "*rjuli*" also referred more broadly to the local customary law.

[18] *Ochiauri A.*, Customary Law of Khevsureti, 1945, personal archive, Notebook No. 1, 10 (in Georgian).

[19] The term "*samarkhi*" appears with the same meaning in the monuments of Georgian law. For example, under Article 92 of Vakhtang's Law Code, in cases of *"pateraki"* (that is, unintentional homicide), no penalty is imposed on the perpetrator for unintentionally causing another's death. He is only required to pay "*samarkhi*" to the injured party, meaning he must reimburse the material damage suffered by the family of the deceased (Monuments of Georgian Law, texts published, with study and glossary by I. Dolidze, Vol. 1, Tbilisi, 1963, 504–505 (in Georgian)). Similarly, under Article 187, no criminal responsibility arises for homicide committed by a person under the age of ten, as it was committed "through youthfulness and lack of judgement". In such cases, the child's parents must only pay "*samarkhi*" to the family of the deceased (Ibid., 527–528). In both instances, what arises is civil liability in the modern sense in the form of "*samarkhi*", while criminal responsibility is not imposed. In the case under consideration as well, the

In our view, a similar result would arise even where the person sent or taken somewhere by another did not die as a result of an accident on the way but instead sustained bodily injury (for example, became maimed). In such a case, the sender or accompanying person would not have the compensation prescribed for bodily injury imposed on him for bodily injury under Khevsur "*rjuli*" (law), but would instead be required to cover the cost of medical treatment, where applicable.

In similar circumstances, the imposition of material compensation by the mediatory court and the determination of its amount are also found in Svaneti. B. Nizharadze cites a specific case that occurred in the 1860s. A Svan named Giergi, who had previously travelled outside Svaneti (for example, to Ratcha-Lechkhumi), decided to go to Kutaisi. He did not dare undertake such a long journey alone and therefore persuaded others to accompany him. Initially, everyone refused to travel to Kutaisi, but after persistent persuasion, he managed to convince several fellow villagers. Each of them went to Kutaisi relying on him. He assured them that through work or trade in Kutaisi they would earn money. During the journey, they endured severe hardship, were detained by the police in a tavern for fighting and causing destruction, and narrowly escaped death due to harsh climatic conditions (it was January). Upon their return, several of them fell ill for a long period (some for six months, others for a year). As a result, some accused the man who led them to Kutaisi of being responsible for the suffering they endured and for being unable to work at home for an extended period (up to a year). Thus, the hardship experienced during the journey and the inability to work due to illness were attributed to the person who led the complainants to Kutaisi, as, had he not taken them there, none of this would have occurred. After deliberation, the mediators required the person who led them to Kutaisi to pay three days' worth of land as compensation to the injured parties.[20] In this instance, the claim was brought against the person because he had taken them to Kutaisi, and full responsibility for all the negative consequences of the journey – including the illness that followed their return and the resulting loss – was attributed to him. In such cases, the responsibility of the person who led or sent another arose irrespective of whether he had taken or sent the person in his own interest (for example, as assistance in something) or for the latter's benefit. What mattered was that he had initiated the act of sending or accompanying them. In the case cited by B. Nizharadze, it is clear that Giergi had to make considerable efforts to convince his fellow villagers to travel to Kutaisi and that they did not accompany him of their own initiative. Had that been the case, no responsibility would have been imposed on him. This principle may equally be extended to the case concerning Khevsureti.

Customary law is based on the legal consciousness of the people; accordingly, the connotation of its norms is determined by how society perceives a given situation. The specific examples presented demonstrate that an individual who had not directly caused harm to the victim could still be regarded by the community as responsible for material damage resulting from the victim's death or injury due to an accident. In Svaneti and Khevsureti, the injured party regarded as culpable the person who had sent or accompanied the victim when the latter died, was harmed, or suffered material loss – even if

imposition of "*samarkhi*" on the person who sent the deceased may be regarded, in contemporary terms, as civil liability.

[20] *Nizharadze B.*, Historical-Ethnographic Essays, Tbilisi, 1962, 192-209 (in Georgian).

the harm resulted from an accident and for reasons independent of the sender or accompanying person. The rationale was had he not sent or taken him, nothing would have happened, and the serious consequence would not have ensued. Thus, it may be said that the community regarded the act of sending or accompanying the victim as a necessary condition for the outcome, and that a causal link was perceived between them, leading to the obligation to compensate for the material loss resulting from that outcome. In the case of death, this meant compensation for the damage that normally followed a person's death (funeral and related expenses). In such cases, the injured party considered that equality between the sender or accompanying person and the injured party had been disrupted and that it was necessary to restore it. Compensation for the material loss resulting from the outcome served this purpose. This understanding was reflected in the norms of customary law, which established that an individual would be obliged to compensate material damages if the person they sent or accompanied suffered harm for reasons independent of the sender or the accompanying person.

4. Place, Time and Weapon in the Commission of Crime under Georgian Customary Law

In the qualification of an act as a crime, the place and time of its commission held particular significance. For example, the commission of an offence within a shrine,[21] or burglary committed by entering a dwelling in certain regions of Georgia,[22] resulted in a more severe punishment. The time of the offence was relevant in crimes such as working on a feast day, which consisted of engaging in labour on days designated for rest. For this offence, punishments prescribed by local customary law are recorded in various regions of Georgia, particularly in the mountainous areas. For instance, in Khevsureti, working on a feast day could result in the offender being temporarily excluded from the community.[23] This offence could only be committed within a specific period, namely on feast days. Clearly, activities such as mowing, ploughing and sowing, or house construction did not constitute crimes in themselves; however, when performed on feast days, such acts were considered offences under customary law and resulted in sanction by the community.

In certain offences, the type of weapon used was of significance. For example, in Khevsureti, "*arbiti*" was payable only in cases of murder committed with a weapon made of iron. [24] Murder was typically carried out using an iron weapon, although theoretically it could have been committed by other means, in which case "*arbiti*" would no longer apply. Under Svan and Khevsur customary law, the severity of bodily injury in cases of wounding was determined by the type of weapon used. Specifically, in Svaneti, an injury inflicted by a firearm entailed a higher payment than one inflicted by

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21 *Ochiauri A.*, Materials on Khevsureti, II, Collection Georgian Customary Law, 2, Tbilisi, 1990, 130-131, 139, 152, 157 (in Georgian); *Jalabadze D.*, Crime and Punishment in Georgian Customary (Folk) Law, Tbilisi, 2003, 37-38 (in Georgian).

22 *Zoidze O.*, Materials on the Customary Law of Samegrelo, Ethnographic Notebook, 1988, 63 (in Georgian); *Merebashvili J.*, Materials on Ajara Customary Law, Ethnographic Notebook, 1989, 39 (in Georgian).

23 *Ochiauri A.*, Materials on Khevsureti, II, Collection Georgian Customary Law, 2, Tbilisi, 1990, 180 (in Georgian).

24 *Jalabadze D.*, Crime and Punishment in Georgian Customary (Folk) Law, Tbilisi, 2003, 36 (in Georgian).

a dagger.[25] In Khevsureti as well, any injury inflicted by a firearm, regardless of its severity, was considered life-threatening. Therefore, even a minor wound caused by a bullet required a high payment, whereas an injury of equivalent severity inflicted by another weapon was valued less. The reason was that a firearm-inflicted wound carried a greater degree of danger.[26]

5. Conclusion

Under Georgian customary law, the object of crime encompassed both public and private interests. Offences were committed either through action or through omission.

Under Georgian customary law, full responsibility (in Khevsureti) and primary responsibility (in Svaneti) for murder, wounding or maiming under Khevsur customary law were imposed on the person whose act was found to bear a direct causal link with the criminal result. The act had to constitute a necessary condition for the result, without which the outcome would not have ensued. This implied the individual who committed the killing or inflicted the injury.

In cases of murder, wounding or maiming, under Khevsur and Svan customary law, a certain degree of responsibility (significantly less than that of the main perpetrator) was imposed on the person who supplied the weapon to the offender, the bearer of provocative words, and the instigator of the conflict. Such conduct was regarded in Svaneti and Khevsureti as a necessary condition (though not the immediate cause) for the criminal result and therefore entailed a certain degree of responsibility. Furthermore, in Khevsureti, responsibility could be imposed (subject to predetermined conditions) on a person who witnessed the conflict that gave rise to the offence, or who was present in the village during the conflict with the door of their house open and did nothing to intervene and separate the parties. Thus, in Khevsureti, the failure to use the opportunity to prevent the criminal result (omission) was regarded as a condition for that result; otherwise, no responsibility would arise under Khevsur customary law.

In Svaneti and Khevsureti, material compensation could be imposed on a person even where death, bodily injury or material loss did not result from someone's criminal act. For example, if one person sent another somewhere, or took them along, and that person died, sustained bodily injury or suffered material loss for reasons independent of the sender or the one accompanying them, material compensation could still be imposed. In such cases, responsibility for material damage was based on the fact that the community regarded one person sending or accompanying another as a necessary condition for the occurrence of those results. Consequently, it was considered that a causal link existed between those actions and the resulting consequence.

In Georgian customary law, certain qualifying elements of an offence included the place of its commission (for example, within the grounds of a shrine or a church), the time (such as committing a violation on a feast day), and the type of weapon used. For instance, the imposition of a particular sanction, namely "*arbiti*", could be triggered exclusively by the commission of murder using a weapon

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[25] *Ковалевский М*., Закон и обычай на Кавказе, [*Kovalevsky M*., Law and Custom in the Caucasus], Vol. 2, Moscow, 1890, 71 [in Russian]; *Kekelia M.*, Materials on Svan Customary Law, Ethnographic Notebook No. 6, 1969, 51 (in Georgian).

[26] *Davitashvili G.*, Types of Offences in Georgian Customary Law, Tbilisi, 2017, 294 (in Georgian).

made of iron. Likewise, in Svaneti and Khevsureti, wounding with a firearm entailed a higher payment than inflicting an equivalent injury with a dagger or a sword.

Bibliography:

1. *Chartolani M.*, From the History of the Material Culture of the Georgian People, Tbilisi, 1961 (in Georgian).
2. *Davitashvili G.*, Types of Offences in Georgian Customary Law, Tbilisi, 2017 (in Georgian).
3. *Jalabadze D.*, Crime and Punishment in Georgian Customary (Folk) Law, Tbilisi, 2003 (in Georgian).
4. *Kekelia M.*, Materials on Khevsur Customary Law, Ethnographic Notebook, 1988 (in Georgian).
5. *Kekelia M.*, Materials on Svan Customary Law, Ethnographic Notebook No. 4, 1968 (in Georgian).
6. *Kekelia M.*, Materials on Svan Customary Law, Ethnographic Notebook No. 6, 1969 (in Georgian).
7. *Kekelia M.*, Materials on Svan Customary Law, Ethnographic Notebook No. 7, 1970 (in Georgian).
8. *Kharadze R.*, Customary Law of Khevsureti, Chronicles, Vol. 1, 1947 (in Georgian).
9. *Merebashvili J.*, Materials on Ajara Customary Law, Ethnographic Notebook, 1989 (in Georgian).
10. *Merebashvili J.*, Materials on Khevsur Customary Law, Ethnographic Notebook, 1988 (in Georgian).
11. Monuments of Georgian Law, texts published, study and glossary appended by I. Dolidze, Vol. 1, Tbilisi, 1963 (in Georgian).
12. *Nizharadze B.*, Historical-Ethnographic Essays, Tbilisi, 1962 (in Georgian).
13. *Ochiauri A.*, Blood Feud and Inflicting Wounds in Khevsureti, Tbilisi, 2019 (in Georgian).
14. *Ochiauri A.*, Calendar of Georgian Folk Festivals, Khevsureti II (Bude-Khevsureti, Shatili-Mighmakhevi), Tbilisi, 2005 (in Georgian).
15. *Ochiauri A.*, Customary Law of Khevsureti, 1945, personal archive, Notebook No. 1 (in Georgian).
16. *Ochiauri A.*, Customary Law of Khevsureti, 1945, personal archive, Notebook No. 3 (in Georgian).
17. *Ochiauri A.*, Materials on Khevsureti, II, Collection Georgian Customary Law, 2, Tbilisi, 1990 (in Georgian).
18. *Zoidze O.*, Materials on the Customary Law of Samegrelo, Ethnographic Notebook, 1988 (in Georgian).
19. *Ковалевский М.*, Закон и обычай на Кавказе, [*Kovalevsky M.*, Law and Custom in the Caucasus], Vol. 2, Moscow, 1890 (in Russian).

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Easement of Necessity and Related Topical Issues in Notarial Practice

A claim for an easement of necessity entitles the owner to submit a request to the owner of the neighbouring plot, enabling the establishment of a connection to public roads and to electricity, oil, gas and water supply networks. The claim encompasses both private and public interests, which must be assessed with regard to the determination of agreed compensation, the term, any abuse of rights, the collection of relevant evidence and the duty of forbearance. The aim of the article is to highlight the advantages of notarial mediation in evaluating disputed situations arising from neighbourly relations, in order to determine whether notarial mediation constitutes a timely, efficient and beneficial means of dispute resolution. In the absence of agreement between the parties, disputes concerning an easement of necessity are examined by the courts, and each party must prove the circumstances on which it relies in support of its claims and statement of defence.

Keywords: *Constitution of Georgia, Civil Code of Georgia, easement of necessity, courts, notary, notarial act, notarial mediation, protection of property rights.*

Quod alias non fuit licitum necessitas licitum facit*

1. Introduction

The right to an easement of necessity presupposes situations in which there is no alternative and must be dictated by necessity;[1] however, this does not mean that a claim for access cannot also be based on other rights *in rem*, such as construction rights or a servitude.[2] Necessity is the determining factor for the regulation of the relationship.[3] The establishment of an easement of necessity raises a number of interesting issues, although it is impossible to address all of them exhaustively within the framework of this paper. The research therefore focuses on several of the most topical questions arising in notarial practice.

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*** (Latin) Necessity makes lawful that which otherwise was not lawful.

1 *Zarandia T.,* Property Law, Tbilisi, 2023, 280 (in Georgian).

2 *Chanturia L. (ed.),* Civil Code Commentary, Volume II, Property (Rights *in Rem*) Law, Tbilisi, 2018, 223, 276, 283-284 (in Georgian).

3 *Zoidze B.,* Property Law of Georgia, Tbilisi, 2003, 125 (in Georgian).

2. Easement of Necessity as a Statutory Right *in Rem* and its Distinction from Other Rights *in Rem*

An easement of necessity and other rights *in rem* may be regarded as alternative means of achieving the desired result, albeit under different conditions. The notary must explain to the parties that a claim for an easement of necessity, as an extreme measure *vis-à-vis* the owner of the neighbouring plot, necessarily requires verification of whether other means of achieving the same result have been excluded. "In order for an individual to be able to make practical use of the right of property, it is not sufficient to confer upon them an abstract proprietary guarantee. They must also benefit from such a civil, private-law order as will enable the unhindered enjoyment of the right of property and the development of civil circulation."[4] What constitutes an easement of necessity for one owner amounts to "encroached" property for another; accordingly, the boundary frequently oscillates between such restrictions, which may be examined by the notary as interrelated issues to be ruled out (or accorded priority, taking into account the interests of the parties) in the light of Article 180 of the Civil Code of Georgia.

When drawing up transactions relating to immovable property in the form of a public act (sale, usufruct, construction right, lease, rent, mortgage and others), the notary is obliged to request an extract from the Public Registry concerning the immovable property.[5] In judicial practice, this obligation of the notary is interpreted in the light of the purpose of the Public Registry, by assessing the aims of the publication of those rights which, based on the presumption of knowledge of the law and the standard of diligence, are deemed accessible to every person. The fact that ownership of a given immovable item is confirmed by an extract from the Public Registry is well known, and the obtaining of such information is accessible to any citizen; however, the notary must also be satisfied that an appropriate extract exists in respect of the specific immovable property.[6]

It is true that civil rights must be exercised lawfully and that it is impermissible to exercise a right solely for causing harm to another; however, such a prohibition cannot ensure the protection of the landowner against an unfounded claim for an easement of necessity.[7] In notarial practice, the function of distinguishing between rights *in rem* lies with the notary, who provides legal advice to

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4 Judgment of the Constitutional Court of Georgia of 2 July 2007 in case No. 1/2/384.

5 Articles 15 and 47 of the Instruction on the Procedure for Performing Notarial Acts provide that: "For the certification of an act (transaction, certificate or other act) for which, under the legislation of Georgia, compliance with the notarial form is prescribed as a condition of its validity, the notary is obliged to verify the identity, authority and legal capacity of the parties (their representatives), the genuineness of the expression of will, and to ensure that the transaction complies with the legislation, that the will of the parties is adequately reflected in the transaction, that the content and legal consequences of the transaction are explained to the parties, and that advice is given." A notarial act performed in accordance with this procedure constitutes a public act.

6 See judgment of the Supreme Court of Georgia of 5 June 2020 in case No. AS-8-8-2017. Cf. *Khubashvili T.*, Obligations Relating to Property Rights Subject to Registration in the Public Registry, Journal of Law, No. 2, 2016, 162 (in Georgian).

7 Cf. *Martínez Velencoso, L. M.,* The Land Register in European Law: A Comparative and Economic Analysis, in the Book: Transfer of Immovables in European Private Law, Cambridge – New York, Part 1, 2017, 3-5.

individuals in connection with notarial acts and, at their request, prepares drafts of documents, and is authorised to provide legal advice to an interested person that is not related to the performance of a notarial act.

A plot of land along with a construction right may be transferred to another person for use for a fixed term, in such a way that he/she is entitled to erect a structure on or beneath that plot, as well as to alienate this right, transfer it by inheritance, lend it or lease it. The construction right may extend to that part of the plot of land that is not necessary for the construction itself but allows for better use of the structure. The term of the construction right is determined by agreement between the parties and must not exceed 99 years.[8]

By means of a usufruct, an immovable item may be transferred to another person for use in such a way that they are entitled, like an owner, to use this item and to prevent third parties from using it; however, unlike the owner, they have no right to alienate the item, encumber it with a mortgage or transfer it by inheritance. The consent of the owner is required for the renting or leasing of this item. After the termination of the usufruct, the owner becomes a party to the existing lease or rent relationships.[9]

By means of a servitude, a plot of land or other immovable property may be used (encumbered) for the benefit of the owner of another plot of land or other immovable property in such a way that this owner has the right, in specific cases, to make use of that plot, or that certain acts on that plot are prohibited, or that the exercise by the owner of the encumbered plot of certain rights in respect of another plot is excluded. The rules laid down for the acquisition of immovable property apply to the establishment of a servitude. Consideration may be determined in the form of a periodic payment.[10] A servitude may exist only where it affords the entitled person an advantage in the use of his/her own plot of land. In exercising the servitude, the entitled person must have due regard to the interests of the owner of the plot of land used (encumbered).[11] By means of a servitude, the parties may agree that the owner of a plot of land shall have the right, in order to reach their own plot, to use the subordinate plot of land. In this respect, a right-of-way servitude is similar to an easement of necessity;[12] however, whereas a right-of-way servitude arises based on an agreement between the parties, the right to an easement of necessity arises by virtue of law, although the mutually exclusive nature of the interests creates difficulties for the establishment of an easement of necessity.

Example: In the course of the construction of an oil pipeline, a claim lodged by a company against the owner of a private plot of land was recognised by the Supreme Court of Georgia as admissible from the standpoint of the right to an easement of necessity and was granted. The Court indicated that an easement of necessity constitutes a right *in rem*[13] and that, based on Article 180 of the

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8 Civil Code of Georgia, Legislative Herald of Georgia, 26/06/1997, Article 233.

9 Ibid., Article 242.

10 Ibid., Article 247.

11 Ibid., Article 248.

12 *Rusiashvili G., Sirdadze L., Egnatashvili D.,* Property Law (Collection of Case Studies), Tbilisi, 2019, 358 (in Georgian).

13 See the Law of Georgia on the Public Registry, Legislative Herald of Georgia, No. 41, 19/12/2008, Article 11.1, Rights and Obligations Subject to Registration in the Register of Rights to Immovable Property.

Civil Code of Georgia, the owner of the neighbouring plot incurs a duty of forbearance, which is linked precisely to the application of this provision and not to the acquisition of a construction right or servitude, since the company had purchased the plot of land for the purpose of laying an oil pipeline, and, for the proper use of the acquired plot, required a necessary connection to the oil network.[14] There had been an expectation that, in this type of case, the courts would accord precedence to a servitude; however, practice has developed under Article 180 of the Civil Code of Georgia.

When bringing a claim in respect of a right to an easement of necessity, the claimant must indicate the preconditions laid down in Article 180 of the Civil Code: (a) they must be the owner of the plot of land; (b) the plot must not have an adequate connection to a public road; (c) the use of the neighbouring plot as an easement of necessity must be dictated by the actual location of the property and its use in accordance with its functional purpose; (d) the neighbouring plot of land must constitute the only proportionate means of achieving the aim. The object of proof is determined by reference to which of these facts are contested by the owner of the neighbouring plot; and, in view of the procedural nature of the objections, the burden of proof is allocated between the parties.

In notarial practice, the distinction between the proprietary bases may emerge precisely when assessing precondition (d); however, it should be borne in mind that the performance of a notarial act may be postponed at the request of an interested person who wishes to apply to the court in order to contest the right or fact whose confirmation is sought by the other party. In such a case, the notary is entitled to postpone the performance of the notarial act for no more than 10 days. If, within the time limit set by the notary, no notification is received from the court that the interested person has lodged an application, the notary proceeds to perform the notarial act. The notary may also propose notarial mediation to the parties.[15]

3. Notarial Mediation in Neighbour Disputes

Does the notary have the right to participate in disputed neighbourly relations? Is his function confined solely to providing explanations for the establishment of an easement of necessity, or does it also encompass the prevention of disputes? It is evident that where the boundaries of land plots are neither demarcated nor registered, the determination of a demarcated and registered road between plots with imprecisely defined areas is itself contentious. The problem here lies not only in the establishment of the road, but also in the registration of the land plots, and unless the basic systemic issues of land registration are resolved within the framework of the parties' responsibilities, matters relating to an easement of necessity are of a risky nature from the standpoint of the notary's liability.[16]

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[14] Judgment of the Chamber of Civil, Entrepreneurial and Bankruptcy Cases of the Supreme Court of Georgia of 21 April 2005 in case No. AS-1416-1548-04.

[15] Law of Georgia on Notaries, Legislative Herald of Georgia, 04/12/2009, Article 46.

[16] Cf. *Bar C., Clive E., Schulte-Nölke H., Beale H., Herre J., Huet J., Storme M., Swann S., Varul P., Veneziano A.* and *Zoll F.* (eds.), Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR), 2008, 3987-3988. See also *Shengelia E.,* Legal Aspects of the Notary's Professional Liability Insurance Contract, Jubilee Volume: Roman Shengelia 70, Tbilisi, 2012 (in Georgian).

Notarial mediation is a process for the resolution of private-law disputes in which the parties, on a voluntary basis (with the consent of all parties), or, in the case provided for by the Law of Georgia on the Systematic and Sporadic Registration of Rights to Plots of Land and the Improvement of Cadastral Data, on a mandatory basis, conduct negotiations with the assistance of one or more mediator-notaries with a view to reaching an agreement on the disputed issues. The notary is authorised to conduct mediation in neighbour disputes and, where the parties so agree, to draw up a settlement act, which is certified in notarial form as a public act.

In neighbourly relations, the transformation of the social system of land ownership, road access and the importance of public awareness are interconnected topics, the assessment of which is based on political, legal and social determinants. Whereas, before the courts, the subject of proof consists of facts of substantive legal significance indicated by the parties in order to substantiate their claims (or defences), and each party must prove the circumstances on which it relies in support of its claims and defences, this issue does not arise in notarial mediation.

Generally, a claim for an easement of necessity *vis-à-vis* the owner of the neighbouring plot may be either well-founded or unfounded,[17] which creates inconsistency where the court restricts the owner's right[18] yet, in terms of legal consequences, fails to distinguish between a claim for an easement of necessity, deprivation of property, and claims arising from a servitude, construction right or other right *in rem*. Private-ownership relations in respect of land remain a challenge for civil circulation,[19] and the development of a uniform approach to claims for access is therefore limited. In individual cases, where a plot of land is the subject-matter of a contract, the issue of access may not be addressed from the outset, or the parties may not pay attention to the existence of an access road to the plot – the plan may not fully specify the access route to the plot, or the claimant owner may attempt unilaterally to propose conditions. In such circumstances, the interests of the parties are mutually opposed.[20] In a 2019 judgment of the Supreme Court of Georgia it was established that, when purchasing the plot, the parties to the transaction had not secured access to the plot, and that this risk attaches to the parties themselves and not to the owner of the neighbouring plot.[21]

The mediator-notary must explain to the parties the legal consequences of the agreement reached as a result of mediation and, in the event of disagreement, the possible consequences. It is desirable that the parties understand that, under Article 180 of the Civil Code of Georgia, the right to use another's property is a statutory (non-contractual) restriction on the right to use property, irrespective of the neighbouring owner's consent; however, the neighbouring plot of land may also be used for the benefit of another plot on the basis of a contractual relationship or, within the scope of Article 180 of the Civil Code, based on an agreement on compensation with the owner of the

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17 See judgment of the Civil Chamber of the Supreme Court of Georgia of 7 November 2018 in case No. AS-554-529-2016.

18 With regard to Article 19 of the Constitution of Georgia.

19 *Zoidze B.,* Problems Concerning the Review of the Constitutionality of Constitutional Provisions, Constitutional Law Review, VIII, 2015, 15 (in Georgian).

20 *Kobaladze L.,* Legal Interest in Civil Proceedings, Jubilee Volume: Sergo Jorbenadze 90, Tbilisi, 2019, 203 (in Georgian).

21 Judgment of the Civil Chamber of the Supreme Court of Georgia of 8 February 2019 in case No. AS-1513-2018(B).

neighbouring plot. As noted, if, in the course of notarial mediation, the dispute is concluded by agreement between the parties, the notary draws up a settlement act and certifies it in notarial form.

The mediator-notary is entitled to refuse to certify the settlement act if the content of the agreement reached by the parties is manifestly contrary to mandatory provisions of the law, morality or public order. Accordingly, the legal interest served by a court judgment may be replaced by an agreement reached, with the participation of the parties, in notarial mediation and by the expression of their mutual interest in the establishment of an easement of necessity, in a context where negotiations take the place of claim and defence. The possibility of reaching an agreement in mediation reflects a broader scope for assessing the problem, in which the decision-makers are the parties themselves, without any allocation of the burden of proof and without the need to prove evidence and claims. This alters the conditions in which, before the courts, these matters are of decisive importance.

4. The Privilege of Notarial Certification of Agreements on Compensation and Guarantees of Enforcement

The notarial certification of an agreement on compensation – and, in certain cases, the receipt of the compensation amount in deposit – is the result of the parties' consensus. On the one hand, the transfer of money to the notary has the same legal consequences as its transfer to the court; on the other hand, the notary receives money in deposit (into a deposit account) in cases provided for by the legislation of Georgia or at the request of the parties. In the protocol on receipt into deposit, the notary indicates the reasons for the transfer, the transferor's instructions regarding the transmission of the money to a third party (the creditor) and does not verify the basis for the creation of the obligation.[22] The notary issues a writ of execution for the enforcement of that notarial act based on which the enforcement of the established obligation is permitted, under the legislation, by means of a notarial writ of execution, provided that the statutory limitation periods for performance of the obligation have not expired. The notarial certification of the agreement on compensation constitutes the legal basis for the subsequent issuance of a writ of execution. In the event of non-performance by a party of an obligation established by a settlement act concluded within the framework of notarial mediation, compulsory enforcement is carried out based on a writ of execution issued by the notary, in accordance with the Law of Georgia on Enforcement Proceedings.[23]

In notarial practice, the privilege of notarial certification of an agreement on compensation may be discerned in the difficulties encountered in judicial practice when determining compensation and in the assessment of how effective and beneficial it is to resolve the dispute through notarial mediation. In one case,[24] the Supreme Court of Georgia considered that the imposition on the claimant of a monthly payment of GEL 200 for an easement of necessity was not expedient, as it would place him in a difficult position, and that he should therefore be required to pay GEL 20; whereas, years later, in another case it was established that, where a plot of land encumbered with an obligation relating to an

22 *Bichia M.,* Defining the Legal Nature of Shared Rights, TSU "Journal of Law", No. 2, 2022.

23 Law of Georgia on Notaries, Legislative Herald of Georgia, 04/12/2009, Article 38[1].

24 Judgment of the Chamber of Civil, Entrepreneurial and Bankruptcy Cases of the Supreme Court of Georgia of 5 October 2005 in case No. AS-328-648-05.

easement of necessity has a commercial purpose, the compensation for forbearance may be determined by reference to its rental value, since leasing is the most common form of using immovable property in accordance with its ordinary economic purpose.[25]

The court found that the amount offered by the pipeline company to the neighbouring owner constituted compensation within the meaning of Article 180 of the Civil Code of Georgia, and not a purchase price for the plot of land or an amount intended for the expropriation of the plot.[26] In several cases, the court has held that, when assessing an expert opinion, it is entitled not to follow the method of calculating compensation proposed by the expert to the client.[27] Where compensation is paid as a lump sum, it will be calculated differently. In the abovementioned case, the neighbouring owner claimed, as compensation, an amount corresponding to the market value of the plot of land, since the gas pipeline ran through the middle of the plot and the remaining part of the land became unusable, the plot thereby losing its function. It is also important, when calculating compensation, to determine the extent of the impact on the neighbouring plot of land. As regards photographic material of the land, it was clarified that, in terms of legal force, it cannot be regarded as evidence invalidating an expert examination.[28] In another case, where only the establishment of a right to an easement of necessity was at issue, the Court of Cassation explained that the issue of compensation had not arisen within the scope of the dispute and, naturally, the Court of Cassation could not rule on it; however, this should not be understood as meaning that the respondents had lost their right to claim compensation.[29]

5. Section 917 of the Civil Code of Germany

Section 917 of the Civil Code of Germany applies not only to claims for an easement of necessity, but also to the laying of supply and delivery lines by using the neighbouring plot of land.[30] Section 917 may be applied in such cases only if land legislation does not establish a less restrictive regime. [31] The extent of an easement of necessity must be confined to a route of specified length and width over the plot of land; however, this provision does not determine the precise limits of such restriction. Within the framework of an easement of necessity, a route must be chosen that is least restrictive for the owner of the plot of land subject to the duty of forbearance. The property rights of

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25 Judgment of the Civil Chamber of the Supreme Court of Georgia of 30 March 2022 in case No. AS-172-2021. Furthermore, the form and content (value) of the compensation require careful scrutiny. See also *Zoidze B.,* Formalism in Georgian Law – Primarily Based on the Practice of the Constitutional Court, Journal of Public Law, No. 1, 2023, 124 (in Georgian).

26 Judgment of the Chamber of Civil, Entrepreneurial and Bankruptcy Cases of the Supreme Court of Georgia of 22 April 2008 in case No. AS-802-1122-07.

27 Judgment of the Chamber of Civil, Entrepreneurial and Bankruptcy Cases of the Supreme Court of Georgia of 9 December 2010 in case No. AS-797-746-2010.

28 Judgment of the Civil Chamber of the Supreme Court of Georgia of 17 December 2015 in case No. AS-1070-1009-2015.

29 Judgment of the Civil Chamber of the Supreme Court of Georgia of 22 March 2021 in case No. AS-58-2019.

30 On the individual and general-social approach, see *van der Walt A. J., Raphulu T. N.,* The Right of Way of Necessity: a Constitutional Analysis, Journal of Contemporary Roman-Dutch Law, Vol. 77, 2014, 475.

31 *Prütting H., Wegen G., Weinreich G*. (eds.), BGB – Kommentar, § 917 BGB – Notweg.

the owner of the neighbouring plot may be restricted only to the extent required by necessity.[32] The interests of the person entitled to an easement of necessity, in selecting the most efficient route for him/herself, do not take precedence over the interests of the landowner. In one case, having regard to these preconditions, an easement of necessity was limited to a width of three metres, since, when determining the access required to reach the plot of land, the possibility of travel by motor vehicle was also taken into account.[33]

Whether the owner of a plot of land is obliged to tolerate certain restrictions depends on how the matter is regulated under local land law; however, the provisions of that law displace the general regulation of neighbour law contained in the Civil Code only where, and to the extent that, they offer a complete settlement of the specific issue.[34] The courts regulate such matters directly based on sections 906 *et seq*. of the Civil Code of Germany (BGB) and do not require recourse to analogy. German legislation does not preclude the application of section 917 in cases involving the laying of important communication lines across a neighbour's land. It is determined how the construction and technical costs are to be apportioned among the neighbours where there is joint use of supply and delivery lines. The neighbour is obliged to tolerate the use of his/her plot of land as an easement of necessity and is not required to take any action to maintain that easement of necessity; however, if he also uses this access route, the costs of constructing the way must be apportioned between the parties.[35] In the BGB, the right to claim an easement of necessity and the exclusion of this right are formulated in two separate provisions.[36]

6. Conclusion

When establishing an easement of necessity, the binding force of the owner's declared undertaking is determined by the absence of a connection to public roads and to electricity, oil, gas and water supply networks, the impossibility of the proper use of the land without such access, the existence of necessity and the exclusion of arbitrary conduct on the part of the owner. Article 180 of the Civil Code of Georgia has been assessed in the practice of the courts of general jurisdiction of Georgia with regard to both its substantive and procedural aspects; however, when evaluating the duty of forbearance and compensation, it still gives rise to inconsistent views as regards abuse of rights. This issue requires particular attention, since, notwithstanding its justification, a claim for an easement of necessity may excessively restrict the rights of the owner of the neighbouring plot.

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32 *Tomuschat C., Currie D. P., Kommers D. P., Kerr R.,* Basic Law for the Federal Republic of Germany, German Bundestag, 2022, 88. See also *Raphulu T. N.,* The Right of Way of Necessity: a Constitutional Analysis, Master's Thesis No. 17439140, Stellenbosch University, 2013, 149-150.

33 OLG Hamm, AZ: I-5 U 30/19, 18.11.2019.

34 *Müller P*., Recent Developments in Land Tenure and Land Policies in Germany, Land Economics, University of Wisconsin, Vol. 40, No. 3, 1964, 271.

35 BGH Karlsruhe, AZ: V ZR 172/07, 04.07.2008.

36 In the Civil Code of Georgia, the right and its exclusion are set out in a single provision, see: practice relating to the right to use an easement of necessity: *Nachkebia A.,* Interpretation of Civil-Law Provisions in the Case Law of the Supreme Court of Georgia (2000-2013), Tbilisi, 2014, 77-80 (in Georgian); *Winter G., Kalichava K.,* Legal Transfer and Internal Dynamics in Transforming Countries: The Example of the Development of Administrative Law of Georgia, Journal of Public Law, No. 1, 2023, 7-8 (in Georgian); *Zoidze B.,* Reception of European Private Law in Georgia, Tbilisi, 2005, 268 (in Georgian).

Bibliography:

1. Constitution of Georgia, Legislative Herald of Georgia, 24/08/1995.
2. Civil Code of Georgia, Legislative Herald of Georgia, 26/06/1997.
3. Law of Georgia on Notaries, Legislative Herald of Georgia, 04/12/2009
4. *Bichia M.,* Defining the Legal Nature of Shared Rights, TSU "Journal of Law", No. 2, 2022.
5. *Winter G., Kalichava K.,* Legal Transfer and Internal Dynamics in Transforming Countries: The Example of the Development of Administrative Law of Georgia, Journal of Public Law, No. 1, 2023 (in Georgian).
6. *Zarandia T.,* Property Law, Tbilisi, 2023 (in Georgian).
7. *Zoidze B.,* Property Law of Georgia, Tbilisi, 2003 (in Georgian).
8. *Zoidze B.,* Reception of European Private Law in Georgia, Tbilisi, 2005 (in Georgian).
9. *Zoidze B.,* Problems Concerning the Review of the Constitutionality of Constitutional Provisions, Constitutional Law Review, VIII, 2015 (in Georgian).
10. *Zoidze B.,* Formalism in Georgian Law – Primarily Based on the Practice of the Constitutional Court, Journal of Public Law, No. 1, 2023 (in Georgian).
11. *Kobaladze L.,* Legal Interest in Civil Proceedings, Jubilee Volume: Sergo Jorbenadze 90, Tbilisi, 2019 (in Georgian).
12. *Nachkebia A.,* Interpretation of Civil-Law Provisions in the Case Law of the Supreme Court of Georgia (2000-2013), Tbilisi, 2014 (in Georgian).
13. *Rusiashvili G., Sirdadze L., Egnatashvili D.,* Property Law (Collection of Case Studies), Tbilisi, 2019 (in Georgian).
14. *Shengelia E.,* Legal Aspects of the Notary's Professional Liability Insurance Contract, Jubilee Volume: Roman Shengelia 70, Tbilisi, 2012 (in Georgian).
15. *Shotadze T.,* Property Law, Tbilisi, 2014 (in Georgian).
16. *Chanturia L. (ed.),* Civil Code Commentary, Volume II, Property (Rights *in Rem*) Law, Tbilisi, 2018 (in Georgian).
17. *Khubashvili T.*, Obligations Relating to Property Rights Subject to Registration in the Public Registry, Journal of Law, No. 2, 2016 (in Georgian).
18. Judgment of the Chamber of Civil, Entrepreneurial and Bankruptcy Cases of the Supreme Court of Georgia of 21 April 2005 in case No. AS-1416-1548-04.
19. Judgment of the Chamber of Civil, Entrepreneurial and Bankruptcy Cases of the Supreme Court of Georgia of 5 October 2005 in case No. AS-328-648-05.
20. Judgment of the Chamber of Civil, Entrepreneurial and Bankruptcy Cases of the Supreme Court of Georgia of 22 April 2008 in case No. AS-802-1122-07.
21. Judgment of the Chamber of Civil, Entrepreneurial and Bankruptcy Cases of the Supreme Court of Georgia of 9 December 2010 in case No. AS-797-746-2010.
22. Judgment of the Civil Chamber of the Supreme Court of Georgia of 17 December 2015 in case No. AS-1070-1009-2015.
23. Judgment of the Civil Chamber of the Supreme Court of Georgia of 7 November 2018 in case No. AS-554-529-2016.
24. Judgment of the Civil Chamber of the Supreme Court of Georgia of 8 February 2019 in case No. AS-1513-2018(B).

25. Judgment of the Civil Chamber of the Supreme Court of Georgia of 22 March 2021 in case No. AS-58-2019.
26. Judgment of the Civil Chamber of the Supreme Court of Georgia of 30 March 2022 in case No. AS-172-2021.
27. *Clive E., Schulte-Nölke H., Beale H., Herre J., Huet J., Storme M., Swann S., Varul P., Veneziano A.* and *Zoll F.* (eds.), Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR), 2008.
28. *Müller P*., Recent Developments in Land Tenure and Land Policies in Germany, Land Economics, University of Wisconsin Press, Vol. 40, No. 3, 1964.
29. OLG Hamm, AZ: I-5 U 30/19, 18.11.2019.
30. *Prütting H., Wegen G., Weinreich G*. (eds.), BGB – Kommentar, § 917 BGB – Notweg.
31. *Raphulu T. N.,* The Right of Way of Necessity: a Constitutional Analysis, Master's Thesis No. 17439140, Stellenbosch University, 2013.
32. *Tomuschat C., Currie D. P., Kommers D. P., Kerr R.,* Basic Law for the Federal Republic of Germany, German Bundestag, 2022.
33. *van der Walt A. J., Raphulu T. N.,* The Right of Way of Necessity: a Constitutional Analysis, Journal of Contemporary Roman-Dutch Law, Vol. 77, 2014.
34. *Martínez Velencoso, L. M.,* The Land Register in European Law: A Comparative and Economic Analysis, in the Book: Transfer of Immovables in European Private Law, Cambridge – New York, Part 1, 2017.

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Mikheil Bichia*

The Two Hypostases of Law in Weinberger's Ontology: Norms and Life

Determining the nature of law is one of the central issues in legal theory. According to Weinberger, law is a dynamic, living and autopoietic (self-generating) organism, which simultaneously encompasses two fundamental hypostases – norms and social life. Therefore, law is not merely a rigid system of rules and laws.

This is an attempt to analyse the dialectic between these two aspects and, at the same time, to overcome the traditional opposition between normative idealism and social reality. Weinberger seeks to bring out their harmonious co-existence within the framework of law. In his view, law is a holistic system which operates not only in accordance with legislation, but also with due regard to the social context, at both the individual and the collective level. Moreover, a sharp separation between theory and practice is inadmissible, as they are inextricably linked and mutually reinforcing. Weinberger therefore strives to connect theory and practice organically. Thus, law is a living and multifaceted system in which rules and social relations co-exist harmoniously.

Keywords: *dual nature of law, ontology, social reality, Weinberger, autopoietic system*

1. Introduction

Over the years, the philosophy of law has sought answers to key questions: what is law and how does it operate in different social environments? How important is it to clarify the nature of law, and what impact does this have on the social environment?

In the context of contemporary globalisation, these questions acquire particular urgency and practical significance. A profound and complex understanding of the nature of law, which takes account of its normative and social aspects, is crucial for legal regulation and stability. In this process, the views of the well-known Czech-Austrian legal philosopher Ota Weinberger assume special importance. He studied at Charles University in Prague and, starting from his philosophical dissertation, already demonstrated the interconnection between logic and law. The book he published in 1958 based on this dissertation, "*Die Sollsatzproblematik in der modernen Logik,*" laid the foundations for the discipline of deontic (i.e. normative) logic. After moving to the West, Weinberger further consolidated his reputation with the publication of the extensive work "*Rechtslogik*" (1970). He initially held visiting lectureships at several Austrian universities and, ultimately, from 1972 to 1989, was Professor of Philosophy of Law at the University of Graz.[1]

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1 *Koller P.*, Ota Weinberger: In Memoriam, Ratio Juris, Vol. 22, No. 3, 2009, 416-417.

Ota Weinberger made a significant contribution in two fields: the development of the logic of norms and analytical legal theory. His works exert considerable influence in the field of law, particularly from the perspective of normative logic, where he focuses in depth on legal norms and their critical examination. From this angle, it is necessary to determine on whose views Weinberger's approach is based and how realistic the harmonious co-existence of two distinct sides – legal norms and social institutions – is.

The aim of the research is also to ascertain to what extent the traditional dichotomy between normative idealism and social reality can be overcome by means of Weinberger's reflections on the ontology of law and analytical jurisprudence. In this regard, it is important to answer the question of what Weinberger understands by law – merely a set of rules, solely an empirical reality, or a phenomenon that unites legal norms and the social context.

2. Normative Idealism vs Social Reality

Ota Weinberger examines the essence of law, the foundations of its operation, and its normative and social reality. The ontology of law entails explaining the nature and functioning of law.[2] Weinberger seeks to overcome one of the most difficult dichotomies in modern jurisprudence – the opposition between normative idealism and social reality. He criticises approaches based either on excessively formal rules (Kelsen's pure normativism) or solely on facts (extreme realism), which enables him to develop a dialectical understanding of the essence of law.

The strength of the Austrian scholar's analytical approach lies in the fact that Weinberger does not view law as a static normative system, but as a living social process that constantly changes and develops in accordance with factual reality. He regards the ontology of law as a theory, which examines the essence of law as well as its impact on human life and society. In his view, **law is not merely a collection of normative rules**; **it "lives" and operates within real, everyday relationships**. Therefore, legal norms are not simply ideas or abstractions; law interacts with and has a real effect on the social environment,[3] which constitutes a central issue in the ontology of law.

Based on this conception, a fundamental question arises: how can norms, which by their nature differ logically from empirical facts, exert an influence on the social environment? This idea is directly linked to R. Dworkin's theory of law, according to which law is not merely a set of norms of positive law, but also encompasses aspects determined by values and social context.[4] Accordingly, law functions fully when it is grounded in the principles of justice and the protection of human rights. In this case, law is not simply a body of formal rules, but a real guarantee of the protection of these principles.[5]

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2 *Weinberger O.*, Rechtsontologie und analytische Jurisprudenz, Memoria del XI Congreso Mundial Ordinario de Filosofía del Derecho y Filosofía Social, Vol. 10, México, 1984, 393.

3 Ibid., 398.

4 See *Dworkin, R. M.,* Is Law a System of Rules?, in: Philosophy of Law*, R. M. Dworkin* (ed.), Tbilisi, 2010, 41 (in Georgian).

5 See *Kaufmann A.*, The Ontological Structure of Law, Natural Law Forum, 8, 1963, 82.

Within this theoretical framework, norms are not merely ideas, but part of human reality. Norms are connected with the facts of everyday life; normative rules determine what we ought to do (for example, laws, and moral norms).[6] They encompass rules, **principles or categories that, within a logical-formal system, define** what a person must do (**obligation**), what he or she is permitted to do (**permission**), and what is impermissible (prohibition).[7]

According to Hart, law is a system of rules that differs both from commands and from moral norms.[8] In this sense, Hart's theory of primary and secondary rules partially explains this problem. This is due to the fact that the uniqueness of law lies in the interaction between primary and secondary rules, that is, in their internal logic.[9] However, this does not fully resolve the ontological question of how norms exist and what makes them operative.

3. Transnational Legal Order

In the conditions of contemporary globalisation, understanding the nature of law acquires particular significance, since it no longer functions solely on a national basis. This is due to the fact that, as Hardt and Negri note, law and power increasingly operate within transnational network structures, where law is not merely an instrument of national sovereignty but is transformed into a mechanism of transnational governance.[10] This new reality gives rise to the following fundamental question: if law is no longer grounded in classical sovereign authority, how does it acquire legitimacy and how does it operate? In their view, the answer is that contemporary legal norms and institutions function as part of a global biopolitical order which influences individuals' lives and social relations.[11] It is precisely in order to analyse this complex reality that Weinberger seeks to reveal how law transforms society and, conversely, how that same social context (society) shapes law.[12]

At the same time, **members of society often attach different meanings to the same norm**.[13] For example, if there is a rule "be honest," different people use this norm for different purposes. One person is honest in order to achieve success in business and gain customers' trust; another uses honesty to build a good reputation in society, and so on. Accordingly, the same norm may be used with different purposes and implications for different individuals; the meaning of a norm is diverse and depends on the social context and on the addressee.

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6 See *Weinberger O.*, 'Is' and 'Ought' Reconsidered: Comment on G. H. von Wright's Lecture "Is and Ought", Archiv für Rechts- und Sozialphilosophie / Archives for Philosophy of Law and Social Philosophy, Vol. 70, No. 4, 1984, 467.

7 *von Wright G. H.*, Deontic Logic, Mind, 60, No. 237, 1951, 1.

8 *Hart H. L. A.*, The Concept of Law, 2nd edition, Oxford, 1994, 8-13.

9 Ibid., 27-29.

10 *Hardt M., Negri A.*, Empire, Cambridge, Massachusetts, 2000, 9-15.

11 Ibid., 22-23.

12 *Weinberger O.*, Rechtsontologie und analytische Jurisprudenz, Memoria del XI Congreso Mundial Ordinario de Filosofía del Derecho y Filosofía Social, Vol. 10, México, 1984, 394-395.

13 See *Weinberger O.*, 'Is' and 'Ought' Reconsidered: Comment on G. H. von Wright's Lecture "Is and Ought", Archiv für Rechts- und Sozialphilosophie / Archives for Philosophy of Law and Social Philosophy, Vol. 70, No. 4, 1984, 468.

This **diversity** is particularly evident in hard cases, where **a legal norm acquires an indeterminate character and is applied in the form of "open texture."**[14] It is precisely this indeterminacy that has led, in theory, to the emergence of two approaches: legal formalism closes its eyes to gaps in the law and maintains that decisions must formally correspond to the statute or established precedent, whereas legal scepticism fails to consider objective reality. However, both approaches represent dangerous extremes,[15] since in reality **law is neither entirely formal nor entirely indeterminate**.[16] Accordingly, its content is variable and depends on the specific context.

It is precisely on this basis that Weinberger recognises that law is closely connected with reality, since **norms are important only when they operate within a specific social environment**.[17] He therefore seeks to bring issues of legal theory and practice closer together, in order to bridge the gap between them and to respond to the new challenges arising in conditions of globalisation.

In this respect, the ontology of law means not only examining the abstract existence of norms, but also understanding the function they perform in social reality. This approach corresponds to Weinberger's idea of the interaction between legal norms and social facts. Consequently, in modern jurisprudence, the study of the ontology of law entails not the examination of law merely at the level of theoretical concepts, but the consideration of the practical application of norms and their understanding within the social context.[18]

Thus, under the heading of the "ontology of law," Weinberger examines the following questions: what is law? How does it operate? What is the ontological status of legal norms? How is law connected with social reality?[19]

4. Synthesis of Theoretical and Practical Jurisprudence

The methodological innovation of Weinberger's analytical jurisprudence lies in his attempt to combine methods of conceptual analysis and empirical observation.[20] This represents not a mere interdisciplinary approach, but an effort to create a new analytical framework capable of examining both the in-depth theoretical analysis of law and its practical effectiveness at the same time. In this context, Weinberger's aim is not merely to "describe" or "explain" law, but to reveal the logic of its functioning. In this way, Weinberger seeks to formulate the central question of analytical jurisprudence: to determine the nature of the relationship and interaction between the conceptual-normative dimension of law and institutional-factual reality. This conceptual framework enables theorists to overcome the traditional dichotomy between pure normativism and sociological realism.

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14 *Hart H. L. A.*, The Concept of Law, 3rd edition, Oxford, 2012, 121.

15 See *Hart H. L. A.*, Positivism and the Separation of Law and Morals, in: Philosophy of Law, R. M. Dworkin (ed.), Tbilisi, 2010, 17 (in Georgian).

16 See *Hart H. L. A.*, The Concept of Law, 3rd edition, Oxford, 2012, 140-141.

17 See *Muthhorst,* O., Foundations of Jurisprudence: Method – Concept – System, translated by D. Maisuradze, Tbilisi, 2019, 9-10 (in Georgian).

18 See *Vile M. J. C.,* Legal Ontology and Legal Reasoning, The American Journal of Jurisprudence, 7(1), 1962, 169-172.

19 *Weinberger O.,* Rechtsontologie und analytische Jurisprudenz, Memoria del XI Congreso Mundial Ordinario de Filosofía del Derecho y Filosofía Social, Vol. 10, México, 1984, 395-396.

20 Ibid., 394-395.

In this context, Teubner's conception of autopoietic (self-generating) systems acquires particular importance. According to Teubner, law operates as a self-generating system which autonomously shapes its own normative structure.[21] This means that the legal system not only reacts to external impulses, but also creates its own "code" (rules and logic) by which it determines how these impulses (new laws, altered circumstances) are to be interpreted and implemented. In this way, the social reality of law acquires a special autonomy.[22]

This approach complements Weinberger's ontological analysis, as it explains how law preserves its identity against a background of social change while at the same time remaining responsive to those changes. In this way, the internal logic of the legal system is elucidated. For Weinberger, **analytical jurisprudence is a method** which determines the structure of law and its theoretical foundations; **it encompasses not only theoretical cognition of law but also its practical application**, thereby enabling us to establish how law operates in real life. The author considers that theoretical analysis must be balanced with the practical aspects of law if we are to form a complete picture of law.[23] Analytical jurisprudence and the logic of norms are inseparably linked; it is based on a specific logic of norms. Accordingly, if legal norms and their logical connections are not properly understood, it is impossible fully to comprehend the essence of law.[24]

Accordingly, **law is a self-generating (autopoietic) social system** which creates its own norms and rules. It is not merely the result of the influence of commands originating from outside, or a set of externally imposed rules, but **a living and constantly developing organism**. Law creates a stable social order and a practical legal system which protects itself both from within – by relying on its own structures and procedures – and from without – against influences emanating from the external world. In this way, the legal system has two main characteristics:

- **Legal norms and rules, by virtue of their internal logic, preserve a degree of unity and identity**; they themselves create and regulate their own elements; and

- At the same time, **the legal system responds to changes and challenges originating from outside**, but does so within the framework of its own internal logic and rules.[25]

This multi-layered approach makes it possible to overcome the traditional dualism between formalism and realism. According to Weinberger, analytical jurisprudence does not disregard the practical aspects of law, but seeks to integrate them into its logical structure. He considers that the ontology of law and analytical jurisprudence complement each other, in particular: **the ontology of law makes it possible to determine the fundamental essence and nature of law, while analytical jurisprudence offers the instruments for the accurate and thorough study of that nature**.[26] Formal logic and substantive meaning thus complement one another, and through the combination of these two approaches it becomes possible to study and understand law in a more complete manner.

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21 *Teubner G.*, Law as an Autopoietic System, Oxford, 1993, 1-4.

22 Ibid., 12-15.

23 *Weinberger O.*, Rechtsontologie und analytische Jurisprudenz, Memoria del XI Congreso Mundial Ordinario de Filosofía del Derecho y Filosofía Social, Vol. 10, México, 1984, 394.

24 See *Weinberger O.*, A Philosophical Approach to Norm Logic, Ratio Juris, Vol. 14, No. 1, 2001, 141.

25 See *Teubner G.*, Law as an Autopoietic System, Oxford, 1993, 13-15.

26 *Weinberger O.,* Rechtsontologie und analytische Jurisprudenz, Memoria del XI Congreso Mundial Ordinario de Filosofía del Derecho y Filosofía Social, Vol. 10, México, 1984, 396-399.

5. nalysis of Institutional Facts and Normative Reality

Particular attention should be paid to the fundamental ideas of the structural theory of law. Weinberger, following Searle, regards law as an institutional fact, which is closely connected with human will, values and actions. According to Searle, social reality is created through collective intentionality and institutional facts, whereby rules define social objects and relations, and individuals accept common rules and norms.[27] This means that institutional facts such as money, property and law "come to life" only when society recognises the corresponding norms and values. Therefore, in order to understand the essence of law, it is necessary to employ practical propositions and concepts, which form the linguistic basis of legal theory.[28]

In view of this, Weinberger considers that law operates as an institutional fact which is at once constituted by human agreement and participates in the formation of social reality and the regulation of social relations. This two-way process confirms that **law is neither purely conceptual nor purely material, but an intersubjective phenomenon**;[29] that is, it is formed through human interaction and, at the same time, exerts an influence on people's lives.

The human world comprises not only purely physical facts and realities, but also institutional facts – objects that acquire significance only within the context of social rules. For example, a piece of plastic becomes a credit card, a mechanism attached to the wrist becomes a watch, and metal discs become coins. Physically, these are mere objects, but they are given specific meaning by the social rules that surround them. Law is precisely such an institutional phenomenon, operating on two levels: on the one hand, it creates "institutions" (institutional facts) such as contract, property, marriage, trust, foundation (Stiftung), and so on; all of these exist only by virtue of legal norms. On the other hand, from an organisational perspective, law is "institutional" in the sense that it is implemented through "institutions" such as courts, legislative bodies, prosecutorial authorities, the police and so forth. This perspective helps lawyers to understand the nature of law more clearly.[30]

Social institutions are strictly formalised within the framework of public law, which is clearly visible in everyday life. *For example*, the issuing of railway tickets is regulated by law. The purchase of a ticket means the conclusion of a contract of carriage, which imposes on the company the duty to transport the passenger to the place of destination. This is a normatively prescribed constraint (rule), for the breach of which the law provides for a fine. In addition, so-called "physical constraints" are distinguished. *For example*, a person without a ticket cannot physically board an aeroplane because barriers are in place (the passport is checked, luggage is screened, and so on). Here, normative rules become constraining barriers. The system of property rights is more complex, as it is not confined to physical control; property extends both to physical objects (a car, a house) and to abstract "institutional objects" (shares, securities, and so forth). As a result, the world around us is based on

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27 *Searle J.*, The Construction of Social Reality, New York, 1995, 2-5.

28 Ibid., 7-8.

29 *Weinberger O.*, Rechtsontologie und analytische Jurisprudenz, Memoria del XI Congreso Mundial Ordinario de Filosofía del Derecho y Filosofía Social, Vol. 10, México, 1984, 394-395.

30 *MacCormick N.*, Institutions of Law: An Essay in Legal Theory, New York, 2007, 11-12.

"institutional realities" – objects and rights that exist by virtue of legal rules. These rules are so deeply integrated into our lives that non-compliance with them becomes physically impossible, because they operate instead of physical constraints.[31]

Weinberger persuasively connects law with social and normative reality, which further deepens the issues of the ontology of law. This approach is important because **law is an abstract system of rules created by human beings in order to regulate social relations**. Although law "comes to life" only through its actual application, it nonetheless has a "metaphysical" (invisible) capacity to stand above the material world, to govern our behaviour and to create order in society.[32] The aim of law should be not only the construction of legal concepts, but also the regulation of existing social relations, with due regard to the social context.[33]

Accordingly, **law has a dual nature**: it is at the same time **abstract and metaphysical in character**. This dual nature makes it possible for law to encompass both the foundations of normative reality and those of social reality. For this reason, **law is simultaneously a normative and a social category** which is not only a set of rules, but also a regulator of relations between individuals. In this way, it creates social order and stability.

Weinberger's structural-theoretical analysis of the dynamics of law shows the normative-logical connection between legal norms and social phenomena. At the same time, he criticises radical sociological realism, which defines the essence of law solely on the basis of external social factors. He considers that legal argumentation is founded not only on the formal logic of norms, but also on their substantive meaning.[34]

Law performs **a dual function**: **it creates social order and at the same time protects individual rights**. This dual function determines the complex nature of law, as it must constantly balance personal freedom and the public interest. Accordingly, law must be grounded in both individual and societal needs.

The pure theory of law seeks to "purify" law of social complexity and to determine its authentic nature. This approach views law as an autonomous system which must be freed from extraneous elements – psychology, sociology, ethics and political theory. In this sense, all external facts (for example, a parliamentary sitting or a court decision) are, in themselves, natural phenomena, but they acquire legal significance through a norm. It is precisely **the norm that determines how facts are to be understood and endowed with legal meaning**. A norm does not describe reality ("what is happening"), but reflects what "ought to be" or "ought to occur" (the normative sphere), which distinguishes it from the sphere of being (that which "is"). In accordance with this logic**, a norm is a**

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31 Ibid., 33-34.

32 *Wolf E.*, Recht und Welt. Bemerkungen zu der gleichnamigen Schrift von Gerhart Husserl (Sonderdruck aus der Festschrift für Edmund Husserl), Zeitschrift für die gesamte Staatswissenschaft / Journal of Institutional and Theoretical Economics, Bd. 90, H. 2, 1931, 332-333.

33 See *Husserl G.,* Rechtssubjekt und Rechtsperson, Archiv für die civilistische Praxis, 127. Bd., H. 2, 1927, 193-194; *Bichia M.*, Phenomenological Inquires into Gerhart Husserl's Scientific Work "The Subject of Law and the Legal Person," TSU "Journal of Law", No. 2, 2024, 43 (in Georgian).

34 *Weinberger O.*, Rechtsontologie und analytische Jurisprudenz, Memoria del XI Congreso Mundial Ordinario de Filosofía del Derecho y Filosofía Social, Vol. 10, México, 1984, 397.

rule by which one subject regulates (governs) the conduct of another; **it contains a command, permission or conferral of competence to carry out a specific act**.[35]

According to Kelsen, law cannot be reduced to fact; the norm is regarded as belonging to the sphere of the "ought," while the act expressing the will belongs to the sphere of "being."[36] Thus, a legal norm is a "model" which establishes rights and obligations of an "ought"-character between subjects. This model is understood as a formal element by virtue of which factual relations acquire legal form. Accordingly, within normativism, the legal relationship is constituted not on a social, but on a purely juridical basis.[37]

In developing this theoretical framework, Weinberger emphasises an important methodological **distinction between "*de lege lata*" (the law as it stands) and "*de lege ferenda*" (the law as it ought to be)**. This distinction is essential for law, since it separates the objective description of the existing legal system from subjective proposals for law reform.[38] Therefore, according to Kelsen's pure theory, scientific jurisprudence must remain within the sphere of "*de lege lata*," so as not to encroach upon politico-social assessments.

Weinberger criticises the ideas of the "pure theory of law" school and considers that norms are not merely acts of will or commands, but complex systems of interpretation which possess their own rules and logic within the legal sphere. His approach is distinctive in that **it treats law as a holistic project in which it is necessary to take account of both theoretical and practical aspects**. In this way, Weinberger unites law's formal (normative) and social (political, socio-phenomenological) dimensions. Accordingly, in this perspective, **law is understood as a living and dynamic social organism**. At the same time, Weinberger does not agree with the view that legal-political argumentation is inaccessible to structural analysis and does not belong to the domain of jurisprudence. He maintains that the entire field of legal problems, legal reasoning and argumentation can and should be analysed structurally.[39] This critique on Weinberger's part once again returns us to the original dual function of law: if law in fact operates both at the individual and at the societal level, then **it cannot be fully understood without its social and political components**.

Weinberger's normativist-institutionalist conception of the existence of law is important for clarifying the ontology of law. The author rightly observes that a legal order can be regarded as a system that truly exists only when the system of norms is practically implemented by institutional organisations functioning over time. Moreover, the present work is noteworthy both for the philosophy of law and for practical jurisprudence, since the author clearly shows that an understanding of law cannot be achieved by analysing legal norms alone, but requires the study of institutional legal reality. This integrated perspective is particularly important for contemporary legal thought. Its merit lies both

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35 See *Kelsen H.*, Pure Theory of Law, translated from the second German edition by M. Knight, Clark, New Jersey, 2005, 1-6; *Khubua G.*, Theory of Law, Tbilisi, 2004, 39-40 (in Georgian).

36 See *Kelsen H.,* Pure Theory of Law, translated by M. Knight, Berkeley and Los Angeles, 1967, 5.

37 See *Bichia M.*, Methodological Problems of Civil Law, Tbilisi, 2023, 32-33 (in Georgian).

38 *Weinberger O.*, Rechtsontologie und analytische Jurisprudenz, Memoria del XI Congreso Mundial Ordinario de Filosofía del Derecho y Filosofía Social, Vol. 10, México, 1984, 397.

39 Ibid., 403-404.

in the conceptual innovations it advances and in the creation of a holistic (complex) methodological framework which makes it possible fully to analyse the intricate and multi-dimensional nature of law.

6. Conclusion

In Weinberger's view, **law** is not merely a unity of static rules, but **a dynamic and self-generating (autopoietic) system which is organically intertwined with the social environment**. It constantly shapes abstract norms in accordance with the real context. According to Weinberger, the normative and social aspects of law should not be considered in isolation; **norms acquire significance only when they are created with regard to a specific social context and practice**. Law is therefore flexible and adapts to a changing social environment. Accordingly, the central thesis of Weinberger's theory is that law encompasses two fundamental hypostases: norms and social life. The relationship between these two spheres forms a comprehensive view of the development of law.

Weinberger's approach has a significant impact on contemporary legal theory and practice for the following reasons. *First*, it substantially reduces the sharp opposition between traditional formalism and social reality. In this way, **law performs a dual function**: **it takes account of the dynamic nature of society while preserving stability**. *Second*, Weinberger's analytical jurisprudence confirms that **a profound understanding of law requires both theoretical knowledge and practical experience**. *Third*, his system is important in the context of globalised legal challenges, in which **law must be holistic (integrated) and flexible**.

Thus, the significance of Weinberger's approach is confirmed by several indicators:

- In order fully to understand law, it is necessary to take into account the internal logic of norms and their social functions;
- Law is responsive to changes in the external world and has the capacity for adaptation;
- There is a harmonious relationship between legal norms and social facts, although at the same time they interact with one another;
- Through practical understanding, law appears as a living social organism which encompasses both formal and informal legal relations; and
- A better understanding of the complex nature of law requires the integration of theory and practice.

Law is created by human beings and extends broadly to social relations, which ensures its autonomy and sustainability. This enables it to respond effectively to global challenges (climate change, international security and others) and to strengthen the ethical and legal responsibility of both individuals and institutions. Weinberger's approach is important for modern law because it unites theory and practice, elucidates the complex nature of law and provides for its deeper, holistic analysis.

Bibliography:

1. *Bichia M.*, Phenomenological Inquires into Gerhart Husserl's Scientific Work "The Subject of Law and the Legal Person," TSU "Journal of Law", No. 2, 2024 (in Georgian).
2. *Bichia M.*, Methodological Problems of Civil Law, Tbilisi, 2023 (in Georgian).

3. *Dworkin R. M.,* Is Law a System of Rules?, in: Philosophy of Law, R. M. Dworkin (ed.), Tbilisi, 2010 (in Georgian).
4. *Muthhorst* O., Foundations of Jurisprudence: Method – Concept – System, translated by D. Maisuradze, Tbilisi, 2019 (in Georgian).
5. *Khubua G.*, Theory of Law, Tbilisi, 2004 (in Georgian).
6. *Hart H. L. A.*, Positivism and the Separation of Law and Morals, in: Philosophy of Law, R. M. Dworkin (ed.), Tbilisi, 2010 (in Georgian).
7. *Hardt M., Negri A.*, Empire, Cambridge, Massachusetts, 2000.
8. *Hart H. L. A.*, The Concept of Law, 3rd edition, Oxford, 2012.
9. *Hart H. L. A.*, The Concept of Law, 2nd edition, Oxford, 1994.
10. *Husserl G.,* Rechtssubjekt und Rechtsperson, Archiv für die civilistische Praxis, 127. Bd., H. 2, 1927.
11. *Kaufmann A.*, The Ontological Structure of Law, Natural Law Forum, 8, 1963.
12. *Kelsen H.*, Pure Theory of Law, translated from the second German edition by M. Knight, Clark, New Jersey, 2005.
13. *Kelsen H.,* Pure Theory of Law, translated by M. Knight, Berkeley and Los Angeles, 1967.
14. *Koller P.*, Ota Weinberger: In Memoriam, Ratio Juris, Vol. 22, No. 3, 2009.
15. *MacCormick N.*, Institutions of Law: An Essay in Legal Theory, New York, 2007.
16. *Searle J.*, The Construction of Social Reality, New York, 1995.
17. *Teubner G.*, Law as an Autopoietic System, Oxford, 1993.
18. *Vile M. J. C.*, Legal Ontology and Legal Reasoning, The American Journal of Jurisprudence, 7(1), 1962.
19. *Weinberger O.*, A Philosophical Approach to Norm Logic, Ratio Juris, Vol. 14, No. 1, 2001.
20. *Weinberger O.*, Rechtsontologie und analytische Jurisprudenz, Memoria del XI Congreso Mundial Ordinario de Filosofía del Derecho y Filosofía Social, Vol. 10, México, 1984.
21. *Weinberger O.*, 'Is' and 'Ought' Reconsidered: Comment on G. H. von Wright's Lecture "Is and Ought", Archiv für Rechts- und Sozialphilosophie / Archives for Philosophy of Law and Social Philosophy, Vol. 70, No. 4, 1984.
22. *Wolf E.*, Recht und Welt. Bemerkungen zu der gleichnamigen Schrift von Gerhart Husserl (Sonderdruck aus der Festschrift für Edmund Husserl), Zeitschrift für die gesamte Staatswissenschaft / Journal of Institutional and Theoretical Economics, Bd. 90, H. 2, 1931.
23. *von Wright G. H.*, Deontic Logic, Mind, 60, No. 237, 1951.

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Protection of Indigenous Peoples' Intangible Cultural Heritage within the Conceptual Framework of Intellectual Property Law

Is the current Intellectual Property Rights (IPR) regime an adequate model for the protection of Intangible Cultural Heritage (ICH)? Intellectual property systems generally recognize individual ownership, whereas traditional knowledge is held collectively and transmitted orally, making it difficult to put it into intellectual property categories (such as patents, copyrights, and trademarks).

The appropriation of intangible cultural heritage causes not only economic harm but also violates community identity and human rights. Existing intellectual property measures may be useful for peoples whose primary goal is to prevent the unauthorized use of creative works and to regulate the commercial exploitation of contemporary adaptations of traditional art. More importantly than economic potential, intellectual property law mechanisms may serve to exclude the unauthorized use of intangible heritage resources.

Keywords: *Intangible heritage, intellectual property, indigenous community, traditional cultural expression.*

1. Introduction

Cultural heritage is a fundamental aspect of human identity, reflecting the shared experiences and beliefs of a society. It creates a tangible link to the past, shapes the present, and influences the future. In recent years, cultural heritage has become a human right protected and recognized by international law as an essential component of individual and collective identity. The protection of heritage is crucial for preserving cultural, historical, and aesthetic significance for future generations.

Naturally, several questions arise: What is the relationship between the protection of intellectual property and the promotion of cultural diversity? Which legal mechanism of intellectual property is relevant for protecting creative knowledge? When is "borrowing" from traditional culture a legitimate inspiration, and when is it an inappropriate adaptation or imitation?

Intangible heritage, which lies at the center of a society's identity, connects the past with the present and the future; it is also "living" – constantly renewable. Modern interpretations or adaptations often emerge as new "works" for copyright protection. Consequently, a range of issues must be considered to enable communities to control the commercialization of their knowledge through intellectual property law.

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It is important to have theoretical and practical legislative instruments that allow stakeholders to realize their heritage resources in the global market and benefit from adequate advantages. Over time, the legal framework should strengthen the readiness of communities to promote a sustainable model of economic development and to face the inevitable socio-political changes that accompany the protection of intangible cultural heritage.

2. Elements of Intangible Cultural Heritage

One of the primary ideas of cultural heritage as a common concern of humanity is that future generations have the right to share this heritage. This can only be guaranteed through concerted global action. In the context of intangible heritage, the intergenerational aspect is inherent to the concept, as living culture is transmitted from generation to generation.[1]

By its very nature, intangible cultural heritage is inextricably linked to peoples and communities. It is defined by a distinct human dimension. It indicates a progressive shift from the concept of "the cultural heritage of humanity" toward the "cultural heritage of societies, groups, and individuals." Furthermore, it possesses an innate ability to "emerge" near and/or across borders, "easily escaping the territorial jurisdiction of the state," as there is no habitable territory on Earth from which its exclusion would be possible. Consequently, regulations must also address the protection of cross-border expressions of intangible cultural heritage.[2]

The 2003 UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage is considered the central point of reference in the field and serves as the axis for protecting this form of cultural heritage under international law. According to Article 2 of the Convention, intangible cultural heritage means the practices, representations, expressions, knowledge, and skills, as well as the instruments, objects, artifacts, and cultural spaces associated therewith, that communities, groups and, in some cases, individuals recognize as part of their cultural heritage. This intangible heritage, transmitted from generation to generation, is constantly recreated by communities and groups in response to their environment, their interaction with nature, and their history, providing them with a sense of identity and continuity.[3] Based on this description, intangible cultural heritage consists of three essential components: Social (Societies, groups, and in some cases, individuals); Objective (The manifestation of such heritage); and Territorial (The cultural space)[4].

Considering the nature of intangible heritage, it may seem odd to acknowledge that intellectual heritage is a reality based not on territories, but primarily on people and ways of life. Here, we are dealing with embodied knowledge and forms of expression, the development and transmission of

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1 *Lixinski L.,* International Human Rights and Intangible Cultural Heritage, Intangible Cultural Heritage in International Law, Oxford University Press, 2013,12.

2 *Gkana A.,* Safeguarding shared Intangible Cultural Heritage: A "bridge over troubled water"? Vol 18, 2020,177.

3 Convention for the Safeguarding of the Intangible Cultural Heritage, Paris 2003.

4 *Urbinati S.,* The Role for Communities, groups and Individuals under the Convention for the Safeguarding of the Intangible Cultural Heritage, Cultural Heritage, Cultural Rights, Cultural Diversity, New Developments in International Law, Borelli e Lenzerini (eds), 2012, 202.

which often depend on gestures and movements, i.e., learning skills and acquiring knowledge expressed through bodily actions.[5]

For indigenous peoples, creation is a gift. All elements of life are sacred and respected: water, land, and sky; fish, animals, and birds; humans; trees and plants. Over many generations, indigenous people have developed extensive knowledge of ecology, flora, fauna, medicine, and spirituality. Since time immemorial, they have passed down songs, stories, designs, and ways of doing things that reflect their past, culture, ethics, and creativity, based on customary laws and protocols. The combination of knowledge, spirituality, and art forms is known as Traditional Knowledge (TK). It is generally considered to belong to the indigenous population rather than to one or several individuals.[6] Thus, in the context of intellectual property, intangible cultural heritage is described as Traditional Knowledge (TK), which embodies the customary way of life of indigenous and local communities. It includes "stories, dance, languages, symbols, handicrafts, cosmology, medicinal and environmental knowledge," the use of which is often economically significant (WIPO 2016).[7]

In some indigenous societies, there is little distinction between tangible and intangible property. The value of an object may be linked not to its physical form, but to the intangible assets and knowledge it represents, such as songs, dances, or designs. Thus, cultural heritage includes artifacts, places, creative beings, ancestral spirits, stories, and songs, which are present manifestations of those objects and times we consider the "past." The concepts of "property," "past," and "present" may be insufficient to describe these relationships. Although local terms are not uniform across peoples, groups, and societies, the concept of "belonging" may be more appropriate than "ownership," because, unlike property, it emphasizes a relationship rather than commodification.[8]

The application of intellectual property (IP) legal norms to intangible heritage is accompanied by two main contradictions. The first concerns the nature of such heritage. Intangible heritage implies an "indefinable" state; consequently, any attempt to provide protection may be futile due to the absence of a fixed object. It is often argued that protection can be granted not to the expression in its entirety, but only to tangible assets, those specific works that can be cataloged and documented.[9]

The second contradiction is that the implementation of intellectual property mechanisms is complicated, as many societies have multifaceted perceptions of property and ownership.[10]

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5 *Arantes A.,* The Governance of Safeguarding Comments on Article 2.3 of UNESCO's Convention for the Safeguarding of Intangible Cultural Heritage, 2019, 9.

6 *Brascoupé S., Endemann K., Intellectual* Property and Aboriginal People: A Working Paper, Intellectual Property Policy Directorate, Industry Canada, Fall 1999,1.

7 *Rogers L.,* Intangible cultural heritage and international environmental law: the cultural dimension of environmental protection, Heritage, Sustainability and Social Justice, Vol 29, 2017, 32.

8 *Nicholas G., Bell C., Bannister K., Ouzman S., Anderson J.,* Intellectual Property Issues in Heritage Management, Heritage & Society, September 2009, 264,265.

9 *Lixinski L.,* International Human Rights and Intangible Cultural Heritage, Intangible Cultural Heritage in International Law, Oxford University Press, 2013,14.

10 According to some views, everything surrounding communities was created by a deity, and any intention to exert dominion over anything would be a serious offense to them. For example, if a member of a community crafts a sculpture from clay, it is still perceived as the earth from which it was created. This sculpture has no additional value based on the fact that the artist put labor into it and transformed the raw material, as this would assume that a divine creation can be reshaped by human hands. In this sense, the

Intellectual property protection differs from the concept of "safeguarding" found in the UNESCO Convention. The Convention is more focused on the identification, documentation, transmission, conservation, protection, revitalization, and promotion of cultural heritage to ensure its viability. It does not address issues typically associated with intellectual property, such as: Who owns or should own the expression of intangible creativity as private property? Who should benefit from the exclusive right to commercially use intangible traditional creations? Should legal mechanisms exist to protect cultural expressions from derogatory or offensive use?[11]

3. Intellectual Property and Traditional Cultural Expressions (TCE)

By its nature, the information society undermines social norms and institutions, thereby heightening the importance of culture as a set of values and moral obligations. Anthropologist Harrison noted that cultural identity could become a scarce resource that must be protected in the form of personal or collective property. Heritage, as a retrospective expression of culture, is transformed into a highly politicized product. Economic significance increases the value of intellectual property. Copyrights, patents, trademarks, and trade secrets have become the keys to prosperity in an era where controlling prototypes is as profitable as replicating them. Global markets require large-scale control regimes to protect intellectual property rights, such as the TRIPS Agreement and similar legal instruments. More important than attempts to extend the duration of intellectual property rights is the dramatic expansion of what qualifies as such property. Software engineering and biotechnology have opened new panoramas for establishing intellectual property, including gene sequences, life forms, and the manipulation of information in databases. The growth of such influence has triggered a moral panic in the political, cultural, and economic life of society.[12]

WIPO is discussing the possible recognition of intellectual property rights in traditional knowledge systems and expressions of folklore, as well as considering the possibility of establishing legal control over innovations derived from or based on traditional knowledge. For example, in Australia, the production of T-shirts depicting indigenous rock art was halted due to a copyright infringement of a cultural institution. Although the original creator of the artwork is unknown and the copyright would likely have expired due to the passage of time, it applied to the drawings and photographs created by a researcher funded by the cultural institution, Eric Joseph Brandl, during the 1960s and 1970s, which were published in a book in 1973. The act of taking the photographs indeed generated copyrights against third parties. Images of the rock art are rare, and the site itself is restricted to the public; the T-shirt manufacturers had made copies directly from this unique

ability to transform is a gift, and its appropriation or monetization is impossible. *Lixinski L.,* International Human Rights and Intangible Cultural Heritage, Intangible Cultural Heritage in International Law, Oxford University Press, 2013,15.

11 *Wendland W.,* Intangible Heritage and Intellectual Property: challenges and future prospects, WIPO 2004,101.

12 *Brown M. F.,* International Journal of Cultural Property Heritage Trouble: Recent Work on the Protection of Intangible Cultural Property, 2005, 44.

publication. The institution, together with Brandl's widow, sent a letter to the T-shirt manufacturing company. The issue was resolved after lengthy negotiations.[13]

The correlation between intellectual property and expressions of traditional knowledge has been a subject of debate for decades. In the 1970s and 1980s, attempts to create an international mechanism for the protection of folklore proved unsuccessful. In 1971, UNESCO presented a document titled "Possibility of Establishing an International Instrument for the Protection of Folklore," but universal protection through the use of copyright was deemed unrealistic. The effort aimed to develop copyright and intellectual property protection measures.[14]

In 1973, Bolivia approached UNESCO with a request to develop a protocol for the Universal Copyright Convention that would protect the popular art and cultural heritage of all nations. In 1980, at the twenty-first session of the General Conference, UNESCO was asked to conduct studies related to establishing international regulations for the protection of folklore. In 1982, during the first meeting of governmental experts, UNESCO and WIPO developed model provisions for national legislation "to protect expressions of folklore against illicit and other harmful actions." A definition of "folklore" was established that was more adequate for a global approach than for an intellectual property rights perspective.[15]

In 1984, an attempt was made to develop a universal mechanism based on these model laws. This initiative to create an international treaty was again considered premature. An international forum and regional consultations on intellectual property and expressions of folklore were organized in 1997 and 1999. In April 1997, the UNESCO-WIPO World Forum on the Protection of Folklore was held in Phuket, Thailand. In 1998 and 1999, WIPO conducted fact-finding missions in 28 countries to identify the intellectual property-related needs and expectations of traditional knowledge holders. For the purposes of these missions, "traditional knowledge" included historical cultural expressions as a subcategory. Among the more than 3,000 individuals involved in the consultations were indigenous and local communities, NGOs, academics, researchers, and representatives from the government and private sectors.[16]

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13 *Torsen M., Anderson J.,* Intellectual Property and the Safeguarding of Traditional Cultures: Legal Issues and Practical Options for Museums, Libraries and Archives, WIPO, December 2010,19.

14 *Aikawa N.,* An Historical Overview of the Preparation of the UNESCO International Convention for the Safeguarding of the Intangible Cultural Heritage, Vol 56, 2004,138.

15 *Wendland W.,* Intangible Heritage and Intellectual Property: challenges and future prospects, WIPO 2004, 98,99.
Some communities stand strongly against the intellectual property-based approaches, which are not in line with the needs and interests of the aboriginal populations. WIPO consultations with these communities have shown that intellectual property framework can only partly fill in the holistic and integrated measures to retain the traditional cultures practiced by societies.

16 Intellectual Property and Traditional Cultural Expressions/Folklore Booklet nº 1, WIPO, 2005,3. Since 1997 WIPO's work was strongly influenced by large-scale consultations held with representatives of indigenous peoples. Local communities are fighting for the right to control the accessibility and use of their own knowledge and cultural expressions. They demand the prevention of unauthorized reproduction, adaptation, distribution, performance, and/or derogatory, culturally and spiritually offensive use of traditional literary and artistic works. They also seek the protection of handicrafts, particularly from the imitation of their "style"; the prevention of false or misleading claims regarding authenticity and origin; and the refusal of

At the end of 2000, the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore was established. The committee meets twice a year, bringing together 250 representatives from states, indigenous and local communities, and non-governmental and intergovernmental organizations, including UNESCO. The WIPO Secretariat published a detailed questionnaire on national experiences and conducted a series of comprehensive analytical studies. This laid the foundation for ongoing international political debates and facilitated the development of practical instruments.[17] Extensive empirical information became available through the collection and analysis of experiences related to intellectual property in traditional knowledge and cultural expressions. As a result, the decisions reached are "effective, tailored, and practically useful for communities."

Specific measures have already been implemented. For instance, geographical indications for handicrafts were registered in Portugal and Mexico; the Māori people of New Zealand recently registered a certification trademark to ensure the authenticity and quality of Māori arts and crafts; Australia amended its copyright law to create communal moral rights for indigenous cultural materials.[18] An interesting case took place regarding the violation of moral rights in relation to traditional cultural expression. For the Sydney Olympic Games in 2000, the Olympic Museum in Lausanne posted three works by Australian Aborigines on its website without permission. This action offended the artists, as the paintings were linked to their knowledge of the land. Following a complaint, the museum removed the images from the website, and the matter was settled. The artists received compensation and a letter of apology from the President of the Museum Foundation for the cultural harm caused.[19]

Photographs, sound recordings, and films depicting local, traditional practices and knowledge are often subject to copyright and related rights legislation. Contemporary expressions of traditional cultures are protected by copyright if they meet the necessary criteria. Article 15.4 of the Berne Convention for the Protection of Literary and Artistic Works, the preeminent international instrument on copyright, provides special protection for unpublished works by "unknown authors," a provision specifically added to the convention to protect traditional cultural expressions.[20] These are also protected at the international level by the WIPO Performances and Phonograms Treaty (WPPT). Special protection exists for compilations of cultural expressions and databases. Certification and collective trademarks, as well as labels of authenticity, are used by local communities in Tonga, Panama, and New Zealand to restrict the sale of counterfeit works of traditional creativity.[21]

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registration of traditional symbols as trademarks. Wendland W., Intangible Heritage and Intellectual Property: challenges and future prospects, WIPO 2004,100.

17 Intellectual Property and Traditional Cultural Expressions/Folklore Booklet nº 1, WIPO, 2005, 4.

18 *Wendland W.,* Intangible Heritage and Intellectual Property: challenges and future prospects, WIPO 2004,104.

19 *Torsen M., Anderson J.,* Intellectual Property and the Safeguarding of Traditional Cultures: Legal Issues and Practical Options for Museums, Libraries and Archives, WIPO, December 2010,39.

20 Berne Convention for the Protection of Literary and Artistic Works, September 28,1979.

21 *Torsen M., Anderson J.,* Intellectual Property and the Safeguarding of Traditional Cultures: Legal Issues and Practical Options for Museums, Libraries and Archives, WIPO, December 2010,16.

In 1963, a husband and wife travelled to the central part of Arnhem Land, Australia, for the research. During their fieldwork, they captured the significant Djalambu ceremony on film and audio recordings. This ceremony represents one of the final acts of the Yirritja mourning ritual, when the body is laid to rest in a djalambu (a hollow log coffin). A local leader named Djawa participated in the video. In 1997, his son, Joe Gumbula, wrote the song "Djiliwirri" for his group, Soft Sands. While creating the music video, he decided to merge the present with the past and used the 1963 recording of his father, in which all the participants had since passed away. Integrating this protected material into a commercial music video without permission violated the couple's copyright, as they held the rights to these works and related objects. The original film, Djalambu (1963), remains educationally significant for generations of the local community, and there have even been proposals for its digitization and placement on a website. Consequently, the community perceived the film as property. This raises an interesting question: who should have the right to make decisions regarding these recordings? The researchers? The community? The archive? The wife, as the copyright holder, diligently tried to prevent unauthorized use of the work. Maintaining full control, she initially did not grant the communities permission to use the material. After lengthy negotiations, she eventually granted the right to make copies in some instances.[22]

4. Commercialization of the Traditional Cultural Expression (TCE)

The intellectual property system protects invention and creativity. The intellectual property framework grants exclusive rights to natural or legal persons, whereas traditional knowledge does not have a single "inventor," "author," or "creator," or they are often anonymous. According to intellectual property law, the creator introduces content to the public, and after the expiration of a set term, the knowledge becomes part of the public domain. In contrast, indigenous populations have long opposed the inclusion of ancient knowledge into the public commons and strive to preserve uniquely defined cultural property. Profit-motivated corporations view the use of indigenous designs as a means to increase sales or market share. Communities have less power and fewer resources, which complicates the effective protection of their intellectual property rights.[23]

In 2013, The Walt Disney Company filed an application with the United States Patent and Trademark Office (USPTO) for the trademark of the term "Día de los Muertos." The traditional Latin American holiday "Day of the Dead," celebrated on November 1st and 2nd, was inscribed by

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22 *Torsen M., Anderson J.,* Intellectual Property and the Safeguarding of Traditional Cultures: Legal Issues and Practical Options for Museums, Libraries and Archives, WIPO, December 2010,10. In some cases, the lady argued that institutions did not have the right to include her collections in their online catalogs. This situation may be considered unfair to the community that wishes to use the recorded material concerning its own culture. In such cases, how should negotiations be conducted? It is a challenge for indigenous populations and traditional communities that they are often unable to establish physical contact with the copyright holder for the purpose of reaching an agreement, due to either geographical location or language barriers.

23 *Fasi M. A.,* A review of the practices related to the protection of indigenous designs and traditional cultural expressions under intellectual property law in Canada and India, International Journal of Intellectual Property Management, Vol. 13, Nos. 3/4, 2023, 449.

UNESCO on the Representative List of the Intangible Cultural Heritage of Humanity in 2008. Every year, people honor lost family members and friends by building altars, holding processions, decorating graves, and bringing offerings to shrines. Disney sought the trademark for a movie it was planning to release. This attempt to appropriate a traditional cultural expression caused an outcry. Ultimately, the company withdrew its registration application. [24]

Traditional knowledge, symbols, stories, songs, and language sometimes become objects of exploitation in ways that are inconsistent with cultural norms or lack proper attribution. Various courts have halted the unauthorized copying of cultural property for commercial gain. Examples include: T-shirts featuring cliff art, and food products that use cultural expressions or symbols in their marketing. Advertisements for selling products often feature archaeological sites, ranging from the giant stone heads of Easter Island to the use of Tollund Man, a remarkably preserved body from a Danish peat bog, to sell face cream.[25]

Copyright law does not strictly limit the appropriation of Traditional Cultural Expressions (TCE) by non-indigenous entities. In the US, the registration of copyrights and trademarks for works containing TCE is sometimes permitted. In 2002, Disney released the animated film Lilo & Stitch, the story of an orphaned Hawaiian girl and a stranded alien. Two "mele inoa" used in the movie were dedicated to two 19th-century rulers known for their strong ethnic identity and contributions to the Hawaiian counter-revolution: King Kalākaua and Queen Liliʻuokalani. A "mele inoa" is a sacred name chant performed in someone's honor. These two chants, which are considered a source of indigenous pride for Hawaiians, were performed as a single song under Lilo's name. Disney protected the music with copyright. This outraged the native population of Hawaii, and the representation was assessed as "inaccurate and culturally insensitive."[26]

In some cases, traditional cultural expression is distorted, specifically changing its meaning or values. The harm inflicted on society increases when the violated traditional cultural expression is sacred. In 2013, Nike released a women's sportswear collection called "Pro Tattoo Tech," inspired by traditional Polynesian tattoos. A pattern from a Samoan man's tattoo was adapted for transfer onto the product. The placement of the composition was considered a sign of disrespect toward Samoan culture, as Nike used patterns and placements intended exclusively

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[24] *Awopetu R.,* In Defense of Culture: Protecting Traditional Cultural Expressions in Intellectual Property, Emory Law Journal, Vol 69, Issue 4, 2020, 747,748,772. In response to Disney's actions, one could find the Tweets with the following content: "Tell @Disney not to trademark 'El Día de los Muertos'. "Culture is not for sale!" "Are we okay with @DisneyPixar commercializing our culture?" Similarly, pressure mounted on the Walt Disney Company to revoke the trademark for "Hakuna Matata", which became popular through "The Lion King". As of January 2018, the petition signed by more than 138 000 condemned the registration, deeming it greedy and derogatory not only towards Swahili people, but the whole spirit of Africa."

[25] *Nicholas G., Bell C., Bannister K., Ouzman S., Anderson J., Intellectual* Property Issues in Heritage Management, Heritage & Society, September 2009, 264.

[26] *Awopetu R.,* In Defense of Culture: Protecting Traditional Cultural Expressions in Intellectual Property, Emory Law Journal, Vol 69, Issue 4, 2020, 770 <https://scholarlycommons.law.emory.edu/elj/vol69/iss4/3> [22.02.2026].

for men.[27] The disregard for customary rules, which define the right to wear these tattoos based on gender, caused an outcry. The government criticized the business for using traditional local typography without prior agreement with the legal owners. An online petition was created, accusing Nike of stealing the design, which is a clear violation of Pacific indigenous communities' rights and the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). After worldwide criticism of the offensive and disrespectful use of indigenous tattoos, Nike was forced to remove the clothing from sale and issue a public apology.[28]

In May 2019, Nike began selling a limited edition "Air Force 1 Puerto Rico". The shoes were decorated with patterns created by the Guna people, an indigenous community living in Panama and Colombia. The traditional composition contains bright, fashionable motifs and geometric illustrations that express the worldview of the Guna people. Nike mistakenly attributed the traditional design to Puerto Rican culture. Guna officials categorically opposed the distribution of the shoes featuring their model. The community accused the manufacturer of plagiarizing a protected traditional design. As a result, Nike suspended the release of the sporting goods. Guna leaders issued a statement saying they did not oppose the commercialization of the patterns, but doing so without informing the community caused anger.[29]

Ecological knowledge based on the cultural characteristics of ethnic minorities, handmade items, rituals, and performing arts deserve protection. This is especially true as the Arctic attracts more people and commercial enterprises seeking to use (or at least collect) such knowledge. For example, the British firm Kokon To Zai apologized and withdrew from sale an Inuit sacred parka design, which it took from the 2006 film "The Journals of Knud Rasmussen" and used in a new clothing line. Creating programs to strengthen the protection and sustainability of Arctic intellectual property will have a long-term impact on the interaction of the local population with the land and the functioning of their societies. Against the backdrop of globalization, it is important to preserve mass culture and diversity in northern regions.[30]

In some cases, collective trademarks help local cultures and communities preserve their designs. India's law on Geographical Indications covers various themes, including works of traditional cultural expression. One such example is the Kullu shawl, made with unique geometric patterns. By recognizing it as a Geographical Indication, there is a legal basis for filing a lawsuit against any product sold as an authentic Kullu shawl.[31] Sisal baskets are made by the local population of Kenya's

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27 *Martinet L.,*Traditional Cultural Expressions and International Intellectual Property Law, International Journal of Legal Information 47.1, 2019,11.

28 *Fasi M. A.,* A review of the practices related to the protection of indigenous designs and traditional cultural expressions under intellectual property law in Canada and India, International Journal of Intellectual Property Management, Vol.13, Nos. 3/4, 2023, 452.

29 Ibid., 453.

30 *Wheelersburg R. P., Melvin S.,* Indigenous Intellectual Property Rights in the Arctic, Arctic Yearbook, January 2019, 1, 2.

31 *Torsen M.,* Intellectual Property and Traditional Cultural Expressions: A Synopsis of Current Issues, Intercultural Human Rights Law Review, Vol 3, 2008, 212.

Taita-Taveta County using traditional craftsmanship. This knowledge is passed down from generation to generation. A group of commercial basket weavers established the Taita Basket Association and registered as the sole owner of the collective trademark "Taita Basket." Members of the association use this mark for marketing and product protection to prevent design copying and the misuse of local intellectual property. The association has developed guidelines for using the mark, quality requirements, and designs. The mark was registered to create a strong, identifiable, and valuable regional brand.[32]

In 1998, the New Zealand swimwear manufacturer Moontide released a new line of women's swimwear made from material featuring the Maori people's Koru design. The company developed the products together with a Maori entrepreneur and negotiated the use of the Koru motif with a local community elder. Two issues regulated the use of the design element: commercial viability and cultural respect. A portion of the revenue from sales was allocated to the Pirirakau hapu, a sub-tribe of the Ngati Ranginui people.[33]

At the beginning of 2018, the Chicago-based restaurant chain Aloha Poke Co., owner of a registered trademark, sent "cease and desist" letters to several small businesses regarding the use of names containing certain variations of "Aloha Poke." Most of the business owners who received the notice were Native Hawaiian. The meaning of "Aloha" is deeply associated with traditional Hawaiian heritage. The "Spirit of Aloha" is a Hawaiian phenomenon equivalent to their identity, while "Aloha" itself is a popular greeting. The word "Poke" refers to a traditional Hawaiian dish. In a viral video, a local activist spoke about how the concept of Aloha is undergoing "complete commercialization and discredit." The Office of Hawaiian Affairs stated it was "appalled by the attempts to assert control over the traditional language of the indigenous population." The appropriation of cultural expression has a long history. However, trademark law in the United States defines means to protect TCEs (Traditional Cultural Expressions). Specifically, the interpretation of Section 2(a) of the Lanham Act should prevent non-local entities from registering traditional cultural expressions as trademarks.[34] While the Lanham Act, which contains the framework for federal registration of marks, does not specifically state whether traditional cultural expressions can be registered, refusing such registration protects cultural expression. The refusal to register TCEs as trademarks is possible, for example, due to a lack of "distinctiveness" or based on evidence that the use of the trademark is "disparaging."

The "Aloha Poke" dispute shows that indigenous populations not only fail to benefit from the commercial use of traditional cultural expressions but also suffer significant losses due to illegal appropriation. Some Native Hawaiian businesses faced financial difficulties due to the need to change

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32 *Fasi M. A.,* A review of the practices related to the protection of indigenous designs and traditional cultural expressions under intellectual property law in Canada and India, International Journal of Intellectual Property Management, Vol. 13, Nos. 3/4, 2023, 456.

33 Intellectual Property and Traditional Cultural Expressions/Folklore Booklet nº 1,WIPO, 2005,14.

34 As per Section 2(a) of the Lanham Act, a trademark registration application shall be rejected if the mark consists of or comprises immoral, deceptive, or scandalous symbols; or matter which may disparage or falsely suggest a connection with persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt or disrepute. Lanham Trademark Act 1946; *Awopetu R.,* In Defense of Culture: Protecting Traditional Cultural Expressions in Intellectual Property, Emory Law Journal, Vol 69, Issue 4, 2020, 747,748.

signs, logos, and other marketing materials. A search of the USPTO database revealed a large number of registrations containing the term "Aloha." Most of them suggested a false connection with the Native Hawaiian population, which is a violation of the Lanham Act.[35]

Despite the existence of Section 2(a) of the Lanham Act, the term "Bula" has become the subject of many trademark registrations in the United States. In September 2018, a Florida restaurateur obtained a trademark registration (Bula Nation Inc.), which angered the government of Fiji. "Bula" is a common greeting in Fiji and carries broad cultural significance. The Fijian authorities began to submit necessary documentation to the U.S. Patent and Trademark Office (USPTO) and to raise the issue at WIPO to challenge the registration. The Attorney General called the restaurateur's actions "a clear case of heritage appropriation." An online petition by a Fijian activist gathered 5,000 signatures on the very first day. It asserted that WIPO should assist trademark offices worldwide in developing guidelines to prevent cultural appropriation. According to Fijian politicians, if the USPTO were to cancel the trademark registration in accordance with Section 2(a), the need to appeal to the United Nations would no longer exist.[36]

Intellectual property creates limited monopolies over the products of creativity and invention. If one has the right to take something into ownership and prevent others from using it without paying a license fee, ultimately, society remains the loser. The example of the song "Happy Birthday to You" is quite comprehensive. It is a lesser-known fact that it is protected by copyright in the United States.[37] Due to term extensions, this law remains in effect until 2030, which means that in the U.S., no one has the right to sing "Happy Birthday to You" publicly without paying royalties. In this awkward situation, copyright holders have prohibited several hundred restaurants from performing the song through legal proceedings. This law is called the "Mickey Mouse Act" because it is primarily the result of lobbying by Walt Disney Inc. lawyers to prevent Mickey Mouse from entering the public domain. Disney has pursued an aggressive policy, suing anyone who uses the images of their characters without permission.[38] It is a fact that the majority of the economic benefit is received not by the creators or authors, but by the corporations that control the distribution of copyrighted materials.

The threats impacting intellectual heritage and its expression cannot be underestimated. Often, indigenous knowledge is used in commercial products (for example, expensive medications), or tribal names and identifiers (sacred symbols, artistic designs) are appropriated by outsiders.[39]

In the Washington Redskins case, the registration of the sports team's trademark was challenged by the local community because it was generally harmful due to the promotion of racism toward the indigenous population. The case highlighted the importance of challenging trademarks to protect a society's traditional culture from essentialization and commercial stereotyping. Assigning a derogatory

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35 *Awopetu R.,* In Defense of Culture: Protecting Traditional Cultural Expressions in Intellectual Property, Emory Law Journal, Vol 69, Issue 4, 2020, 763, 773, 774.

36 *Awopetu R.,* In Defense of Culture: Protecting Traditional Cultural Expressions in Intellectual Property, Emory Law Journal, Vol 69, Issue 4, 2020,773.

37 *Lixinski L.,* International Human Rights and Intangible Cultural Heritage, Intangible Cultural Heritage in International Law, Oxford University Press, 2013, 5, 6.

38 Ibid., 5.

39 *Farah D. P.,* Conflict between Intellectual Property Rights and Human Rights: A Case Study on Intangible Cultural Heritage, Oregon Law Review, Vol.94, 2015,145.

name for Native Americans to a football team raises questions concerning the financial aspects of intangible cultural heritage and intellectual property rights. However, the essence of the dispute went beyond and touched upon human dignity as a part of cultural identity. In 2014, the U.S. Patent and Trademark Office cancelled the "Redskins" name as offensive.

Traditional know-how covers an extremely wide area: the medicinal properties of fauna and flora, and knowledge about biodiversity, genetic, and natural resources. Medical corporations, pharmaceutical companies, and cosmetic brands attempt to appropriate local and ecological knowledge for the production of traditional herbal medicine and cosmetics. Biopiracy violates the right of ethnic communities to maintain and control their heritage. The dispute surrounding the Mexican Enola bean variety reflects one of the most famous cases of such appropriation.[40]

For centuries, the San people of South Africa used the Hoodia plant as an appetite suppressant. Pharmaceutical companies attempted to develop a weight-loss drug from the plant without prior consultation with or compensation for the tribe. After years of legal disputes, the San finally received compensation.[41] Similarly, in the U.S. in 1995, a patent was granted to two American researchers for the wound-healing properties of turmeric. The decision was challenged in 1996 by India's Council of Scientific and Industrial Research (CSIR) on the grounds that the use of turmeric for healing wounds was part of India's traditional knowledge and had been used in local communities for centuries; therefore, it did not constitute a novelty. The issued patent was ultimately revoked through legal proceedings.[42]

The cases discussed above reflect the struggle waged by indigenous populations over many years. It is essential to recognize that knowledge passed down from generation to generation is not merely a resource for extraction. It is a living tradition, intertwined with the identity, values, and spirituality of a people.

5. Legal Mechanisms to Protect Intangible Cultural Property

Is the intellectual property protection available for contemporary tradition-based arts and performances adequate? Does a balance exist between the needs of indigenous groups and the broader public? Is a new form of intellectual property protection necessary for creativity and economic development?

The use of traditional cultural materials as a source for contemporary creativity can promote the economic development of communities through the creation of enterprises and jobs, tourism, and revenue generation from local products. Intellectual property provides for the certification of the origin of arts and crafts (through trademarks) or the fight against the presentation of counterfeit goods as

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40 *Polymenopoulou E.,* Indigenous Cultural Heritage and Artistic Expressions: "Localizing" Intellectual Property Rights and UNESCO Claims, Canadian Journal of Human Rights, 2017, 95.

41 *Amusan L.,* Politics of Biopiracy: An Adventure Into Hoodia/Xhoba Patenting In Southern Africa, African Journal of Traditional, Complementary and Alternative Medicines, January 2017, 103-108; *Higgs R., Kapepiso F.,* Tracing the curation of Indigenous knowledge in a biopiracy case, AlterNative An International Journal of Indigenous Peoples 16 (1), February 2020,50-63.

42 *Bhowmick A., Deb Roy S., De M.,* A Brief Review on the Turmeric Patent Case with its Implications on the Documentation of Traditional Knowledge,Vol.1, 2021, 83-88.

"authentic" (through unfair competition legislation). Traditional expressions serve as the foundation of inspiration for cultural industries such as entertainment, fashion, publishing, handicrafts, and design. Today, in both developed and developing countries, small, medium, and large businesses create wealth by using customary forms and materials passed down from generation to generation. For example, in India and Nigeria, the publishing, music, and audiovisual industries rely on local cultural materials.[43]

The Ashanti people living in Africa developed the tradition of Kente strip-weaving; strips are embroidered with various designs in a way that the cloth resembles a chessboard. The product is a mosaic textile of diverse patterns, whose forms reflect ancient events, the social thoughts of significant figures, and artistic connections. The fabric is considered royal attire and is intended for special occasions. The ethnic group uses unique pigments and compositions to create stunning traditional designs. The different symbolic meanings of the silk thread colors reflect various levels of status. In the 1980s, counterfeit Kente materials appeared on global textile markets, causing concern regarding its preservation.[44] The Ashanti people primarily live in Ghana and neighboring West African countries. Ghana's Copyright Act of 2005 protects Kente cloth; however, it does not extend to those neighboring states with which no regional or international document has been signed.[45]

The concept of "protection" is used in two senses: "positive" (obtaining intellectual property rights for traditional cultural expressions for the purpose of commercialization) and "defensive" (intended to prevent the application of intellectual property legal regimes to cultural customs and their derivatives). In some cases, the "defensive" mechanism is more important for communities than the "positive" one, especially regarding sacred spiritual expressions. New Zealand, the United States, and the Andean Community have adopted sui generis measures against the unauthorized registration of indigenous symbols as trademarks. For example, in New Zealand, trademark registration is no longer possible if its use is likely to offend a significant part of the public, including the country's indigenous population, the Maori. Based on the U.S. Indian Arts and Crafts Act (IACA) of 1990, a dedicated Board protects the authenticity of aboriginal artifacts. The law prohibits the sale of products marketed as "Indian made" when they are not, in fact, the work of Indians. Thus, besides adapted intellectual property and new sui generis systems, applicable options may include trade practice and labeling laws, contracts, and cultural heritage protection legislation.[46]

Visual arts and crafts are a significant source of income for communities living in Australia. According to a report published in 2002, the turnover of the authentic indigenous artwork and craft

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43 By providing legal protection for custom-based expressions, it is possible to commercialize the authentic creativity of ethnic groups. Through the marketing of artisanal products, society strengthens its cultural identity and diversity. Indigenous peoples use their intellectual creativity to protect cultural expressions and to prevent offensive use. Intellectual Property and Traditional Cultural Expressions/Folklore Booklet nº 1, WIPO, 2005,7.

44 *Fasi M. A.,* A review of the practices related to the protection of indigenous designs and traditional cultural expressions under intellectual property law in Canada and India, International Journal of Intellectual Property Management, Vol. 13, Nos. 3/4, 2023, 454-455.

45 *Torsen M.,* Intellectual Property and Traditional Cultural Expressions: A Synopsis of Current Issues, Intercultural Human Rights Law Review, Vol 3, 2008, 209.

46 *Wendland W.,* Intangible Heritage and Intellectual Property: challenges and future prospects, WIPO 2004,100.

industry is approximately $130 million USD, of which the local population receives $30 million. Therefore, a high level of copyright and intellectual property protection is of the utmost importance. The national institute "Artesanías de Colombia" is responsible for the development and promotion of the handicraft sector. In most cases, handmade items are the only trade products for small communities in Colombia. Women are primarily employed in this sector, which is considered a significant factor in wealth distribution for low-income or single-parent households.[47]

WIPO's activities, in accordance with its mandate, concern the protection of Traditional Cultural Expressions (TCE). Within the context of cultural heritage, there is a significant link between the protection and preservation of intellectual property. For example, the preservation process (recording, documenting, and publishing materials) may inadvertently create a risk of turning TCEs into the public domain, whereby they could be used against the wishes of the indigenous community. When capturing traditional expressions, a person may acquire copyright over the specific form in which it is recorded (e.g., a photograph, film, or sound recording of a TCE).[48]

Is the existing protection for contemporary adaptations, interpretations, and performances of traditional cultural materials adequate, or should intellectual property rights also be established for the underlying and collectively developed materials currently considered to be in the "public domain"? Answers to this question vary. Several states and stakeholders suggest that the universal nature of folklore will not prevent it from evolving. Society will preserve existing cultural heritage by establishing copyrights when authentic expressions are used in contemporary creativity. Such "forward-looking" tradition-based incentives promote the economic development of communities and the preservation of identity. On the other hand, representatives of indigenous peoples at WIPO committee sessions actively argue that the "public domain" is not a recognized concept among local groups, as folklore samples were never protected in the form of intellectual property to begin with. Should all historical material be denied protection simply because it is not "new" enough? Almost everything has a cultural and historical past; therefore, systems should exist to ensure that communities benefit from all creations based on tradition.[49]

6. Legal Dilemma of Protecting Collective Heritage: Is the Intellectual Property Law an Effective Regime?

The conflict between intellectual property rights and intangible heritage stems from the fact that the former aims to protect the property rights and economic interests of individuals (whether human or corporate), while the latter aims to preserve the common heritage of a specific society or group. Thus,

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47 Intellectual Property and Traditional Cultural Expressions/Folklore Booklet nº1,WIPO, 2005,7.

48 For example, protecting a legend written on a piece of fabric centuries ago through intellectual property forms could be useful for preventing its reproduction on a T-shirt. If only a few people know the legend and the language in which it is told, a format should be used that facilitates its transmission to future generations and ensures its preservation if the fabric begins to decay. Protection measures may also encourage the promotion of the tale outside the community, fostering respect for it among others. Intellectual Property and Traditional Cultural Expressions/Folklore Booklet nº1,WIPO, 2005,11.

49 *Wendland W.,* Intangible Heritage and Intellectual Property: challenges and future prospects, WIPO 2004,103-104.

two important aspects of intellectual property protection have emerged: the recognition of intellectual property rights related to traditional knowledge and the problem of unauthorized access by third parties. As noted in legal scholarship, one of the side effects of using intellectual property rights in this context is the commodification of intangible cultural property, transforming it into items of economic value that can be exchanged for commercial profit through means such as licensing, leasing, or selling. Profitable intellectual property reflects a society's interaction with its environment and serves as a means of economic development.[50]

In a significant 1994 case,[51] the Federal Court of Australia confirmed a violation of copyright in indigenous art and cultural expression. The works of famous Australian artists were applied to products imported from Vietnam labeled as "Aboriginal Carpets." While several were direct copies of original works, others were not exact replicas due to simplified designs; however, the copying distorted the artistic meanings of the tribal imagery, as the change in manufacturer falsified their cultural message. In 1993, the artists filed a lawsuit against the carpet importing company, Indofurn Pty Ltd, for copyright infringement and won the dispute.[52] The carpets were discovered by the National Indigenous Arts Association of Australia (NIAAA) when a salesperson in a Sydney shop inquired whether the "Aboriginal carpets" for sale were authentic. Upon inspection, Association staff recognized copies of original works by local artists. The Australian National Gallery had hosted solo exhibitions for all three prominent artists involved. One of the works reproduced on the carpets, "Goose Egg Hunt," was the property of the National Gallery and had even been featured on an 85-cent postage stamp issued in 1993 to commemorate the International Year of the World's Indigenous People. The drawings of Banduk, an internationally recognized living artist, were taken from the Gallery's Aboriginal culture educational platform, created in 1988 for the education of teachers and students. She filed the lawsuit in Perth on her own behalf and on behalf of two deceased artists. After starting the production and import of the carpets in June 1992, Indofurn sought consultation from the Aboriginal Legal Service of Western Australia regarding copyright permission. A letter was sent to the local artists' association informing them of the reproduction of the paintings and the import of the carpets. The letter included photos of the products, data on the artists, and a check for 750 Australian dollars. Due to an incorrect address, the association never received the letter. In November, a copy of the letter was sent to the NIAAA, whose staff contacted the artists. They were outraged by such use of their works, refused to grant permission, and asked the association for help in fighting the illegal imports. The check was returned, and legal proceedings began. It was revealed that the company had imported 200 carpets covering approximately 850 square meters, some of which sold for more than 4,000 Australian dollars. The court ordered the defendant to return the unsold 366.59m^2 of carpets and pay approximately 188,640 Australian Dollars in damages, including 12,000 for the infringement of

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50 *Farah D. P.,* Conflict between Intellectual Property Rights and Human Rights: A Case Study on Intangible Cultural Heritage, Oregon Law Review, Vol.94, 2015,142-143.

51 Milpurrurru And Others v. Indofurn Pty Ltd 1994 Federal Court of Australia.

52 *Janke T.,* Minding Culture: Case Studies on Intellectual Property and Traditional Cultural Expressions, Geneva, 2003, WIPO, 9.

copyright. Instead of individual payments, the artists were given collective compensation so that it could be distributed in accordance with their cultural practices.[53]

The court considered the use of the paintings to be a violation of the Australian Copyright Act. Furthermore, according to Aboriginal customary law, the right to create artworks containing cultural narratives belongs to traditional custodians who are recognized by the people and the community. Traditional owners have collective authority to determine who can use art forms and in what context. They know and are responsible for the customs, values, and protocols. According to the judge, members of the community who had a significant connection to the artworks also experienced anger and suffering. As a result, the court developed a new measure of cultural harm; the legal infringement and suffering of intellectual property owners were expanded to include the pain experienced by the community.[54] Effective protection requires the legal recognition of intellectual property within both existing and sui generis (unique and special) regimes. The heterogeneity of cultural heritage makes it impossible to adopt a single, universal solution. Therefore, it is necessary to equip owners with a "menu" of appropriate mechanisms so that a choice can be made between different typologies of protection. From this perspective, the protection of intellectual property is viewed not just as a task, but as an instrument of political goals. Thus, effective protective options must include new, innovative systems of intellectual property.[55]

In the case discussed, the Aboriginal artists hoped to protect intangible cultural elements. The carpets incorrectly conveyed their works and ignored customary laws, values, and protocols, which offended both the community and the artists. Authentic local works are more than just "artworks" in the Western sense of the word. They are expressions of cultural histories, imbued with a diverse spectrum of collective and spiritual meanings; their painting carries a moral responsibility. What would happen if the carpet manufacturers listened to the sacred stories upon which the patterns are based and then created their own, very different visual representations of these stories? Such carpets might have become new copyrighted works because their expression would be different from the existing ones. It can be said that even in this hypothetical scenario, there is an element of misuse or misrepresentation of real stories.[56]

It is essential to assess the adequacy of intellectual property rights (IPR) in overcoming certain obstacles. Since most traditional cultural expressions are intangible in nature, intellectual property norms represent a reliable legal mechanism for preventing unauthorized use. Nevertheless, the current intellectual property framework does not provide a sufficient basis for protecting the specificities and characteristics of intangible heritage. In particular, experience has shown that the main drawback of intellectual property rights is their individualistic, egocentric nature, which is incompatible with the

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53 Ibid.,10, 18.

54 *Torsen M., Anderson J.,* Intellectual Property and the Safeguarding of Traditional Cultures: Legal Issues and Practical Options for Museums, Libraries and Archives, WIPO, December 2010, 25.

55 *Farah P. D.,* Conflict between Intellectual Property Rights and Human Rights: A Case Study on Intangible Cultural Heritage, Oregon Law Review, Vol. 94, No.1, 2015, 146.

56 *Torsen M., Anderson J.,* Intellectual Property and the Safeguarding of Traditional Cultures: Legal Issues and Practical Options for Museums, Libraries and Archives, WIPO, December 2010, 29.

collectivist nature of intangible heritage. Furthermore, the interests of traditional communities in their cultural heritage are intergenerational and last significantly longer than most intellectual property rights. Another obstacle is the high cost associated with the enforcement and exercise of intellectual property rights.[57]

The public domain is not entitled to copyright protection. Any entity can use such works for any purpose, including commercial ones, without the author's permission. In 1989, Aboriginal artist Terry Yumbulul filed a lawsuit based on the reproduction of his "Morning Star Pole" on the 1988 ten-dollar bicentennial banknote. The suit was brought against the Reserve Bank of Australia, the manufacturing agent of the agreement, and the Aboriginal Artists Agency Ltd.

The Bank relied on an agreement concluded between the applicant and the agent, which granted permission for reproduction. The Bank settled with the applicant by paying a certain amount without admitting liability. The proceedings continued between the artist and the agent; however, the judge dismissed the claim in this part. The plaintiff asserted that the permission was obtained through deception and that the contract was entered into by mistake due to the agent's unconscionable conduct. The court ruled that there was no mistake in the content of the transaction, the agent had not acted unethically, and the plaintiff himself possessed sufficient capacity to understand the essence of the contract. This conclusion established the standard for the application of unconscionability principles toward indigenous populations. The court pointed out that the traditional rights of Aboriginal people regarding the reproduction of an artwork were not protected by existing legislation. The agent argued that the right to reproduction was granted by Sections 65 and 68 of the Copyright Act of 1968, which state that a sculpture on permanent public display may be reproduced. In this case, the artistic work, a ceremonial pole, was exhibited in a Sydney museum. The plaintiff claimed the work was not a sculpture. The judge did not share this view and stated: "If the argument regarding Sections 65 and 68 is correct, then some Aboriginal artists certainly do not realize the impact that an exhibition has on the copyright of their works." Although the lawsuit was unsuccessful, the positive effect of the proceedings was the sparking of debates regarding the proper protection of local artists in the context of the shortcomings of current legislation.[58]

As noted above, positive protection allows communities to "protect knowledge, control its use, and benefit from commercial exploitation." The owner of traditional knowledge and cultural expressions acquires intellectual property or other exclusive rights over property and commercial benefits, controlling their use by third parties.[59] When Traditional Knowledge (TK) is recorded or embodied in Traditional Cultural Expressions (TCE), they become directly linked. In such cases, local

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57 *Farah P. D.,* Conflict between Intellectual Property Rights and Human Rights: A Case Study on Intangible Cultural Heritage, Oregon Law Review, Vol. 94, No.1, 2015,146-147.

58 <https://classic.austlii.edu.au/au/journals/AboriginalLawB/1992/26.html> [25.02.2025]. The agency and the bank acted with proper legal authority, and the disputed Aboriginal design was considered to be in the public domain. As the judge noted, the sacred nature of the work and the community criticism directed toward the artist highlight the inadequate protection of TCEs (Traditional Cultural Expressions) under Australian copyright law. Torsen M., Intellectual Property and Traditional Cultural Expressions: A Synopsis of Current Issues, Intercultural Human Rights Law Review, Vol 3, 2008, 206, 207.

59 *Shabalala D. B.,* Intellectual Property, Traditional Knowledge, and Traditional Cultural Expressions in Native American Tribal Codes, Akron Law Review: Vol. 51, Issue 4, July 2018,1089,1090.

TCEs may be appropriated, or secret, confidential knowledge may be used in books and artworks. In this regard, the Federal Court of Australia case Foster v. Mountford is noteworthy. In the 1980s, anthropologist Mountford traveled by camel to South Australia to visit Aboriginal people. He met with representatives of the Pitjantjatjara people and made records of their customs and traditions. He published the collected information without the community's consent in the book "Nomads of the Desert". The book sold particularly well in Australia. The high-level Aboriginal body, the Pitjantjatjara Council, filed a lawsuit against Mountford for the unauthorized publication of secret material and breach of confidentiality. The Council requested an injunction against the publication of the material. This was one of the first instances where the Supreme Court of Australia officially established the possibility of maintaining the confidentiality of indigenous traditional knowledge. A few years later, the country adopted legislation for the protection of Aboriginal cultural heritage, and in 2003, the "Aboriginal Land Rights Act" was enacted.[60]

7. Conclusion

Traditional knowledge containing cultural customs and local sketches preserves ancient traditions. Intellectual property regulations may not adequately respond to the unique challenges of protecting indigenous design and heritage. Ethnic communities, as the perpetual guardians of cultural assets, seek to protect their legacy. Although economic and legal frameworks often fail to account for the needs of indigenous peoples, some tribes strive not to remain isolated and fight for protection mechanisms at the international level.

In specific cases, it is difficult to say who will benefit from the commercialization of intangible heritage elements, as many people lack the resources to make initial investments to protect their intellectual property (for example, trademark registration fees). Furthermore, a significant barrier is the lack of formal documentation of traditional knowledge. Local social practices are often passed down orally, making them less accessible to patent examiners and legal systems that depend on written documentation. In such cases, non-locals benefit from traditional knowledge, obtaining patents for resources and practices used by communities for centuries. Due to this gap in documentation, local groups become vulnerable to biopiracy, as their knowledge is not officially recorded and is considered "new" by legal systems that do not recognize oral traditions.

Indigenous populations seek access to materials protected in the collections of cultural institutions to create modern reinterpretations with contemporary meanings. The use of such material by indigenous people is not provided for by copyright legislation, especially in cases where it is commercially valuable. Along with changes in the technological environment and the evolution of copyright, indigenous interests may find themselves awkwardly positioned outside the legal framework. How should these seemingly conflicting rights and interests be reconciled? The ability to protect intellectual property is vital for local communities that need to maintain control over their expressions. The use of traditional expressions by non-local actors can lead to an identity crisis,

[60] *Polymenopoulou E.,* Indigenous Cultural Heritage and Artistic Expressions: "Localizing" Intellectual Property Rights and UNESCO Claims, Canadian Journal of Human Rights, 2017, 98.

negatively impacting the overall well-being of the society. Unfortunately, the existing intellectual property regime does not offer a viable solution, as assets may become part of the public domain due to time limitations.

Bibliography:

1. Aikawa N., An Historical Overview of the Preparation of the UNESCO International Convention for the Safeguarding of the Intangible Cultural Heritage, Vol 56, 2004.
2. Amusan L., Politics of Biopiracy: An Adventure into Hoodia/Xhoba Patenting In Southern Africa, African Journal of Traditional, Complementary And Alternative Medicines, January 2017.
3. Arantes A., The Governance of Safeguarding Comments on Article 2.3 of UNESCO's Convention for the Safeguarding of Intangible Cultural Heritage, 2019.
4. Awopetu R., In Defense of Culture: Protecting Traditional Cultural Expressions in Intellectual Property, Emory Law Journal,Vol 69, Issue 4, 2020.
5. Bhowmick A., Deb Roy S., De M., A Brief Review on the Turmeric Patent Case with its Implications on the Documentation of Traditional Knowledge,Volume 1, 2021.
6. Brascoupé S., Endemann K., Intellectual Property and Aboriginal People: A Working Paper, Intellectual Property Policy Directorate, Industry Canada, Fall 1999.
7. Brown M. F., International Journal of Cultural Property Heritage Trouble: Recent Work on the Protection of Intangible Cultural Property, 2005.
8. Farah D. P., Conflict between Intellectual Property Rights and Human Rights: A Case Study on Intangible Cultural Heritage, Oregon Law Review, Vol.94, 2015.
9. Fasi M. A., A review of the practices related to the protection of indigenous designs and traditional cultural expressions under intellectual property law in Canada and India, International Journal of Intellectual Property Management, Vol. 13, Nos. 3/4, 2023.
10. Gkana A., Safeguarding shared Intangible Cultural Heritage: A "bridge over troubled water"? Vol 18, 2020.
11. Higgs R., Kapepiso F., Tracing the curation of Indigenous knowledge in a biopiracy case, AlterNative An International Journal of Indigenous Peoples 16 (1), February 2020.
12. Intellectual Property and Traditional Cultural Expressions/Folklore Booklet nº 1, WIPO, 2005.
13. Janke T., Minding Culture: Case Studies on Intellectual Property and Traditional Cultural Expressions, Geneva, 2003, WIPO.
14. Lixinski L., International Human Rights and Intangible Cultural Heritage, Intangible Cultural Heritage in International Law, Oxford University Press, 2013.
15. Martinet L.,Traditional Cultural Expressions and International Intellectual Property Law, International Journal of Legal Information 47.1, 2019.
16. Nicholas G., Bell C., Bannister K., Ouzman S., Anderson J., Intellectual Property Issues in Heritage Management, Heritage & Society, September 2009.
17. Polymenopoulou E., Indigenous Cultural Heritage and Artistic Expressions: "Localizing" Intellectual Property Rights and UNESCO Claims, Canadian Journal of Human Rights, 2017.
18. Rogers L., Intangible cultural heritage and international environmental law: the cultural dimension of environmental protection, Heritage, Sustainability and Social Justice, Vol 29, 2017.

19. Shabalala D. B., Intellectual Property, Traditional Knowledge, and Traditional Cultural Expressions in Native American Tribal Codes, Akron Law Review: Vol. 51, Issue 4, July 2018.
20. Torsen M., Intellectual Property and Traditional Cultural Expressions: A Synopsis of Current Issues, Intercultural Human Rights Law Review, Vol 3, 2008.
21. Torsen M., Anderson J., Intellectual Property and the Safeguarding of Traditional Cultures: Legal Issues and Practical Options for Museums, Libraries and Archives, WIPO, December 2010.
22. Urbinati S., The Role for Communities, groups and Individuals under the Convention for the Safeguarding of the Intangible Cultural Heritage, Cultural Heritage, Cultural Rights, Cultural Diversity, New Developments in International Law, Borelli e Lenzerini (eds), 2012.
23. Wendland W., Intangible Heritage and Intellectual Property: challenges and future prospects, WIPO 2004.
24. Wheelersburg R. P., Melvin S., Indigenous Intellectual Property Rights in the Arctic, Arctic Yearbook, January 2019.
25. Berne Convention for the Protection of Literary and Artistic Works, September 28,1979.
26. Convention for the Safeguarding of the Intangible Cultural Heritage, Paris 2003.

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Patient's Informed Consent and the Physician's Civil Liability Within the Scope of Standard Treatment and Clinical Trials

Informed consent constitutes a fundamental element of modern medical relationships, embodying the patient's autonomy and representing a universally recognized ethical principle. The present paper examines the civil law foundations of informed consent, the essential elements required for its validity, the scope of liability arising from breaches of the standard of disclosure, and special case of informed consent in the context of clinical trials. While the primary focus lies on the Georgian legal framework governing informed consent, the paper also reviews international case law and regulatory instruments to highlight current challenges in medical practice and to propose recommendations.

Keywords: *informed consent, patient autonomy, clinical trial, medical law.*

1. Introduction

Informed consent is a fundamental principle and a legal and ethical standard that constitutes an essential element of contemporary medical relationships. Its purpose is to protect the patient's autonomy within the relationships arising in the course of medical care. It facilitates the expression of the principle of self-determination, within the scope of which healthcare providers and patients communicate for the purpose of planning an appropriate course of treatment.[1] Unlike the early stage of medical relationships, which was shaped by medical paternalism, where the guiding principle was that, physicians determined what was best for the patient when planning treatment,[2] modern medical relationships have transformed into a more equal and consensual model,[3] grounded in the principle of patient autonomy. Patient autonomy requires that medical interventions be undertaken only after the patient has been fully informed of the anticipated consequences of the intervention and has expressed consent freely, without any factors influencing their free will.[4] Georgian legislation recognizes informed consent, regulates its substantive characteristics and the procedural rules for obtaining it, and establishes the legal mechanisms for the protection of this right. Informed consent is, on the one hand, understood as a substantive component of the human rights protected by the Constitution of Georgia, and, on the other hand, is regulated in detail by the special legislation governing the field of healthcare.

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1 *Berg J.W., Appelbaum P.S., Lidz C.W., Parker L.S.*, Informed Consent Legal Theory and Clinical Practice, Second Edition, Oxford University Press, 2001, 3.

2 *Bichia, M., Gagua, I.,* Historical Foundations and Contemporary Challenges in the Practice of Obtaining a Patient's Informed Consent, "Journal of Law", No. 1, 2024, 26 (in Georgian).

3 *Kurniawan I.G., Chandra A.*, The Civil Law Aspects of Informed Consent to Medical Procedures, SASI, 30(3), 327.

4 *Freeman v Home Office* [1986] 1 All ER 1036

The purpose of this paper is to analyze how Georgia's civil-law framework ensures the protection of patient autonomy through an examination of the legislation regulating the process of informed consent and the relevant judicial practice. To achieve this objective, the paper reviews the elements necessary for the validity of informed consent, the grounds of liability in cases of breach of the duty to inform, and the specific form of informed consent in the context of clinical trials. In addition, the paper analyses the civil-law mechanisms for the protection of patients' rights and examines the challenges that arise in this respect.

2. Civil-Law Mechanisms for the Protection of Patients' Rights In Relation to Informed Consent

2.1. The Historical Evolution of The Concept of Informed Consent

The development of the concept of informed consent is linked to the recognition of the value of patient autonomy.[5] "Informed consent is based on the principle of respect for personal autonomy and on the idea that only the individual who holds the right is entitled to control their own medical care and participation in research. [...] This principle rests on two fundamental ideas: (a) every person has an individual right to self-governance, and (b) every person has the capacity to choose their own fate freely."[6]

The first precedent commonly regarded as relating to informed consent is *Slater v. Baker and Stapleton*. Although the court did not examine the case from the standpoint of a breach of informed consent, the judge reasoned that a patient must be properly informed about the procedures that will be performed on them.[7]

Traditionally, informed consent did not have the comprehensive scope it possesses in its modern understanding. Its essential characteristics were gradually developed and expanded through judicial practice, regulatory instruments, and international standards.[8] For example, the court first addressed the patient's autonomy to decide what would happen to their body in a 1914 judgment.[9] The term "informed consent" was first[10] used in a 1957 judgment in the context of discussing a physician's duty to disclose to patients the information necessary for decision-making.[11] Subsequently, the court

5 *Berg J.W., Appelbaum P.S., Lidz C.W., Parker L.S.*, Informed Consent Legal Theory and Clinical Practice, Second Edition, Oxford University Press, 2001, 42.

6 *Bichia, M., Gagua, I.,* Historical Foundations and Contemporary Challenges in the Practice of Obtaining a Patient's Informed Consent, "Journal of Law", No. 1, 2024, 32 (in Georgian).

7 *Miller, Robert D.*, Slater v. Baker and Stapleton (C.B. 1767): Unpublished Monographs by Robert D. Miller, Madison WI, 2019, 12-13.

8 *Berg J.W., Appelbaum P.S., Lidz C.W., Parker L.S.*, Informed Consent Legal Theory and Clinical Practice, Second Edition, Oxford University Press, 2001, 41-65.

9 Schloendorff v. Society of New York Hospital, 105 N.E. 92 (N.Y. 1914)

10 *Miller R.D.,* History of the Use of the Term "Informed Consent" up to Salgo, posted at Minds@UW, 2020, 1 <https://minds.wisconsin.edu/bitstream/handle/1793/80623/HISTORY%20OF%20THE%20TERM%20INFORMED%20CONSENT.pdf?sequence=1&isAllowed=y> [10.12.2025]

11 Salgo v. Leland Stanford Jr. University Board of Trustees, 154 Cal.App.2d 560, 317 P.2d 170 (Cal. Dist. Ct. App. 1957).

considered the so-called "reasonable practitioner" standard, under which the physician's duty to disclose risks to the patient is limited to the information that a reasonable medical practitioner would deem necessary to share in comparable circumstances.[12] In subsequent decisions, the focus shifted to the patient's perspective, and the court instead relied on the "reasonable patient" standard, under which the physician was required to determine the scope of the information to be disclosed based on what a reasonable patient would need to know in order to make an informed decision.[13] In relation to the modern understanding of informed consent, the decision in ***Montgomery v Lanarkshire Health Board*** is of central importance, in which the court addressed the extent to which information should be provided to the patient in the context of risk assessment.[14]

2.2. The Legal Framework Regulating Informed Consent in Georgia

The Constitution of Georgia enshrines human dignity[15] and physical integrity[16] and, for the purpose of ensuring their protection, exercises oversight over healthcare institutions and the quality of medical services.[17] Medical intervention, even when undertaken for therapeutic purposes, infringes upon physical integrity, and apart from limited exceptions, it is rendered lawful only by the patient's informed consent.[18]

The Civil Code of Georgia regards the human body and health as protected legal interests and enables the restoration of violated rights, as well as the protection of honor, dignity, and personal integrity through judicial proceedings.[19] A general principle of law is that medical treatment administered without consent constitutes a violation. On the one hand, informed consent is an integral component of the patient's right to self-determination; on the other hand, in tort law, it serves as one of the criteria for assessing the lawfulness of medical intervention.[20]

2.3. The Substantive and Procedural Essence of Informed Consent

In terms of its substantive legal essence, informed consent is, on the one hand, a means of protecting fundamental rights such as patient autonomy, dignity, [21] and physical integrity; on the other

12 Natanson v. Kline, 186 Kan. 393, 350 P.2d 1093 (Kan. 1960)
13 Canterbury v. Spence, 464 F.2d 772 (D.C. Cir. 1972)
14 Montgomery v Lanarkshire Health Board [2015] UKSC 11.
15 Constitution of Georgia, Parliamentary Gazette, 31–33, 24/08/1995, Article 9 (1).
16 Ibid, 10 (2).
17 Ibid, 28 (2).
18 *Hagenloch U.,* Informing the Patient in Germany, "Medical Law and Management Journal", No. 2 (3) 2023, 3 (in Georgian).
19 Civil Code of Georgia, Parliamentary Gazette, 31, 24/07/1997, Article 18 (1).
20 *Hagenloch U.,* Informing the Patient in Germany, "Medical Law and Management Journal", No. 2 (3) 2023, 4 (in Georgian).
21 The Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine, ETS No 164, 1997, preamble, articles 1, 5.

hand, it constitutes a regulatory requirement[22] and a fundamental ethical principle[23] in the conduct of clinical trials.[24]

From a procedural perspective, a written informed consent constitutes important evidence in medical disputes. [25] It eases the burden of proof for the healthcare provider with respect to the patient information. [26]

2.4. Liability for Breach of the Duty of Informed Consent

The performance of a medical procedure without the patient's informed consent may give rise to both tortious and contractual liability. [27] In Georgia, the relationship between a physician and a patient is in many cases contractual in nature, which necessitates obtaining informed consent prior to performing a medical procedure, since a contract cannot be validly concluded without the patient being duly informed.[28] However, where the duty to inform is breached, a claim may arise from a contractual obligation. At the same time, medical treatment carried out without the requisite authorization (consent), resulting in harm, constitutes a basis for tort liability. Accordingly, violations related to informed consent are of a dual nature and are subject to both contractual and tort liability rules.[29]

2.4.1. Liability in the Context of Contractual Obligations

From the perspective of contractual obligations, as already noted, a breach of the standard of patient information also constitutes a breach of contract, since the agreement concluded with the recipient of medical services must, inter alia, include information regarding the procedure to be performed, its risks, and the expected outcomes. For example, under the German Civil Code, the duty

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22 Regulation (EU) No 536/2014 of the European Parliament and of the Council of 16 April 2014 on Clinical Trials on Medicinal Products for Human Use, and Repealing Directive 2001/20/EC, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02014R0536-20221205> [10.12.2025]

23 ICH Harmonised Guideline for Good Clinical Practice E6 (R3), Final Version Adopted on 06 January 2025, article 2, <https://database.ich.org/sites/default/files/ICH_E6%28R3%29_Step4_FinalGuideline_2025_0106.pdf> [10.12.2025].

24 U.S. Food and Drug Administration, 21 Code of Federal Regulations (C.F.R.) part 50, Last Amended on 04 September 2025 <https://www.ecfr.gov/current/title-21/chapter-I/subchapter-A/part-50> [10.12.2025]

25 *Kurniawan I.G., Chandra A*., The Civil Law Aspects of Informed Consent to Medical Procedures, SASI, 30(3), 330.

26 *Bichia, M.,* Specificities of Compensation for Damage Caused by a Medical Institution: Theoretical and Practical Aspects, "Justice and Law", No. 2 (70), 2021, 91. (in Georgian). See also: *Bichia, M.,* Golden Rules for Obtaining Informed Consent According to the Case Law of the European Court of Human Rights, in: "*Protection of Human Rights: International and National Experience",* ed. Korkelia K., Tbilisi, 2022, 188 (in Georgian).

27 *Hagenloch U.,* Informing the Patient in Germany, "Medical Law and Management Journal", No. 2 (3) 2023, 5 (in Georgian).

28 *Bichia, M*., Specificities of Ensuring Patient Personal Autonomy and Obtaining Informed Consent (Georgian and European Approaches), "*Law and World",* No. 12, 2019, 59 (in Georgian).

29 Ibid, 60.

to provide information constitutes an integral element of the treatment contract.[30] Accordingly, failure to comply with this requirement amounts to a breach of a contractual obligation.

2.4.2. Liability for Tort

Where a healthcare provider has a duty to inform the patient and fails to do so,[31] resulting in harm that would not have occurred had the patient been properly informed and free to refuse the medical intervention, the prerequisites for tort liability are established. In this context, the patient is required to prove that informed consent was not properly obtained, while the healthcare provider is required to prove that informed consent was obtained or, even in the presence of consent, that the outcome could not have been avoided and to exclude a causal link with the harm that occurred.

As noted above, informed consent constitutes a criterion for assessing the lawfulness of a medical intervention; accordingly, any adverse outcome of treatment performed without consent gives rise to the physician's liability from the outset, irrespective of the existence of a medical error.[32]

Under Georgian legislation, informed consent is defined as "the consent of the patient, or of the patient's relative or legal representative, to the performance of a medical intervention necessary for the patient, after an explanation of the risks associated with that intervention to the patient's health and life."[33] This definition encompasses two components: (1) the consent of the authorized subject, and (2) the provision of relevant information regarding the risks.

Similarly, German legislation imposes on healthcare providers both the obligation to obtain consent and the duty to properly inform the patient.[34] Under French legislation as well, the patient's consent constitutes a prerequisite for the lawfulness of medical acts.[35] In Germany, as in France, patient consent constitutes an integral element of the constitutional values of human dignity and autonomy, and civil legislation reinforces mechanisms for their protection through both the general principles of tort law and, where applicable, contractual liability.

As a conclusion, it should be noted that the purpose of informed consent is to protect personal autonomy and physical integrity. Healthcare providers are not free to act paternalistically; but on the contrary, the legislation requires them to respect the patient's right to self-determination. Patient autonomy is defined as "the patient's right to independently determine all matters relating to the provision of medical care."[36]

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30 German Civil Code (BGB), 10/08/2021, §630(c) <https://www.gesetze-im-internet.de/englisch_bgb/index.html> [10.12.2025].

31 Except for exceptional cases in which grounds exist for exemption from the duty to inform, such as the so-called "therapeutic privilege," which will be discussed below.

32 *Hagenloch U.,* Informing the Patient in Germany, "Medical Law and Management Journal", No. 2 (3) 2023, 5 (in Georgian).

33 *Law of Georgia on "Health Care"*, Parliamentary Gazette, 47–48, 31/12/1997, Article 3, Subparagraph "j".

34 German Civil Code (BGB), 10/08/2021, §630(d); §630(e), <https://www.gesetze-im-internet.de/englisch_bgb/index.html> [10.12.2025].

35 Public Health Code of France, version of October 1, 2020, Article L1111-4, <https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000041721056> [10.12.2025].

36 *Law of Georgia on "Health Care"*, Parliamentary Gazette, 47–48, 31/12/1997, Article 3, Subparagraph "a".

3. Elements Necessary for the Validity of Informed Consent

In order to exclude a physician's liability in the context of patient information, the mere existence of informed consent is not sufficient. It is essential that such consent be obtained in compliance with the relevant prerequisites, from an authorized subject who is capable of understanding and assessing the information provided and of making a decision freely, without any undue influence. Georgian legislation is consistent with international practice and regulates the prerequisites necessary for the validity of informed consent:

3.1. Voluntariness

Consent may be considered valid only if it is expressed on the basis of free will. Georgian legislation, like other applicable regulations, requires that a patient's consent be given voluntarily, without any form of coercion. Voluntary consent also encompasses the right to refuse; accordingly, the patient is free to choose treatment or to refuse it for any reason. The Georgian Law on "Health Care" provides for the patient's right to refuse any medical intervention, participation in scientific research, or involvement in the medical education process.[37] If a patient does not wish to undergo treatment, even where such treatment is critically important for their health, the physician is not authorized to compel the patient or to exert any influence upon them.[38] At the same time, it is important to note that a patient is not bound by consent previously given and may change their decision at any time prior to the medical intervention. For example, a subject participating in a medical-biological research must be informed that they are entitled to withdraw from participation in the study at any stage, without providing any justification.[39] According to the Code of Federal Regulations of the United States, the patient must be given the maximum opportunity to decide whether to participate in a research, and this must be ensured under conditions that minimize any form of coercion or undue influence.[40] Thus, voluntariness constitutes an essential element of informed consent.

3.2. Disclosure of Information

3.2.1. Content of the Information

The grammatical interpretation of the term "informed consent" itself indicates that consent must be obtained under conditions in which the patient is informed. A medical professional is obliged to

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37 *Ibid*, Article 9.

38 "Influencing" is an ambiguous term, insofar as a patient, particularly while battling a serious illness, is already under significant pressure and affected by numerous factors. Therefore, it is the physician's duty, when providing information, to avoid, on the one hand, causing unnecessary fear for the purpose of securing consent to treatment, and, on the other hand, creating unrealistic expectations regarding the anticipated benefits of the treatment. See additionally: *Berg J.W., Appelbaum P.S., Lidz C.W., Parker L.S.*, Informed Consent Legal Theory and Clinical Practice, Second Edition, Oxford University Press, 2001, 68-69.

39 *Law of Georgia on "Health Care"*, Parliamentary Gazette, 47–48, 31/12/1997, Article 109.

40 U.S. Food and Drug Administration, 21 Code of Federal Regulations (C.F.R.) § 50.20, Last Amended on 04 September 2025, <https://www.ecfr.gov/current/title-21/chapter-I/subchapter-A/part-50/subpart-B/section-50.20> [10.12.2025].

provide the patient with comprehensive information necessary for decision-making, including information on the nature and necessity of the medical service, the expected outcomes, risks, available treatment alternatives, the anticipated consequences of refusing medical care, and the financial or social aspects associated with the medical service.[41] At the same time, it should be noted that a physician is not required to enumerate in detail every possible scenario of events; however, it is essential that the patient be informed of the realistically foreseeable risks.[42]

Similarly to Georgian legislation, the French Public Health Code requires physicians to inform patients of all serious risks associated with a procedure, its possible outcomes, and the foreseeable consequences of refusal.[43] Likewise, the German Civil Code refers to the obligation to provide information on the nature of the medical intervention, the risks associated with it, its necessity and urgency, and the chances of success in light of the diagnosis.[44]

3.2.2. Scope of the Information

An analysis of the legislation of various countries demonstrates that medical professionals are obliged to provide patients with information to the extent necessary for them to make decisions related to the planning of treatment. This requirement derives from the principle of patient autonomy, and its establishment is associated with the case *Montgomery v Lanarkshire Health Board*, in which a patient-oriented test was introduced for the first time in the context of informed consent. The court stated that "the doctor is therefore under a duty to take reasonable care to ensure that the patient is aware of any material risks involved in any recommended treatment, and of any reasonable alternative or variant treatments."[45] According to this test, in assessing the information to be disclosed, the physician must be guided by the "reasonable patient" standard, which entails the disclosure of all information that a reasonable patient would consider material to the decision-making process.[46]

3.2.3. Lay Language

Information must be provided to the patient in clear, lay language, without the use of specialized medical terminology.[47] "The information must be understandable to the patient in terms of both language and content, taking into account the individual's capacity for comprehension and,

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41 Law of Georgia on "Patients' Rights", LHG, 19, 25/05/2000, Article 4, Subparagraph "b".

42 *Hagenloch U.,* Informing the Patient in Germany, "Medical Law and Management Journal", No. 2 (3) 2023, 8 (in Georgian).

43 Public Health Code of France, version of October 1, 2020, Article L1111-2, <https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000020890189/2012-10-05> [10.12.2025].

44 German Civil Code (BGB), 10/08/2021,) §630(e), <https://www.gesetze-im-internet.de/englisch_bgb/index.html > [10.12.2025].

45 Montgomery v Lanarkshire Health Board [2015] UKSC 11.

46 *Bichia, M.,* Golden Rules for Obtaining Informed Consent According to the Case Law of the European Court of Human Rights, in: "*Protection of Human Rights: International and National Experience",* ed. Korkelia K., Tbilisi, 2022,190, 195 (in Georgian).

47 *Bichia, M*., Specificities of Ensuring Patient Personal Autonomy and Obtaining Informed Consent (Georgian and European Approaches), "*Law and World",* No. 12, 2019, 54 (in Georgian).

accordingly, the patient's condition."[48] From the perspective of comprehensibility, the time factor is of significant importance. The patient must be given adequate time to understand and assess the information provided and to make an informed decision.[49] Especially in cases where a written informed consent document is provided to the patient, which may be quite extensive for review purposes. For example, the German Civil Code likewise provides, in the context of the duty to inform, that the patient must be provided with sufficient time to make a decision.[50] From this perspective, a written document executed at the registration desk of a medical institution, even if signed by the patient, cannot be regarded as a valid document, since the patient is not provided with adequate time to properly review its contents. In many cases, this process constitutes a mere formality,[51] which disregards the purpose of informed consent, given that "informed consent is not just an administrative formality, but rather a continuous communication process between health workers and patients."[52]

3.2.4. Circumstances Excluding the Duty to Provide Information

In the context of the duty to provide information, it should be noted that exceptional circumstances may exist. For example, disclosure of information may not be mandatory where the patient is themselves a medical professional or is well informed about the relevant issues as a result of prior treatment; where the information is self-evident and does not require further explanation; or where, due to the anticipated stress, the patient themselves declines to be informed.[53] Notwithstanding the above, the patient must nevertheless have a general understanding of the information in respect of which they are declaring a refusal.[54]

Particular attention should be given to situations in which a patient requires emergency care. In such cases, the so-called presumption of "implied consent" applies, the guiding principle of which is that any patient would consent to treatment if they had the physical capacity to express such consent.[55] According to the Law on Health Care, emergency care is defined as "medical assistance without which the patient's death, a serious deterioration of their health condition, or a limitation of capacity is inevitable."[56] Where an emergency medical need arises that precludes the timely obtaining of the

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48 *Hagenloch U.,* Informing the Patient in Germany, "Medical Law and Management Journal", No. 2 (3) 2023, 7 (in Georgian).

49 *Bichia, M.,* "Golden Rules for Obtaining Informed Consent According to the Case Law of the European Court of Human Rights, in: "*Protection of Human Rights: International and National Experience",* ed. Korkelia K., Tbilisi, 2022,181 (in Georgian).

50 German Civil Code (BGB), 10/08/2021, §630(e)(2.2), <https://www.gesetze-im-internet.de/englisch_bgb/index.html> [10.12.2025].

51 *Hagenloch U.,* Informing the Patient in Germany, "Medical Law and Management Journal", No. 2 (3) 2023, 48 (in Georgian).

52 *Kurniawan I.G., Chandra A*., The Civil Law Aspects of Informed Consent to Medical Procedures, SASI, 30(3), 331.

53 *Hagenloch U.,* Informing the Patient in Germany, "Medical Law and Management Journal", No. 2 (3) 2023, 34-35, 49 (in Georgian).

54 Ibid, 49.

55 *Berg J.W., Appelbaum P.S., Lidz C.W., Parker L.S.*, Informed Consent Legal Theory and Clinical Practice, Second Edition, Oxford University Press, 2001, 76.

56 *Law of Georgia on "Health Care"*, Parliamentary Gazette, 47–48, 31/12/1997, Article 3, Subparahraph "s^1".

patient's informed consent,[57] the legislator grants the healthcare professional the authority not to await such consent and to make a decision in consideration of the patient's health interests.[58] In such cases, the burden of proof rests with the healthcare provider to substantiate the emergency nature of the medical intervention and the reasonableness of the actions taken.[59]

Another circumstance excluding the duty to inform the patient is the so-called "therapeutic privilege," the essence of which lies in the physician's authority to withhold information about the patient's health where the physician considers that disclosure would have critically adverse effects on the patient's future therapy and overall health condition.[60]

3.3. The Ability to Understand the Information and to Make a Decision

At an early stage in the development of the concept of informed consent, the question arose as to whether the duty to inform the patient should be regarded as fulfilled by the mere provision of information, or whether it was necessary for the physician to ensure that the patient had understood and comprehended the essence of the information.[61] The purpose of informed consent cannot be achieved if the recipient is unable to comprehend the information provided. Moreover, it is essential that the patient possess decision-making capacity. Informed consent will be valid only where it is given by a patient who has both the legal authority and the mental capacity to understand and make a decision regarding subsequent treatment.

According to Georgian legislation, "the performance of a medical intervention on a minor or on a patient lacking the capacity to make an informed decision, as well as their involvement in medical education or scientific research, is permissible only with due regard to the will previously expressed by the patient (at a time when they possessed the capacity to make an informed decision), and, in the absence of such will, with the informed consent of the patient's relative or legal representative."[62] At the same time, in cases where the patient is a minor or lacks the capacity to make an informed decision, it is important to note that the legislator requires informed consent to be given in written form.[63]

Although the legislator defines the circle of authorized persons, it is noteworthy that the wishes of the primary rights-holder are not disregarded. Even where consent has been given by the patient's legal representative or relative, it remains a significant consideration that the patient themselves does not object to participation in medical education or in a medical-biological research process.[64]

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57 *Bichia, M.,* Golden Rules for Obtaining Informed Consent According to the Case Law of the European Court of Human Rights, in: "*Protection of Human Rights: International and National Experience",* ed. Korkelia K., Tbilisi, 2022, 181 (in Georgian).

58 Law of Georgia on "Medical Practice", LHG, 18, 28/06/2001, Article 45 (2).

59 *Bichia, M., Gagua, I.,* Historical Foundations and Contemporary Challenges in the Practice of Obtaining a Patient's Informed Consent, "Journal of Law", No. 1, 2024, 40 (in Georgian).

60 *Berg J.W., Appelbaum P.S., Lidz C.W., Parker L.S.*, Informed Consent Legal Theory and Clinical Practice, Second Edition, Oxford University Press, 2001, 79.

61 *Ibid,* 67.

62 *Law of Georgia on "Health Care"*, Parliamentary Gazette, 47–48, 31/12/1997, Articles: 11, 110.

63 Law of Georgia on "Medical Practice", LHG, 18, 28/06/2001, Article 47 (2).

64 *Law of Georgia on "Health Care"*, Parliamentary Gazette, 47–48, 31/12/1997, Article 110.

Moreover, health-related information constitutes a special category of personal data[65] and may concern highly sensitive matters, such as the treatment of sexually transmitted diseases or drug addiction, counselling on non-surgical methods of contraception, the artificial termination of pregnancy, or the diagnosis of HIV infection/AIDS.[66] Accordingly, the interest of the minor in preventing the disclosure of such information must be taken into account. Where the above circumstances are present, if a minor patient aged between 14 and 18 objects to the disclosure of information about their health condition to a parent or legal representative, the physician is obliged not to disclose such information and to obtain informed consent directly from the patient, provided that the physician considers the patient capable of adequately assessing their own condition.[67] This approach[68] prioritizes the rights-holder themselves and enables patients who possess the requisite cognitive and emotional capacity to make decisions regarding their treatment independently.[69]

Accordingly, "whether or not the law requires understanding, the patient's actual understanding seems to be an integral component of the idea of informed consent."[70]

3.4. Form

Although, subject to certain exceptions, informed consent may be given either in written or oral form, the written form plays a significant role due to two primary functions:

(1) Written consent makes the information clearer and more comprehensible for the addressee. Although a physician may also provide the necessary information to the patient in detail verbally, visual presentation helps the patient in focusing on the essential details.

(2) Documenting the patient's consent in writing simplifies the burden of proof in the event of a dispute.[71] Although the Civil Code of Georgia does not expressly refer to informed consent, the burden of proving the absence of fault rests with the party that caused the damage.[72] Accordingly, the more detailed the medical documentation is with respect to the procedures

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65 *Law of Georgia on "Personal Data Protection"*, Website, 03/07/2023, Article 3, Subparagraph "b".

66 Law of Georgia on "Patients' Rights", LHG, 19, 25/05/2000, Article 40.

67 Ibid, Articles: 40-41.

68 This approach is known as the so-called "Gillick competence," which was established in the case of: Gillick v West Norfolk and Wisbech Area Health Authority [1986] AC 112, according to which a minor is authorized to provide consent without informing the parents or obtaining their permission, provided that the minor demonstrates "sufficient understanding and intelligence to understand fully what is proposed". See additionally: <https://www.lawteacher.net/cases/gillick-v-west-norfolk.php≥ [10.12.2025]

69 *Vashakidze M*., Protection of the Best Interests of a Child in the Medical Field (According to the Legislation in Force in Georgia), International Journal of Law: "Law and World", Vol.10 (1), 2023, 137.

70 *Berg J.W., Appelbaum P.S., Lidz C.W., Parker L.S.*, Informed Consent Legal Theory and Clinical Practice, Second Edition, Oxford University Press, 2001, 67.

71 *Bichia, M.,* Specificities of Compensation for Damage Caused by a Medical Institution: Theoretical and Practical Aspects, "Justice and Law", No. 2 (70), 2021, 91. (in Georgian). See also: *Bichia, M.,* Golden Rules for Obtaining Informed Consent According to the Case Law of the European Court of Human Rights, in: "*Protection of Human Rights: International and National Experience",* ed. Korkelia K., Tbilisi, 2022, 188 (in Georgian).

72 *Civil Code of Georgia,* Parliamentary Gazette, 31, 24/07/1997, Article 1007.

performed, including the proper obtaining of informed consent, the greater the likelihood that the healthcare provider's liability will be excluded.

Georgian legislation, in accordance with standard practice, provides for informed consent in both oral and written forms; however, in certain cases, with respect to medical procedures involving a high level of risk, it mandatorily requires the use of a written form. According to the Law of Georgia on "Health Care", "the list of medical interventions for which written consent is required is determined by the legislation of Georgia."[73] Written informed consent is required for any surgical operation, abortion, surgical contraception, genetic testing, chemotherapy for malignancies, radiation therapy, and other high-risk medical interventions, the exhaustive list of which is expressly determined by legislation.[74]

4. Liability for Violation of the Procedure for Obtaining Informed Consent

Where a medical intervention is carried out without informed consent and the patient sustains harm, or where no physical harm occurs but the patient's right to autonomy is violated, liability should be imposed on the healthcare provider. The Law of Georgia on "Patients' Rights" provides that "a patient or their legal representative has the right to apply to a court and claim compensation for pecuniary and non-pecuniary damage caused by the violation of the patient's rights."[75]

Georgian legislation allows claims to be brought on the basis of both tortious and contractual obligations.

The successful outcome of a medical intervention does not constitute a ground for excluding liability if it was performed without obtaining informed consent. The absence of consent renders the act unlawful, as it constitutes an interference with the patient's personal autonomy. Accordingly, where harm is caused to the patient – whether manifested in physical injury, pain, or psychological trauma – liability arises.[76]

In the context of informed consent, if the patient proves that a procedure was performed which resulted in an adverse outcome and that they were not duly warned of such a possibility, the healthcare provider must prove that valid informed consent was obtained.

In addition to the above, a patient may also base a claim on the rules of contract law. Although a medical services contract, and consequently its essential elements, are not defined under Georgian legislation, as noted above with reference to German legislation, an obligation to provide information constitutes an essential element of a medical services contract.[77] Accordingly, where a physician breaches the duty to provide information, this constitutes a breach of a contractual obligation.

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73 *Law of Georgia on "Health Care"*, Parliamentary Gazette, 47-48, 31/12/1997, Article 8 (1).

74 Law of Georgia on "Medical Practice", LHG, 18, 28/06/2001, Article 44 (2). See also: Law of Georgia on "Patients' Rights", LHG, 19, 25/05/2000, Article 22 (2).

75 Law of Georgia on "Patients' Rights", LHG, 19, 25/05/2000, Article 10, Subparagraph "a.a".

76 Conversely, if the patient has been duly informed of the possible risks but nevertheless gives consent, and harm subsequently occurs despite successful treatment and the absence of any fault on the part of the physician, then no liability shall arise. *Bichia M.*, Peculiarities of Medical Torts in Georgian Judicial Practice, "South Caucasus Law Journal", 09/2018 – 2019, 226.

77 German Civil Code (BGB), 10/08/2021,) §630(c)(2), <https://www.gesetze-im-internet.de/englisch_bgb/index.html > [10.12.2025].

Where the principle of informed consent is violated, it is necessary, for the purpose of properly formulating a claim, to assess which legal interest has been infringed and what the objective of the claim is. Georgian legislation provides for the possibility of compensation for both pecuniary and non-pecuniary damage, provided that the relevant prerequisites are met.[78] Article 18 of the Civil Code of Georgia constitutes the normative basis for a claim in cases where a violation of the patient's personal autonomy has resulted, for example, in an infringement of dignity or privacy.[79] A breach of the standard of information that results in bodily injury or harm to health constitutes a ground for claiming non-pecuniary damage under Article 413 of the Civil Code of Georgia.[80] /[81]

The determination of the amount of compensation for moral damage in each individual case is the prerogative of the court, which takes into account the fault of the party causing the damage, the severity of the violation, and its impact on the plaintiff's emotional well-being.[82]

With respect to compensation for pecuniary damage, the applicable legal provision is Article 1007 of the Civil Code of Georgia, pursuant to which damage caused to a person's health is compensated on general grounds, and the burden rests on the party causing the damage to exclude their fault in the occurrence of the harm.[83]

In order to examine compensation for pecuniary and non-pecuniary damage in connection with informed consent, let us consider the following hypothetical example:

A patient applied to a clinic to undergo a routine appendectomy. The physician provided the patient with general information about the procedure but failed to inform them of a rare, yet foreseeable, complication of the surgery, which could manifest in acute internal bleeding and/or inflammation of the inner lining of the abdominal wall (peritonitis). Following the procedure, peritonitis developed, necessitating additional examinations and treatment and placing the patient's life at risk. In light of these circumstances, assessed under the reasonable patient standard, the question arises whether, had the patient been informed of these complications, they would nevertheless have undergone the procedure or would have opted for alternative treatment methods, such as antibiotic therapy. If, applying the reasonable patient standard, it is determined that the patient would not have consented to an invasive procedure had they been adequately informed of the risks, the prerequisites for compensation for damage are met. In such a case, the patient is entitled to claim pecuniary damage, manifested in the costs incurred for additional examinations and treatment, lost income, as well as non-pecuniary (moral) damage for the pain and suffering resulting from the complications of the surgery.

In summary, it should be noted that the aim of Georgian legislation is to compensate the patient rather than to punish the physician; however, this does not mean that a physician's liability is limited

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78 *Civil Code of Georgia,* Parliamentary Gazette, 31, 24/07/1997, Article 18 (6).

79 Bichia, M., Specificities of Ensuring Patient Personal Autonomy and Obtaining Informed Consent (Georgian and European Approaches), "Law and World", No. 12, 2019, 63 (in Georgian).

80 *Civil Code of Georgia,* Parliamentary Gazette, 31, 24/07/1997, Article 413 (2).

81 Ruling of the Civil Chamber of the Supreme Court of Georgia of 26 July 2019 in Case No. ას-645-2019.

82 *Bichia, M., Gagua, I.,* Historical Foundations and Contemporary Challenges in the Practice of Obtaining a Patient's Informed Consent, "Journal of Law", No. 1, 2024, 39 – 40 (in Georgian).

83 *Civil Code of Georgia,* Parliamentary Gazette, 31, 24/07/1997, Article 1007.

solely to civil-law mechanisms. A patient is also entitled to seek the suspension or revocation of the medical professional's license,[84] and, where the relevant prerequisites are met, criminal liability may arise in extreme cases.

5. Informed Consent for Participation in a Clinical Trial

5.1. Historical Evolution

Informed consent for participation in a clinical research (trial) constitutes a specific form of informed consent. Despite certain similarities, informed consent in the context of standard medical care and informed consent in the context of research developed independently of one another.[85] While the provisions governing informed consent of patients participating in research have been established through professional codes, legislative regulations, and international recommendation standards, in the standard understanding the primary contribution to the development of the informed consent doctrine has been made by judicial practice, as discussed above.[86]

The need to establish a regulatory framework governing research involving human subjects arose in response to the medical experiments conducted on concentration camp prisoners under the Nazi regime. As a result, following the end of the Second World War, the Nuremberg Tribunal prosecuted the physician–experimenters, and an ethics code – the so-called "Nuremberg Code" – was developed, which, despite its general character, is regarded as the first regulatory document for research involving human subjects.[87] The Nuremberg Code, which comprises a total of ten principles, identifies the principle of voluntary informed consent as the first and paramount value. This principle entails the consent of a participant in a medical experiment who is capable of making an informed decision, is able to exercise a free choice without any form of influence, and is informed of the nature, duration, and purpose of the experiment, as well as of the anticipated discomforts and risks.[88] Although the Nuremberg Code did not comprehensively cover all elements of informed consent as recognized today, it was significant in that it laid the foundation for the concept of informed consent in the context of research involving human subjects. As the Nuremberg Code was not actively implemented in practice, the World Medical Association developed the Declaration of Helsinki with a view to more comprehensive regulation and practical application in research, the purpose of which was to establish recommendations for physicians participating in clinical research (trial).[89]

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84 Law of Georgia on "Patients' Rights", LHG, 19, 25/05/2000, Article 10 (c).

85 *Berg J.W., Appelbaum P.S., Lidz C.W., Parker L.S.*, Informed Consent Legal Theory and Clinical Practice, Second Edition, Oxford University Press, 2001, 249.

86 Ibid.

87 *Annas G. J.*, The Changing Landscape of Human Experimentation: Nuremberg, Helsinki, and beyond, Health Matrix: "Journal of Law-Medicine" 2, No. 2, 1992, 120-121.

88 Shuster E., Fifty Years Later: The Significance of the Nuremberg Code, "The New England Journal of Medicine", 1997, 1436.

89 *Annas G. J.*, The Changing Landscape of Human Experimentation: Nuremberg, Helsinki, and beyond, Health Matrix: "Journal of Law-Medicine" 2, No. 2, 1992, 122.

The Declaration of Helsinki, most recently revised in October 2024, regulates the content of informed consent in a broader manner and encompasses such elements as free, voluntary, and informed consent to participation in research by a potential participant who is informed, in clear and comprehensible language, of the aims of the research, the expected outcomes, the risks and benefits, the funding, and other essential information related to the research.[90]

Building upon the legal and ethical legacy of the Declaration of Helsinki, two principal framework documents were subsequently developed: The International Conference on Harmonization Guideline for Good Clinical Practice (ICH GCP)[91] and EU Clinical Trials Directive 2001/20/EC,[92] which was subsequently replaced by the EU Clinical Trials Regulation. (No. 536/2014).[93] These documents, together with domestic legislative acts, constitute the regulatory framework governing modern clinical trials.

5.2. Georgian Legislation Regarding Clinical Trials

A clinical trial constitutes a prerequisite for the manufacture of a pharmaceutical product. Before a medicinal product obtains marketing authorization, it undergoes a multi-stage development process, which includes laboratory studies (the discovery and development of the molecule), pre-clinical studies conducted in animal models, and, where promising results are obtained, the conduct of a clinical trial within the scope of authorizations issued by an independent local ethics committee and the healthcare regulatory authority. During the clinical trial, under conditions of carefully selected procedures, strict medical supervision, and oversight by regulatory authorities, the effects of the investigational medicinal product on humans are studied in order to determine its safety and efficacy.[94]

Under Georgian legislation, a clinical trial (testing, or investigation) of a pharmaceutical product is defined as "the study of the effects of a pharmacological agent on the human body for the purpose of identifying adverse reactions and assessing the degree of its efficacy and safety."[95] Unlike standard therapy, a clinical trial involves treatment using a medicinal product that is under investigation and in the course of research (the so-called "investigational medicinal product"), for which sufficient

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90 WMA Declaration of Helsinki – Ethical Principles for Medical Research Involving Human Participants, Adopted by the 18th WMA General Assembly, Helsinki, Finland, 1964, Last Amended in 2024, articles 25 – 32, <https://www.wma.net/policies-post/wma-declaration-of-helsinki/>[10.12.2025].

91 ICH Harmonised Guideline for Good Clinical Practice E6 (R3), Final Version Adopted on 06 January 2025, <https://database.ich.org/sites/default/files/ICH_E6%28R3%29_Step4_FinalGuideline_2025_0106.pdf>[10.12.2025].

92 Directive 2001/20/EC of the European Parliament and of the Council of 4 April 2001 on the Approximation of the Laws, Regulations and Administrative Provisions of the Member States Relating to the Implementation of Good Clinical Practice in the Conduct of Clinical Trials on Medicinal Products for Human Use.

93 Regulation (EU) No 536/2014 of the European Parliament and of the Council of 16 April 2014 on Clinical Trials on Medicinal Products for Human Use, and Repealing Directive 2001/20/EC, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02014R0536-20221205> [10.12.2025]

94 *Bertschi, E.,* Biomedical Research and the Uncertain Future of Clinical Trials, "FDLI Update Magazine", no. 6, 2001, 47.

95 *Law of Georgia on "Drugs and Pharmaceutical Activities"*, Parliamentary Gazette, 17–18, 05/05/1997, Article 1^1, Paragraph 45.

information on risks and benefits has not yet been collected. In light of this, particular attention is given to the patient's informed consent prior to participation in a clinical trial. In addition to the standard elements characteristic of informed consent, it is essential in this context that the research participant understands that such therapy is experimental and that the patient is not receiving a medicinal product approved by the regulator and available on the pharmaceutical market, but rather a product effects of which are the subject of investigation. Documents regulating clinical trials place significant emphasis on this element.

A patient may not participate in a clinical trial unless they have given written informed consent. "Informed consent is based on the principle of respect for personal autonomy and on the idea that the individual who holds the relevant authority has the right to control their own medical care and participation in research."[96]

The Law of Georgia on Health Care provides that the patient "must be provided in advance with complete information on the goals, methods, expected results, risks of the research, and the possible discomfort associated with it."[97] The patient is entitled to withdraw from participation in the research at any time, notwithstanding the prior provision of consent.[98]

Due to its distinct and specific nature, informed consent used in clinical trials is regulated more strictly under both Georgian and international legislation, with detailed requirements governing its content, form, and the process of obtaining consent. It should be noted that a clinical trial may not be conducted without authorization issued by the ethics committee established at the medical institution and by the LEPL "Regulation Agency for Medical and Pharmaceutical Activities" of the Ministry of Internally Displaced Persons from the Occupied Territories, Labour, Health and Social Affairs of Georgia.[99] In the decision-making process, these bodies are guided by a risk–benefit assessment of the proposed investigational medicinal product and grant authorization only where the anticipated benefits outweigh the risks. In particular, as Georgian legislation provides, "the interests and well-being of the human being as a research subject are more important than the interests of science and society. The risks of the research must be reduced to a minimum. They must not exceed the expected benefit for the research subject and/or the significance of the research objectives."[100]

Among the documents required to be submitted for the issuance of authorization is a sample of the research subject's information sheet and written informed consent, which must be prepared in accordance with the Good Clinical Practice (GCP) guidelines.[101]

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96 *Bichia, M., Gagua, I.,* Historical Foundations and Contemporary Challenges in the Practice of Obtaining a Patient's Informed Consent, "Journal of Law", No. 1, 2024, 32 (in Georgian).

97 *Law of Georgia on "Health Care"*, Parliamentary Gazette, 47–48, 31/12/1997, Article 109.

98 Ibid.

99 Government of Georgia Resolution No. 335 of 16 July 2019 "On the Approval of the Rules and Conditions for Issuing Authorizations for the Clinical Trial of Pharmacological Products, Pharmaceutical Manufacturing, Authorized Pharmacies, and the Import or Export of Medicinal Products Subject to Special Control", Article 2 (1).

100 *Law of Georgia on "Health Care"*, Parliamentary Gazette, 47–48, 31/12/1997, Article 108.

101 Government of Georgia Resolution No. 335 of 16 July 2019 "On the Approval of the Rules and Conditions for Issuing Authorizations for the Clinical Trial of Pharmacological Products, Pharmaceutical Manu-

5.3. Essential Characteristics of the Informed Consent Form to be Used in a Clinical Trial

The Good Clinical Practice guidelines constitute an international quality standard for the proper conduct of all aspects of a clinical trial and, at the same time, safeguard the rights, physical integrity, and confidentiality of patients participating in research.[102] The Good Clinical Practice guidelines (hereinafter, "ICH-GCP") regulate in detail both the substantive and technical characteristics of the informed consent form, as well as the elements related to the process of obtaining consent itself, and, together with the European Union Clinical Trials Regulation (hereinafter, "EU CTR"), constitute the principal regulatory framework governing the informed consent form. The relevant provisions may be divided into several groups:

(a) **Content-related:**

The regulations provide that a research subject must be furnished with detailed information on the objectives of the research, the procedures involved, the nature of the investigational medicinal product (including an indication that the medicinal product is experimental, i.e. under investigation), the rights and obligations of participants, the anticipated risks and benefits, alternative treatment options, and issues relating to injuries sustained in the course of the research and compensation.[103]

(b) Related to the process of obtaining informed consent:

It is important that no undue influence be exerted on the participant, [104] and that they be informed that participation in the research does not entail a waiver of their rights. [105] The guidelines establish the list of persons authorized to obtain consent, [106] as well as the list of persons authorized to give consent.[107]

(c) Related to technical requirements:

The informed consent form must be drafted in clear and comprehensible language and must not be difficult to understand or unnecessarily lengthy.[108]

The informed consent form is subject to approval by the ethics committee established at the medical institution.[109] The members of the ethics committee must ensure that the content of the informed consent form complies with international standards and applicable regulations. After the

facturing, Authorized Pharmacies, and the Import or Export of Medicinal Products Subject to Special Control", Annex №1, Article 2, Subparagraph "e".

102 *Vijayananthan A, Nawawi O*., The importance of Good Clinical Practice guidelines and its role in clinical trials, "Biomedical Imaging and Intervention Journal", 2008, 1.

103 ICH-GCP § 2.8.10; EU CTR 29(2).

104 ICH-GCP § 2.8.3; EU CTR 2 (2) (21).

105 ICH-GCP § 2.8.4

106 ICH-GCP § 2.8.5; EU CTR 29 (1).

107 ICH – GCP § 2.8.7; EU CTR 29 (1).

108 ICH-GCP § 2.2; EU CTR 29(2)(b).

109 ICH-GCP § 2.8.1 (a)

relevant authorizations have been granted, the medical institution must obtain the patient's informed consent, which is confirmed by the signing of the consent form previously approved by the regulatory authorities, after which the practical part of the research commences.

The requirements for informed consent used in clinical trials, as established by international regulations, are so strict and detailed that substantive deficiencies in the content of the form are reduced to a minimum. At the same time, consent is always obtained in written form: a patient may not participate in a study in the absence of their prior written informed consent. From this perspective, potential deficiencies are less likely to relate to the substantive content and more to the process of obtaining consent, in particular whether the patient was given sufficient time to review the document, whether all unclear aspects were explained, and whether their questions were adequately addressed.

The informed consent form designed for clinical trials is distinguished by the characteristic that it may serve as a standard or model for informed consent forms used in other medical interventions, taking into account the relevant distinctions.

From the perspective of determining liability and bringing a claim, a breach of the informed consent standard in the course of a clinical trial gives rise to the same legal consequences as in the context of ordinary medical therapy, and a clinical trial participant acquires a right of claim in the same manner as any other patient. However, since clinical trials are conducted under the supervision of not only a domestic but also an international regulatory framework,[110] an additional subject assumes liability – namely, the sponsor of the clinical trial, the pharmaceutical company developing the investigational medicinal product – which is required to maintain insurance covering the costs arising from the deterioration of health resulting from participation in the clinical trial and from the direct effects of the investigational medicinal product.[111] According to the ICH–GCP guidelines, the sponsor is obliged to provide insurance or to indemnify the investigator and/or the medical institution for damage arising from claims related to the research, except in cases where such damage results from improper medical practice.[112]

It is noteworthy that, from the perspective of liability, where informed consent has not been properly obtained, the lead specialist of the clinical trial – the principal investigator – may, in addition to local liability, which may be manifested in the obligation to compensate damage and/or the suspension or revocation of the right to practice, also become subject to sanctions imposed by an international regulatory authority.[113]

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110 The ICH–GCP Guideline E6 (R2) has been recognized by Order No. MOH 1 22 00000089 of 2 August 2022 issued by the Minister of Internally Displaced Persons from the Occupied Territories, Labour, Health and Social Affairs of Georgia, and forms part of Georgian legislation. See additionally: <https://rama.moh.gov.ge/geo/static/466/klinikuri-kvleva> [10.12.2025].

111 Government of Georgia Resolution No. 335 of 16 July 2019 "On the Approval of the Rules and Conditions for Issuing Authorizations for the Clinical Trial of Pharmacological Products, Pharmaceutical Manufacturing, Authorized Pharmacies, and the Import or Export of Medicinal Products Subject to Special Control", Annex №1, Article 2, Subparagraph "g".

112 ICH – GCP, § 3.14.1.

113 For example, the U.S. Food and Drug Administration (US FDA) maintains a so-called "blacklist" of investigators who have been disqualified or placed under restriction, and who therefore are either prohibited from serving as principal investigators in clinical trials or may do so only subject to specific conditions.

Judicial decisions concerning clinical trials are scarce. Although the Supreme Court of Georgia has not adjudicated cases specifically relating to clinical trials, it has clarified the issue of the burden of proof, stating that "a patient's informed consent is not to be regarded as a mere expression of will, but as a process that ensures the patient's ability to make a voluntary and informed choice regarding the planned medical intervention. At the same time, the Chamber emphasizes that the burden of proof with respect to the full and proper fulfilment of the duty to inform and explain rests with the clinic."[114]

From the perspective of the burden of proof, similarly to the general rule, the medical institution or the investigator must prove that consent was obtained in compliance with the prescribed requirements. Given that the written form of informed consent is a mandatory requirement, this facilitates the discharge of the burden of proof; however, it remains essential for the investigator to demonstrate that all information contained in the consent document, as well as any additional information in respect of which questions arose, was duly explained to the research subject.

By way of summary, it should be noted that, in the context of clinical trials, Georgia follows the requirements established by international regulations: written informed consent is required and must comply with international standards; at the same time, civil liability is not excluded where the relevant prerequisites are met.

6. Conclusion

Informed consent in the medical context is a significant legal and ethical doctrine that ensures respect for human dignity and personal autonomy.[115] General and specialized legislation of Georgia is characterized by a regulatory approach typical of countries belonging to the Civil Law legal system and establishes the relevant requirements in the context of obtaining informed consent, the guiding principle of which is that a medical intervention is impermissible without prior voluntary informed consent.

In medical practice, the process of informed consent is not as well developed as it is in legislative texts. It should be taken into account that the following challenges exist in practice:

The paper has identified the essential elements characteristic of informed consent, one of which is written informed consent. It should be noted that, in practice, informed consent forms are often treated as a mere formality, and patients sign them at the most stressful moments (for example, immediately prior to surgery), when they lack the emotional resources necessary to properly comprehend the document. Moreover, such documents are pre-drafted, template-based, and technical in nature, intended for repeated use and applied uniformly prior to any medical intervention, without adapting their content to the specific procedure. From this perspective, the informed consent form

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Although the FDA's jurisdiction does not extend to Georgia, the inclusion of a Georgian investigator on such a "blacklist" means that the sponsor will be unable to use the results of a study conducted in Georgia if it intends to apply to the U.S. Food and Drug Administration for marketing authorization. See additionally: <https://www.accessdata.fda.gov/scripts/SDA/sdNavigation.cfm?sd=clinicalinvestigatorsdisqualificationproceedings> [10.12.2025].

114 Ruling of the Civil Chamber of the Supreme Court of Georgia of 26 July 2019 in Case No. ას-645-2019.

115 Dughashvili, G., Informed Consent in Medicine, "*Medical Law and Management Journal",* No. 1/2022, 126 (in Georgian).

designed for clinical trials is a far more refined and comprehensive document, subject to stricter requirements, and the risk of substantive deficiencies is minimal. By contrast, standard informed consent forms present problems both in terms of their content and from a procedural standpoint.

In addition to the above, it should be emphasized that the primary purpose of the informed consent form is to ensure that the patient perceives and understands the information, rather than merely to meet the formal requirement of obtaining consent. A written informed consent document is not intended solely for judicial purposes; rather, its primary function is to safeguard patient autonomy.

By way of conclusion, it should be stated that Georgia recognizes informed consent not as a formality, but as an expression of a patient's fundamental right.

Bibliography:

1. *Constitution of Georgia,* Parliamentary Gazette, 31–33, 24/08/1995.
2. *Civil Code of Georgia,* Parliamentary Gazette, 31, 24/07/1997.
3. *Law of Georgia on "Health Care"*, Parliamentary Gazette, 47–48, 31/12/1997.
4. *Law of Georgia on "Drugs and Pharmaceutical Activities"*, Parliamentary Gazette, 17–18, 05/05/1997.
5. *Law of Georgia on "Patients' Rights"*, LHG, 19, 25/05/2000.
6. *Law of Georgia on "Medical Practice"*, LHG, 18, 28/06/2001.
7. *Law of Georgia on "Personal Data Protection"*, Website, 03/07/2023.
8. Government of Georgia Decree No. 335 of 16 July 2019 "On the Approval of the Rules and Conditions for Issuing Authorizations for the Clinical Trial of Pharmacological Products, Pharmaceutical Manufacturing, Authorized Pharmacies, and the Import or Export of Medicinal Products Subject to Special Control."
9. Order No. MOH 1 22 00000089 of 2 August 2022 issued by the Minister of Internally Displaced Persons from the Occupied Territories, Labour, Health and Social Affairs of Georgia.
10. German Civil Code (BGB), 10/08/2021.
11. Public Health Code of France, version of October 1, 2020.
12. WMA Declaration of Helsinki – Ethical Principles for Medical Research Involving Human Participants, Adopted by the 18th WMA General Assembly, Helsinki, Finland, 1964, Last Amended in 2024.
13. ICH Harmonized Guideline for Good Clinical Practice E6 (R3), Final Version Adopted on 06 January 2025.
14. The Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine, ETS No 164, 1997.
15. Directive 2001/20/EC of the European Parliament and of the Council of 4 April 2001 on the Approximation of the Laws, Regulations and Administrative Provisions of the Member States Relating to the Implementation of Good Clinical Practice in the Conduct of Clinical Trials on Medicinal Products for Human Use.
16. Regulation (EU) No 536/2014 of the European Parliament and of the Council of 16 April 2014 on Clinical Trials on Medicinal Products for Human Use, and Repealing Directive 2001/20/EC.

17. U.S. Food and Drug Administration, 21 Code of Federal Regulations (C.F.R.) part 50, Last Amended on 04 September 2025.
18. *Annas G. J.*, The Changing Landscape of Human Experimentation: Nuremberg, Helsinki, and beyond, Health Matrix: "Journal of Law-Medicine" 2, No. 2, 1992, 120-122.
19. Berg J.W., *Appelbaum P.S., Lidz C.W., Parker L.S.*, Informed Consent Legal Theory and Clinical Practice, Second Edition, Oxford University Press, 2001, 3, 41-65, 68-69, 76, 79, 249.
20. Bertschi, E*.,* Biomedical Research and the Uncertain Future of Clinical Trials, "FDLI Update Magazine", no. 6, 2001, 47.
21. Bichia M., Peculiarities of Medical Torts in Georgian Judicial Practice, "South Caucasus Law Journal", 09/2018 – 2019, 226.
22. Bichia, M., Specificities of Ensuring Patient Personal Autonomy and Obtaining Informed Consent (Georgian and European Approaches), "*Law and World",* No. 12, 2019, pp. 54, 59, 63 (in Georgian).
23. Bichia, M., Specificities of Compensation for Damage Caused by a Medical Institution: Theoretical and Practical Aspects, "*Justice and Law"*, No. 2 (70), 2021, p. 91 (in Georgian).
24. Bichia, M., Golden Rules for Obtaining Informed Consent According to the Case Law of the European Court of Human Rights, in: "*Protection of Human Rights: International and National Experience",* ed. Korkelia K., Tbilisi, 2022, pp. 181, 188, 190, 195 (in Georgian).
25. Bichia, M., Gagua, I., Historical Foundations and Contemporary Challenges in the Practice of Obtaining a Patient's Informed Consent, "Journal of Law", No. 1, 2024, pp. 26, 32, 39–40 (in Georgian).
26. Dughashvili, G., Informed Consent in Medicine, "*Medical Law and Management Journal",* No. 1/2022, p. 126 (in Georgian).
27. Hagenloch U., Informing the Patient in Germany, "Medical Law and Management Journal", No. 2 (3) 2023, pp. 3–5, 34–35, 48–49 (in Georgian).
28. *Kurniawan I.G., Chandra A*., The Civil Law Aspects of Informed Consent to Medical Procedures, SASI, 30(3), 327, 330, 331.
29. *Miller, Robert D*., Slater v. Baker and Stapleton (C.B. 1767): Unpublished Monographs by Robert D. Miller, Madison WI, 2019, 12-13.
30. *Miller R.D.,* History of the Use of the Term "Informed Consent" up to Salgo, posted at Minds@UW, 2020, 1.
31. Shuster E., Fifty Years Later: The Significance of the Nuremberg Code, "The New England Journal of Medicine", 1997, 1436.
32. *Vashakidze M*., Protection of the Best Interests of a Child in the Medical Field (According to the Legislation in Force in Georgia), International Journal of Law: "Law and World", Vol.10 (1), 2023, 137.
33. Vijayananthan A, Nawawi O., The importance of Good Clinical Practice guidelines and its role in clinical trials, "Biomedical Imaging and Intervention Journal", 2008, 1.
34. Ruling of the Civil Chamber of the Supreme Court of Georgia of 26 July 2019 in Case No. ას-645-2019 (in Georgian).
35. Canterbury v. Spence, 464 F.2d 772 (D.C. Cir. 1972).
36. *Freeman v Home Office* [1986] 1 All ER 1036.
37. Gillick v West Norfolk and Wisbech Area Health Authority [1986] AC 112.

38. Montgomery v Lanarkshire Health Board [2015] UKSC 11.
39. Natanson v. Kline, 186 Kan. 393, 350 P.2d 1093 (Kan. 1960).
40. Salgo v. Leland Stanford Jr. University Board of Trustees, 154 Cal.App.2d 560, 317 P.2d 170 (Cal. Dist. Ct. App. 1957).
41. Schloendorff v. Society of New York Hospital, 105 N.E. 92 (N.Y. 1914).
42. <https://www.accessdata.fda.gov/scripts/SDA/sdNavigation.cfm?sd=clinicalinvestigatorsdisqualificationproceedings>

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For Determining the Scope of Tort Liability of Heirs

The aim of the presented article is to determine the scope of the heir's tortious liability as defined in the "interest of creditors" determined under the Part 1 of Article 1484 of the Civil Code of Georgia and the boundaries of this liability. Considering that tort, as a type of obligation, is a controversial category and, as a rule, requires determination by the court, one chapter of the article is devoted to procedural legal issues of satisfying the interests of creditors. The question of limitation as the form of restriction of the tortious liability of the heirs will be dealt separately. The article highlights the importance of judicial practice for the interpretation of the aforementioned norm and the role of the court in obtaining the proper evidence. Among other issues, attention is focused on the content of "personal rights" by contrasting it with the obligation being performed personaly. The latest judgment of the Tbilisi City Court is discussed along with a sample of German judicial practice. The feature of the liability of co-heirs before the division of the estate is compared to German law.

Keywords: *Creditors' interests, Tortious liability, Pecuniary liability, Personaly enforceable obligation, Universal inheritance, "Maligora" division, Deadline for submitting a request.*

1. Introduction

According to Article 1484, Part 1 of the Civil Code of Georgia,[1] the heirs shall satisfy the interests of the decedent's creditors in full but to the extent of the accepted asset proportionately to the share of each heir.

This provision of the Civil Code should be considered comprehensive, but we will not discuss it in detail in this article and will mainly focus on the content of "creditors' interests".

Inheritance is not only beneficial, the heir is also responsible for the obligations of the successor. What is the scope of the "creditors' interest"? The answer of the Civil Code of Georgia to this question is only that it limits this interest to the "scope of the received asset", although this should not be sufficient to determine the content of the "creditors' interest". The aforementioned provision of the norm, which carries a protective function,[2,3] is only a quantitative part of the answer, although the content of the creditors' interest must be determined through doctrine and case law.

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1 Parliamentary Gazette, 31, 24/07/1997.

2 See Decision of July 26, 2017, N as-650-616-2015 of the Civil Cases Chamber of the Supreme Court of Georgia, § 21.

Interest, as a legal category, is nothing more than a legally protected interest, the same as a right.[4] For the purpose of determining the content of the right reflected in Article 1484, the question arises whether, in addition to unfulfilled contractual[5] or statutory[6] obligations, the interest of creditors can also extend to tortious obligations? When tortious liability usually require determination, confirmation through a court proceeding or administrative procedure.

"The function of tort law is to select, from the countless cases of harm inflicted, those in which the victim can attribute the severity of the harm to another person."[7]

Damage caused to the owner of property is only compensated under certain conditions. If we recall, there was a principle in Roman law *casum sentit domnus*[8], which means *res perit suo domino*,[9] however, "this remeins true as long as there is no specific reason to shift the loss. Such shift is justified normally on the basis of culpa or dolus (delictual liability), but there are certain instances where even accidental loss does not lie with the owner."[10] "This rule, which is sometimes called the 'property rule', expresses a fundamental and natural idea: *if someone suffers damage, then, in principle, he must bear that harm himself.* Everyone bears the risk for his own goods, unless another is liable for the harm. ... .

Hence, there must be *specific* reasons that justify allowing the victim to pass the damage on to another person. ... .

The law of damages thus appropriately provides – to put it very generally and vaguely – for the granting of a claim for compensation against another person and hence for a corresponding shifting of the damage only when such person is 'more closely associated' with the damage than the victim."[11]

The aim of the article is to research the issues of under what circumstances a tortious liability will be considered as part of the "interests of creditors", and in what cases the heirs will be required to compensate for the damage caused by the successor.

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3 *Berekashvili D.,* The Compulsory Share in Inheritance Law**,** A Dissertation Submitted for the Academic Degree of Doctor of Law, Tbilisi, 2020, 143 (in Georgian) <https://www.tsu.ge/assets/media/files/48/disertaciebi5/Diana_Berekashvili.pdf> [25.09.2025].

4 *Bichia M.*, The Content of the Right in the Civil Law, Journal of Law, N 2, 2023, 41 (in Georgian).

5 See e.g. Decision of October 16, 2015 N as-567-538-2015 of the Civil Cases Chamber of the Supreme Court of Georgia, § 1.4., motivation section.

6 "The Great Chamber considers that, among the other creditors defined in Article 1484 of the Civil Code of Georgia, are those who, under the Article 969, voluntarily and without any obligation, buried the deceased." See the decision of March 4, 2002 N 3k/441-01 of the Great Chamber of the Supreme Court of Georgia, motivation section.

7 *Tsvaigert K., Kotts H.,* Introduction of Comparative Jurisprudence to the Sphere of Private Law, Vol. 2, Contract, Unjust Enrichment, Delict, *Ninidze Th., (ed.) Sumbatashvili E., (translator),* Tbilisi, 2001, 287 (in Georgian).

8 Accident is felt by the owner.

9 The thing is lost to its master; its loss concerns the owner. For bot terms, see *Wacke A.,* Casum Sentit Dominus: Liability for Accidental Damages in Roman and Modern German Law of Property and Obligation (A shortened and revised English version of the article) <https://heinonline.org/HOL/LandingPage?handle=hein.journals/jsouafl1987&div=49&id=&page=> [23.09.2025], see cit.: *Wacke A.,* "Gafahre-höhung als Besitzerverschulden", in Festschrift Henz Hübner, Berlin/New York 1984, 669-695.

10 *Zimmermann R.,* The Law of Obligations, Roman Foundations of the Civilian Tradition, Oxford, 1996, 154, fn. 12.

11 *Koziol H*., Basic Questions of Tort Law from a Germanic Perspective, Wien, 2012, 1.

The study uses historical and comparative research methods.

The use of the historical research method in law is recognized as a way to reach a simple logical conclusion, preceded by a great deal of hard work.[12]

When using the comparative method, the researcher's work is based on the basic assumption that "everything is comparable".[13]

In order to study the scope of the tortious liability of heirs, the article describes the foundations of this institution that emerged in Roman law and the legal approaches of the Middle Ages. The article presents the historical institution of Georgian inheritance law "Maligora" division, which clearly demonstrates the historical roots of the principle of universal inheritance.

Using the comparative research method, the norms existing in countries with different legal systems regarding the deadlines for receiving an inheritance and submitting claims arising from the inheritance are reviewed.

2. Tortious Liability as Pecuniary Liability

"'Delict' (derived from 'delinquere', hence – also the word 'delinquent') is a civilian term generally used to designate a civil (as opposed to criminal) wrong. Its common-law counterpart is 'tort', which, in turn, has its etymological root in the Latin term 'tortus', meaning 'crooked' or 'twisted'."[14]

Despite the fact that the English "tort" and the "delict", common in continental European countries, are used with equivalent meanings in modern law, the Georgian Civil Code chose to use *delict* and *delictual*.[15]

According to Article 317, Part 1 of the Civil Code of Georgia, for an obligation to arise there shall be a contract between the parties except when the obligation arises from tort (delict), unjust enrichment or other grounds prescribed by law. Based on this provision, an obligation arising from the infliction of damage is the same as an obligation arising, for example, from a contract or unjust enrichment. If this is so, then the tortious obligation can easily be placed within the "interest of creditors" defined in the aforementioned Article 1484, and as a determinant of this interest we should only consider the scope of the received asset, however the issue may not be so simple.

It should be noted that tortious relationship is expressed in the imposition of liability for causing harm. "The basis of tort law is the principle of liability."[16] "Civil liability can be defined as the

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12 *Tsvariani B.,* Legend of Law – Antonin Scalia, Journal "Legal Methods", N 2-2018, 56 (in Georgian).

13 *Örücü E.,* Something Old, Something New in Comparative Law, Journal of International and Comparative Law, 2015, 336, <https://www.jicl.org.uk/journal/december-2015/something-old-something-new-in-comparative-law> [05.11.2025].

14 *Zimmermann R.,* The Law of Obligations, Roman Foundations of the Civilian Tradition, Oxford, 1996, 907.

15 If a tort is a wrongful act that causes damage, the delict formed by adding the suffix-ual ("ur" in Georgian) has become flexibly established in Georgian language.

16 *Tsvaigert K., Kotts H.,* Introduction of Comparative Jurisprudence to the Sphere of Private Law, Vol. 2, Contract, Unjust Enrichment, Delict*, Ninidze Th., (ed.) Sumbatashvili E., (translator),* Tbilisi, 2001, 370 (in Georgian).

obligation of a person to compensate damage caused to another",[17] but pecuniary liability for damage is not unlimited. "The award of damages based on the condition sine qua non formula or the 'but-for' test is considered overly broad in all legal systems, even in France, with certain reservations, both under the fault-based and strict liability rules, where additional criteria based on value judgment are used."[18] After Jhering, who believed that "it is not the damage itself, but the fault, that makes one liable for compensation"[19] law has developed significantly and today fault is only one, sometimes noncompulsory, element of liability, although in addition to fault, many other criteria for limiting liability are used; by the influence of insurance, the "'punitive' or 'normative' function of liability has not only dimed, but in some places has even been eliminated,"[20] especially regarding damages that are compensated under a mandatory insurance contract. We will not discuss this issue in more depth here and, in relation to the research question, we will focus on property damage, because, from the interpretation of the Supreme Court of Georgia, we must conclude that the transfer of liability to heirs for non-property damage is excluded.[21] We would also like to note that the issue of whether liability for non-pecuniary damage includes the above-mentioned "interest of creditors" will be addressed further below.

"Damage may be the result of a fortuitous combination of events, malicious intent, negligence, or force majeure,"[22] however, the change expressed in the damage to every object or good may not be corrected in such a way that this object or good returns to its original state. In the main legal systems, "the pecuniary sanction applied for the breach of an obligation always aims at restoring or compensating the injured party for the infringed right."[23] The imposition not only of compensation for actual damage, but also of additional compensation, characteristic for the common-law system, is "viewed with suspicion. For example, the English term *Punitive Damages* has been translated into German as Strafschadensersatz, which means 'awarding of criminal damage'. By this, German lawyers indicate that by imposing an amount several times higher than the actual damage, American law introduces elements of criminal penalties into the private legal space of compensation for damages, which, as a rule, is unacceptable for states with continental European legal traditions."[24] Georgia has also chosen the path aimed at restoring the situation that existed prior to the damage. Pursuant to Article 408 of the Civil Code of Georgia, increased expenses due to both property damage

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17 *Vicente D. M.,* Comparative Law of Obligations, Cheltenham, 2021, 267.

18 *Koziol H.,* Harmonisation and Fundamental Questions of European Tort Law, Wien, 2017, 129.

19 *Tsvaigert K., Kotts H.,* Introduction of Comparative Jurisprudence to the Sphere of Private Law, Vol. 2, Contract, Unjust Enrichment, Delict*, Ninidze Th., (ed.) Sumbatashvili E., (translator),* Tbilisi, 2001, 321 (in Georgian).

20 *Vicente D. M.,* Comparative Law of Obligations, Cheltenham, 2021, 267.

21 Decision of July 26, 2017 N as-650-616-2015 of the Civil Cases Chamber of the Supreme Court of Georgia, § 21.

22 *Chikvashvili Sh.,* Delictual Obligations in Civil Law, Actual Problems of the State and Law, Anniversary Collection, Tbilisi, 2003, 181 (in Georgian).

23 *Thodua, M., Whilems H.,* Law of Obligations, Tbilisi, 2006, 37 (in Georgian).

24 *Dzlierishvili. Z., Tsertsvadze G., Robaqidze I., Svanadze G., Tsertsvadze L., Janashia L.,* Contract Law, Tbilisi, 2014, 676 (in Georgian).

and human health damage shall be compensated in money. Other types of compensation are excluded by applicable law.

An exception is the right to demand the implementation of a specific action, based on the first sentence of Part 3 of Article 18 of the Civil Code of Georgia, which provides for the refutation of information that is offensive to a persons's honor, dignity, business reputation, private-life secrecy through the same mass media by which it was disseminated; or, in the case of defamation, the right to demand the publication of a notice of the court Judgment in the form established by the court, based on the first paragraph of Article 17 of the Law of Georgia "On Freedom of Speech and Expression".[25] In addition, apologizing for harm caused by defamation is expressly prohibited by paragraph 2 of the same article.

To summarize, as a general rule, "property sanctions are used to restore the property status of a person whose rights have been violated. As a rule, the scope of civil liability corresponds to the amount of damage caused, although there may be exceptions here too. It is precisely in the restoration of the victim's property that the compensatory nature of civil liability is evident."[26]

This compensation constitutes the monetary equivalent of the damage caused. Owing to the universality of money, an obligation expressed in money terms is transferable; consequently, the person liable the tortious obligation may be substituted by another.

3. Tortious Obligation as Part of Creditors' Interest

3.1. Historical Excursion

From the ages of Roman law, although in a limited way, heirs were liable for damage caused by the testetor to another person.

According to the Aquillian action,[27] the delictual claim did not pass against the heirs of the wrongdoer after his death, unless, the heirs' enrichment from the delict. Conversely, the action did survive in favour of the victim's heirs.[28]

Standard proprietary remedies, i.e. *vindicatio,* the possessory interdicts, and in classical Roman law the *actio ad exhibendum* (the action to display) were available gainst the thief or his hiers;[29] *Actio furti*[30] lay againt the thief but not against his heirs.[31]

Personal claims, including those arising from *iniuria*[32] did not pass to the heirs. The action (actio iniuriarum) had to be brought within one year. If the plaintiff delayed longer, it could be argued

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25 Legislative Herald of Georgia, 19, 15/07/2004.

26 *Dundua M.*, Correlation Between Tort and Contractual Liabilities, Journal of Law, N 1, 2009, 53 (in Georgian).

27 The standard procedure under Aquilian law that was available to an injured party for causing damage, see *Mousourakis G.,* Fundamentals of Roman Private Law, Berlin, 2012, 260.

28 *Du Plessis P. J.,* Borkowski's Textbook on Roman Law, 6th edition, Oxford, 2020, 330, 350.

29 Ibid., 337-338.

30 A lawsuit for theft. See Ibid., 338.

31 Ibid., 340.

that the wrongdoing did not cause him significant distress. A defendant who was found to be a wrongdoer was subject to *infamia*.[33] The action did not pass to or against the heirs of the parties. (D.47.10.13.pr).[34]

Mediaeval jurists considered heirs liable in all contractual claims, but delictual claims could only be brought against them for the amount of their enrichment. Such restrictive approach could not be justified with regard to claims relating to compensation for loss. A decisive change came about through the work of canonists, who considered it a question of Christian moral duty of the heirs to make amends for sins committed by the deceased. They explained passive transmissibility of delictual claims by converting them into contractual claims – the promise of the wrongdoer that he will atone for his sins, made to his confessor on his deathbed, was construed as a contract in favour of the victims of the wrongdoing.[35]

3.2. Modern Approaches

In modern continental law systems, "heir" ("héreitier", "erede", "heredero", "herdeiro", "Erbe", "erfgenaam") has a strictly legal meaning: It means a person who inherits all of the assets and liabilities of a deceased person as a universal heir, as distinguished from a "legatee" who only receives benefits under a will, and who (except in the case of legata per vindicationemi) must apply to the heir to receive the benefit. Universal inheritance, like the dominant principle of freedom of testation, is a characteristic feature of all European legal systems, including English law, and is also an inheritance from Roman law. The principle of universal inheritance is binding and cannot be revoked by the testator. Its purpose is to protect the estate of the deceased in such a way as to preserve the ability of the deceased's creditors to satisfy their claims.[36]

In Georgian "inheritance law, which is based on the principle of universality of hereditary succession, Articles 1330 and 1484, among others, have a protective function, this means that within the framework of inheritance legal relations, by replacing the testator, the heir assumes the testator's rights and obligations and it will be relieved only of those rights and obligations that clearly and unambiguously arise from the strictly personal nature of the testator's right (or obligation) and were exercisable solely with his personal participation, and intended exclusively for him."[37]

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32 In Rome, the term *iniuria*, in a broad sense, denoted a wrongful act or violation of a legal right. As the name of a specific tort, it had a more specific meaning: see *Mousourakis G.,* Fundamentals of Roman Private Law, Berlin, 2012, 263.

33 A type of sanction that was applied to various forms of indecent behavior and included certain civil restrictions. See *Mousourakis G.,* Fundamentals of Roman Private Law, Berlin, 2012, 98, fn. 58.

34 *Du Plessis P. J.,* Borkowski's Textbook on Roman Law, 6th edition, Oxford, 2020, 346.

35 *Vukotić M.,* A Comparative Perspective on the Liability of Heirs, Anali Pravnog Fakulteta U Beogradu, 1/2024, 54 <https://anali.rs/xml/202-/2024c/2024-1c/Anali_2024-1c-04.pdf> [04.11.2025].

36 *Reid K. G C.,* Schmidt J. P., Zimmermann R., Administration of Estates, *Reid K. G C., Schmidt J. P., Zimmermann R. (eds.),* Oxford, 2025, 3, 299.

37 *Berekashvili D.,* The Compulsory Share in Inheritance Law**,** A Dissertation Submitted for the Academic Degree of Doctor of Law, Tbilisi, 2020, 143 (in Georgian) <https://www.tsu.ge/assets/media/files/48/disertaciebi5/Diana_Berekashvili.pdf> [25.09.2025].

It follows from this definition that obligations capable of being discharged throug the payment of money are deemed to be in the creditors' interest and must be satisfied. Conversely, obligations of a strictly personal nature should be excluded from the interest of creditors.

It is worth noting that when we are dealing with personal obligation, we should not imagine it as the antithesis of personal right. In legal science, the issue has arisen regarding the extent to which the author's personal non-proprietary rights are "purely" personal rights[38] and whether they also serve to protect his economic interests.[39] The opinion has been expressed that "the unified and general concept of personal rights arising from the right to human dignity should include such characteristics of personality, the implementation of which requires a decision by the right-holder, they may be admitted to civil circulation and be inherited. This may encompass the right to one's name, reputation, or other personal attributes, as well as the rights pertaining to one's voice, stage persona, or likeness."[40] In addition, "the second category of rights should be distinguished as the so-called purely personal rights, which, in light of their inherent value, give rise solely to the right to protection. Article 19 of the Civil Code and the Law of Georgia 'On Freedom of Speech and Expression' should apply to this category, in accordance with the Georgian legal prohibition against excluding compensation for property damage after death, given the intrinsic connection of such rights to the personality of the right-holder. Accordingly, the heirs of a person with this type of right are only equipped with protective levers in the event of a violation, which does not imply the right to demand compensation for proprietary damage."[41] Based on these conclusions, if the possibility of inheriting personal rights can be considered an exception, as seen above, no such exception is allowed regarding the inheritance of personal obligations. It should also be noted that Part 1 of Article 453 of the Civil Code of Georgia prohibits the transfer of an obligation to heirs if this obligation could only be fulfilled with the personal participation of the testator. "Article 453 provides for one specific case when the death of the debtor results in the termination of an obligation. Specifically, this occurs when the obligation cannot be fulfilled without the debtor's personal participation. For example, if a writer dies who had a contract with a publishing house, according to which the new novel he was writing was to be published by that publishing house, but the writer dies before he can finish the novel. According to the first part of Article 453, it is impossible for the heir to fulfill this obligation."[42] In other words, the creditors' right of claim cannot extend to obligations that can only be fulfilled with the personal participation of the creditor. It should also be noted that, taking into account the context of Article 453 of the Civil Code of Georgia, this obligation is contractual and implies a personaly enforceable obligation that is related to a property interest. This cannot include, for example, a personaly

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38 "These are absolute rights that every person has and through which their dignity, honor, and individuality are respected." See *Kereselidze D.,* General Consepts of Private Law, Tbilisi, 2009, 97 (in Georgian).

39 *Katamadze N.*, Defining Non-Property Value within Personal Non-Property Rights in Civil Circulation, Jornal of Law, N 1, 2020, 167 (in Georgian).

40 Ibid., 175.

41 Ibid., 175-176.

42 *Chanturia L.*, Commentary to the Civil Code of Georgia, Book Three, Law of Obligations, *Chanturia L., (chief ed.),* Tbilisi, 2001, 565 (in Georgian).

enforceable tortious obligation such as denying information through the same media outlets through which it was disseminated. If Article 453 excludes only personaly enforceable contractual obligations from the scope of interest of the testator's creditors, while Article 1484 links this interest to any property obligation, except for those that can be performed with personal participation, **there is nothing to prevent the creditors' interest from extending to tortious obligations** as well, and from these obligations, only those that can be expressed by taking action such as denying information or the like should be excluded.

4. Limitation of Heir's Proprietary Liability to Estate Assets

As noted, the heirs are liable for the testator's obligations only up to the value of the inherited property, proportionate to their share.

It is worth noting that in both civil law and common law jurisdictions, creditors are satisfied within the limits of the inherited estate.[43] Among other things, the estate is used to satisfy the decedent's tortious obligations. However, under English law, claims for defamation and seduction are exceptions.[44] Relatively rarely, as under Austrian law, it is possible for an heir to be liable for all of the deceased's debts with their entire estate, without limitation.[45]

It is noteworthy that the history of Georgian inheritance law is familiar with the rule "Maligora" devision, which should be considered the germ of the principle of universal inheritance. "'Maligora' division meant satisfying the creditors of a deceased person in the event of his or her insolvency according to the ratio of his or her assets to his or her debts. By *dividing* the debtor's estate into 'Maligora', creditors were satisfied according to the proportion of the deceased debtor's estate to his debts. The debt was not transferred to the property of the debtor's heirs. If the debtor's property was not sufficient to pay the debt, part of the debt remained unpaid. Articles 137-138 of one of the books of Book of Law of Vakhtang VI established the rule for *dividing* property into 'Maligora' upon the death of a debtor: '137. If a man is insolvent and has no property remaining, he must divide what remains of his estate equally among his creditors, regardless of the amounts owed…'. '138. If a woman has nothing left and there is also some property left, a small amount of it must be given to that woman and distributed to the other debtors in 'Maligora'. However, if there is nothing left of the goods, the woman is not required to contribute. If any goods or purchased items remain, the debtor shall receive from them; otherwise, the master shall not be obliged to provide from the estate.'"[46]

From the above, it is evident that in Georgia, the interests of the deceased's creditors have been protected since ancient times, and their claims were satisfied within the limits of the estate.

According to Article 1328 of the current Civil Code, the estate (inheritance property) includes the totality of both the property rights (inheritance assets) and obligations (inheritance liabilities) of

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43 Supra note 36.

44 *Schwind M. A.,* Liability for Obligations of the Inheritance, in: International Encyclopedia of Comparative Law, vol. V, Succession*, Neumayer K. H., Drobnig U*. (eds.), Tübingen, 2018, 8-6.

45 *Lintl A.,* Austria, in: European Succession Laws, 2nd edition, *ed. by Hayton D*., Cornwall, 2002, 34.

46 *Ujmajuridze I.,* "Maligora" Division, in: Encyclopedia "Georgia", Fifth Volume, Tbilisi, 2023, 482 (in Georgian).

the testator, which he had at the time of death. "The estate includes and represents the property rights of the testator (right of ownership, right of possession, right of construction, intangible property, etc.). The estate also includes those property obligations that the testator had and did not fulfill during his lifetime (for example, the obligation to repay money borrowed by the testator)."[47]

In addition, pursuant to Article 1330 of the Civil Code of Georgia, "not all property rights and obligations are included in the estate. In particular, the inheritance does not include rights and obligations that, due to their personal nature, can only belong to the testator."[48]

We can conclude that the testator's creditors may only direct their claims toward the estate assets that the testator owned at the time of death. It clearly follows from the above that **creditors cannot demand the fulfillment of a tortious obligation from the personal property of the heirs.**

5. Procedural Aspects of Satisfying Creditors' Interests

5.1. Deadlines for Submitting Requests to Satisfy Creditors' Interests

Claims that were unknown at the time of the estate settlement, but brought against the heirs at a later date, may put them under unforeseen financial pressure.[49] Therefore, one way to limit the liability of heirs is through the statute of limitations.

As noted, in the main legal systems, tortious obligations are not excluded from inheritance liabilities. As a rule, creditors must file claims for such obligations within the statute of limitations, which is determined by the laws of each country.

For example, in Hungary, the statute of limitations for creditors to bring a claim is 5 years from the date of taking possession of the estate. These claims include all unsatisfied obligations that are not of a personal nature, regardless of whether they were due at the time the estate was opened or are due for performance at a future date.[50]

Under German law, creditors who raise their claims more than five years after the moment of death are faced with an objection of "keeping silent" (Verschweigungseinrede): the heir can refuse to satisfy their claims if the assets of the estate have been exhausted in order to pay other estate debts. [German Civil Code (GCC), § 1974].[51]

Under the new Turkish Civil Code, which came into effect on January 1, 2002, heirs are fully liable for the debts of the deceased, even if these debts exceed the value of the deceased's estate. In

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47 *Akhvlediani Z.,* Commentary to the Civil Code of Georgia, Fifth Book, Family Law, Inheritance Law, Transitional and Final Provisions of the Civil Code, *Chanturia L., (chief ed.),* Tbilisi, 2000, 383 (in Georgian).

48 Ibid., 385.

49 *Vukotić M.,* A Comparative Perspective on the Liability of Heirs, Anali Pravnog Fakulteta U Beogradu, 1/2024, 65 <https://anali.rs/xml/202-/2024c/2024-1c/Anali_2024-1c-04.pdf> [04.11.2025].

50 *Reid K. G C., Schmidt J. P., Zimmermann R.,* Administration of Estates, *ed. by: Reid K. G C., Schmidt J. P., Zimmermann R.*, Oxford, 2025, 288.

51 *Vukotić M.,* A Comparative Perspective on the Liability of Heirs, Anali Pravnog Fakulteta U Beogradu, 1/2024, 65 <https://anali.rs/xml/202-/2024c/2024-1c/Anali_2024-1c-04.pdf> [04.11.2025].

addition, the heir may renounce his share within three months of being notified of the testator's death. Heirs can also request the official destruction of the estate if none of them are willing to accept the inheritance.[52] Accordingly, creditors must be able to enforce their claims within the prescribed period; otherwise, they may forfeit their right to enforcement against the estate.

It is noteworthy that under Belgian law, the heir has the right to exercise the option[53] within a period of 30 years. Since the menner in which an inheritance is accepted impacts the heir's liability for the testator's obligations, the outcome of claims against the estate may also be linked to the expiration date of this period.[54]

According to Article 1320 of the Civil Code of Georgia, the day of the death of the decedent or the day on which a court's decision declaring the person dead enters into force shall be deemed to be the time of the opening of the estate. "The time of opening the estate is crusial for determining the number of heirs entetiled to receive the estate, the composition of the estate, the acceptance or renunciation of the inheritance, timelines for filing claims by creditors, issuing inheritance certificates, etc."[55]

According to Article 1488 of the same Code, 1. The decedent's creditors shall present their claims to the heirs who received the estate within six months after the day when they obtained knowledge of the opening of the estate, irrespective of whether or not the claims are due.

2. If the decedent's creditors had no knowledge of the opening of the estate, they shall present their claims to the heirs within one year after the claims fall due.

3. Failure to comply with these rules shall result in the forfeiture of the creditor's claim.

"Different deadlines for creditors' claims are set depending on whether the creditors were aware of the opening of the estate. Creditors who are aware of the opening of the estate must submit their claims within six months from the date they became aware of its opening. However, it does not matter whether the deadline for the request has passed or not."[56]

From the practice of the Supreme Court of Georgia, we can point to a case[57] according to which, "On June 20, 2007, at approximately 4:25 p.m., on the third kilometer of the … highway, the Mercedes-Benz 200 …, driven by T.M.-dze, moved to the opposite right side and collided with a moving Ford Transit …, driven by O.P.-dze.

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52 *Ansay T.*, Law of Succession, in: Introduction to Turkish Law, *ed. by Ansay T., Wallace D. Jr. (eds.)*, 6th Edition, Alpen aan den Rijn, 2011, 144.

53 The right to determine the form of inheritance. The option cannot be determined by the deceased. See *Verboke A., Zantbek von A.*, Belgium, in: European Succession Laws, 2nd edition, *ed. by Hayton D.*, Cornwall, 2002, 37-38.

54 *Reid K. G C., Schmidt J. P., Zimmermann R.,* Administration of Estates, ed. by: *Reid K. G C., Schmidt J. P., Zimmermann R.,* Oxford, 2025, 110.

55 *Akhvlediani Z.,* Commentary to the Civil Code of Georgia, Fifth Book, Family Law, Inheritance Law, Transitional and Final Provisions of the Civil Code*, Chanturia L., (chief ed.),* Tbilisi, 2000, 375 (in Georgian).

56 Ibid., 516.

57 Decision of October 7, 2017 № as-143-136-10 of the Civil Cases Chamber of the Supreme Court of Georgia.

The driver of the Mercedes, T. M-dze, died as a result of the collision.

According to the conclusion of the auto-technical examination conducted on the case, ... T.M.'s actions did not comply with the requirements of Article 30.1 of the Traffic Rules. Had these requirements been observed, the car accident would have been avoided. ...

As a result of the car accident, O.P.-dze received serious, life-threatening injuries, namely, bilateral dislocations of the nasal bone, both cranial bones, upper jaws, lower jaw articular heads, dislocation of the right humerus, hematoma of both eye sockets, severe skull trauma, brain contusion, multiple facial abrasions.

... O.P. paid 2089.88 GEL for the treatment of the damage caused to his health. 108 GEL was paid for parking the car and calling a tow truck, and the damage to the car amounted to 6060 GEL.

I., L. and A. M-dze are the heirs of T. M-dze, who actually received the inheritance.

The [Appellate] Chamber, in accordance with Article 1320 of the Civil Code of Georgia, considered that the estate of T. M. was opened on June 20, 2007, and O. P. did not submit a claim to the heirs until December 20, 2007, he did not file a lawsuit nor did he apply to state bodies for the protection of civil rights. … . Accordingly, O.P.'s claim is time-barred."

When considering the cassation appeal, the Cassation Chamber emphasized that "the Court of Appeal did not satisfy the plaintiff's request due to the expiration of the statute of limitations. In reaching this conclusion, the court relied on Parts 1 and 3 of Article 1488 of the Civil Code, according to which, the testator's creditors must submit a claim within six months from the date of notification of the opening of the estate to the heirs who received the inheritance, regardless of the deadline for making the claim. Failure to comply with this rule results in the loss of the right to claim. The Chamber believes that the specified norm establishes the deadline for filing a claim – request, and not the statute of limitations. The statute of limitations refers to the period of time during which a creditor can seek satisfaction of a claim by filing a lawsuit in court. Once this period has expired, the debtor may refuse to satisfy the creditor by invoking the statute of limitations. The claim is usually submitted directly to the party. Failure to submit the claim within the prescribed period creates grounds for the court's refusal to satisfy the claim. A claim submitted within the prescribed period may not be satisfied by the court if the statute of limitations has expired and the debtor makes an indication to this effect."[58,59]

5.2. Burden of Proof, Evidence

As noted above, a tortious obligation takes the form of a sanction and is usually imposed on a person as a result of legal proceedings. This obligation can be complicated to prove when the obligors are heirs. It is anticipated that the heirs will raise a counter-argument to dismiss the claim, among other reasons, reference to the statute of limitations. It is worth noting that it is not the heir's right, but

[58] Discriptive and motivation parts of mentioned decision.

[59] The Court of Cassation also noted the following in its ruling: "It can be said that the court has misunderstood the meaning of these institutions and, accordingly, misinterpreted the content of the applied norm, however, this circumstance cannot serve as a basis for annulling the decision, because the deadline for submitting a claim has expired, which is why the plaintiff has lost the right to claim against the debtor."

rather his obligation, to refer to the statute of limitations on a claim. If he does not refer to the fact of statute of limitations, he will lose the opportunity to release the testator from his tortious liability on this basis.[60]

The burden of proof for the claim set forth in Article 1484 of the Civil Code of Georgia rests with the creditors of the testator.[61] The case reviewed by the Supreme Court of Georgia demonstrated that the evidence to be presented by the creditor consists of the conclusion of an auto-technical examination. However, since this ruling did not address issues of decisive importance for the confirmation of the tortious obligation, ultimately, the lawsuit was dismissed on the grounds of the statute of limitations, we refer to the judgment of the Chamber of Civil Cases of the Tbilisi City Court, dated February 27, 2025.[62]

An analysis of the decision reveals that the lawsuit was filed against the heirs of a person who caused a traffic accident and died as a result of the accident. In addition, as a result of the accident, the plaintiff's property, in particular, a specialized vehicle, suffered damage in the amount of 95,000 GEL.[63] Compensation for damages was imposed on the heirs within the limits of the inherited assets, in proportion to each heir's share. It follows from Article 415, as a legal consequence, that the damage must be apportioned between the injured party and the wrongdoer in proportion to their respective liability. …

In the clarified response, the defendant … also notes that the defendants are not creditors pursuant to Article 1484 of the Civil Code of Georgia. A creditor may arise in private-law relationships on the basis of a contract; in tortious obligations, however, a person can only be considered a creditor if there is a court decision – otherwise, they cannot be deemed a creditor in tort cases.

At the main court session, the defendant's representative ... also noted that the lawsuit was time-barred."[64]

Along with the parties' explanations, the court mainly relied on the following evidence presented in the case: death certificate, inheritance certificate, registration card of the start of the investigation, expertise report of the Forensic-Criminal Department of the Ministry of Internal Affairs of Georgia, expert conclusions of the Levan Samkharauli National Bureau of Forensics LEPL with photographs, victim/witness interview protocol.

The court noted that "despite the fact that the summary document adopted in the criminal case has not been submitted, the court will evaluate the interrogation protocols given during the investigation as legal written evidence, in conjunction with other evidence." The court also

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60 See Chapter 5.1 above, at 56 fn, Additionaly: decision of April 18, 2017 N as-171-160-2017 of the Civil Cases Chamber of the Supreme Court of Georgia and other cases mentioned there (in Georgian).

61 Decision of March 4, 2002 N 3k/441-01, of the Great Chamber of the Supreme Court of Georgia, motivation section, (in Georgian).

62 An electronic copy of the decision, in depersonalized form and including the case number, was provided to me by the person responsible for issuing public information at the Tbilisi City Court on September 22, 2025, under case number N 2-0185/11815211.

63 The plaintiff calculated the damages as the difference between the price of the vehicle before the damage and the price in the damaged condition.

64 The descriptive section of the decision mentioned above.

emphasized that: "The defendant has not presented any evidence proving the commission of unlawful and criminal acts by ---------.[65] The evidence presented concerns only the issue of -----[66] committing unlawful and guilty act.[67]

The court assessed the culpability of the heir itself. According to the legal assessment part of the Judgment: "The illegality of the actions has been established by the expert opinion, namely, according to the opinion of the Forensic Division of the Forensic Department of the Ministry of Internal Affairs of Georgia dated February 10, 2021, The expert categorically concluded that the actions of the driver ---------- did not comply with the requirements of Article 32, Paragraph 1 of the Law of Georgia 'On Traffic', if they had been followed, the traffic accident would not have occurred.

In addition, an interrogation protocol is presented, which reflects the explanation of an eyewitness ----------. According to him, the cement truck was hit by a *Mitsubishi* car moving at high speed, which moved into the opposite lane. The defendant has not presented any evidence to contradict this evidence."

The court also noted that: "When assessing guilt, the degree of will and care of the participant in the civil circulation is examined. This determines whether he acted intentionally or negligently. In addition, a person's guilt is not determined solely by his subjective attitude towards the outcome of his action. For the purpose of civil liability, objective criteria are taken into account, along with the person's subjective attitude, that is, when considering a person guilty for the purpose of liability, the circumstances operating in a specific environment and the impact of these circumstances on the person's actions are also examined. The court must determine the issue of the assessment of the committed person's own actions and mental attitude towards the action – guilt – through a systematic and logical interpretation of the norms of civil legislation and apply the relevant norm to the factual situation presented by the parties. ... .

As a result of the assessment of the circumstances of the case, the court concludes that the damage, which was manifested in the damage to the special vehicle belonging to the plaintiff, was caused as a result of the guilty actions of the defendant's testator ------. There is no evidence presented in the case that --- was driving the vehicle in a condition that would exclude his guilt. ... .

Despite the defendant's statement in the response, it could not be proven that any other person, including the driver of the plaintiff's car, participated in causing the damage, in addition to ----."

In summary, it should be noted that in cases of the type described, the decisive evidence is the expertise conclusion, which establishes that The actions of the heir were not in compliance with the provisions of the Law of Georgia "On Traffic".[68] Had these provisions been adhered to, the traffic accident could have been prevented.

In addition to causing damage as a result of a traffic accident, in cases of other torts, such as causing harm to human health, the expert's conclusion establishing that which establishes that the

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65 Apparently, the plaintiff's driver.

66 Apparently, the testator.

67 Regarding the statute of limitations, the court noted the following in the descriptive part of the decision: "The court will not regard the defendant's submission regarding the statute of limitations, made at the oral hearing, as a factual circumstance submitted belatedly."

68 Legislative Herald of Georgia, webside, 03/01/2014.

deceased's actions at the time of causing the harm did not constitute wrongdoing and that there are no circumstances precluding wrongdoing or guilt, such as, for example, Self-defence, extreme necessity, mental disorder of the deceased, and others.

It should also be noted that in Georgia, obtaining evidence by the plaintiff in a tort lawsuit filed against heirs will be associated with practical difficulties. Torts resulting in the death of the guilty person usually contain elements of a crime. According to Article 56, Part 1 of the Criminal Procedure Code of Georgia,[69] the victim enjoys the rights and obligations of a witness, therefore, during the investigation, he will not have access to criminal case materials, which contain the most important evidence or case materials containing information important for obtaining evidence. Based on the above, the court's assistance in obtaining evidence may prove crucial for the plaintiff.

6. Review of Georgian and German Judicial Practice Examples

Given the laconic nature of Article 1484 of the Civil Code of Georgia, judicial practice is of irreplaceable importance in determining the content of "creditors' interests." The role of the court is all the more important because "the obligation to compensate for the damage incurred in the event of a breach of obligation creates the content of the sanction. Therefore, the more the interests of both parties are taken into account in this content, the more effective the sanction is."[70] Unfortunately, the practice related to the tort liability of heirs in Georgia is scarce, therefore we will again refer to the above-mentioned judgment of the Tbilisi City Court. In the aforementioned decision, the court explained that "pursuant to Article 1484, Part 1, the heirs are obliged to satisfy all creditors within the limits of the estate assets, in proportion to their share in the assets. A creditor is understood as any party to a contractual relationship who has a right of claim against the deceased person, as well as any person with any impersonal claim that arose on the basis of law or tort."

In making this interpretation, the court also relies on the interpretation established in the practice of the Supreme Court of Georgia, according to which: "The most common form of material-legal succession is inheritance relations, and in this case, the scope of the heir's liability is determined by Article 1484 of the Civil Code." (see DSCG: N as-650-616-2015, 26.07.2017, § 21, N as-567-538-2015, 16.10.2015, §1.4., N as-461-435-2014, 30.08.2014, §33).

According to the legal inheritance certificate issued on October 29, 2021, the entire estate is valued at 784,440 GEL. The claim is for 95,000 GEL. Accordingly, the received inheritance asset covers the tortious obligation confirmed by the court."

From this decision, we must conclude that the "interests of creditors" under Article 1484 of the Civil Code of Georgia include, without limitation, the heirs' property-related tort obligations. In addition, where there are multiple heirs, each heir's liability is determined in proportion to their respective share of the estate. The liability of the heirs is several, not joint.

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69 Legislative Herald of Georgia, 31, 03/11/2009.

70 *Zoidze B.,* Property-Related Liability for Breach of Obligations. Tbilisi, 1989, 7 (in Georgian).

Regarding the scope of limitation of heir liability, an interesting case can be found in German judicial practice, the decision was rendered by the German Federal Supreme Court (Bundesgerichtshof, BGH) on February 20, 1962.[71] According to the circumstances of the case, as a result of a traffic accident caused by the defendant, the person was fatally injured and died 4 hours later. The deceased's only heirs were: his wife and daughter from his first marriage (each received ½ of the estate). The deceased had appointed an executor of the will. The deceased was an entrepreneur and ran a chocolate factory. At the time of the incident, he was building his own factory and had ordered equipment valued approximately DM 900,000. He had made an advance payment. The order also included equipment ordered by two other companies, valued approximately DM 332,000 (for which the deceased had paid DM 75,000 in advance). After the entrepreneur's death, the orders were canceled by a joint decision of the executor and heirs. The suppliers found other buyers for the machine but demanded DM 61,000 in damages, representing lost profits and the commission paid to their representative. During the negotiation process, the heirs confirmed that they would pay DM 10,000 in compensation. The executor filed a lawsuit, seeking the imposition of DM 10,000 on the defendant. During the hearing, the defendant argued that the obligation to compensate the supplier arose only after the death, and that the heirs independently decided to withdraw from the project and refuse the ordered equipment. The termination of the contract with the suppliers did not cause any harm to the entrepreneur, nor was it related to his death. Moreover, the deceased had no claim against the offender that could be transferred to the heirs, the plaintiff filed a third-party claim, which was not causally related to the causative circumstance.

The claim was granted by the trial court. The court of appeals upheld the judgment. The cassation appeal was rejected by the BGH. The Supreme Court noted that if the entrepreneur had informed his heirs before his death that they would not receive the ordered equipment, the heirs could not have claimed compensation from the wrongdoer to satisfy the supplier's claim. According to the court's reasoning, the deceased's estate, which under § 1922 of the Civil Code passes to his heirs, includes all legal relationships (wertbezogene Rechtsverhältnis) that a person had at the time of death. This also includes rights and obligations that arose after the opening of the estate, insofar as they relate to the legal relationships in which the deceased was engaged at the time of transfer. In particular, according to § 1922, paragraph 2 of the BGB, heirs remain liable for obligations arising after the decedent's death, even when the decedent merely set in motion the circumstances giving rise to the obligation, such as causing damage, yet the resulting liability materialized only after the estate was opened. However, this rule does not apply in the opposite case, where harm was caused to the deceased, which led to a reduction in his former estate only after the estate was opened. This damage does not affect the deceased personaly, so it cannot be passed on to heirs.

[71] Case VI ZR 65/61 ob. NJW 1962, N 20, 911-912, See cit. *Borysiak W.,* § 18 – Succession of Claims for Compensation for Property Damage Resulting from the Death of a Business Owner in: Shaping the Status of Heirs by Contractual Components under the Polish and German Inheritance Law, Comparative Challenges and the Perspective of Approximation of Legal Systems, *Bartosz K., Macierzyńska-Franaszczyk E., Rott-Pietrzyk E., Fryderyk Z. (eds.)*, Osnabrück, 2023, 207, fn. 1.

The ruling has been endorsed in German legal doctrine. In this regard, it has been suggested that the issue should be assessed on a case-by-case basis to determine whether the deceased would have had the right to bring a claim against the injured party during their lifetime, or whether the potential harm could only be suffered by the heirs. Heirs may file claims for damages against the party responsible for the decedent's death only to the extent that the decedent could have asserted such claims during their lifetime, even if the consequences of the damaging event affected the decedent's property (i.e., estate) even after his death. In this regard, German doctrine points to the heritability of legal positions (die schwebenden Rechtslagen). If the violation of the legitimate interests of the deceased occurred during his or her lifetime, even if the damage occurred only after his or her death, the heirs will still have the right to demand compensation from the person who caused the damage. However, services provided by suppliers that were terminated due to the decedent's death do not constitute a 'loss of the deceased' and do not give rise to any claims for damages against the heirs, because the suppliers are third parties with respect to the person who caused the damage resulting in death, to whom that person owed no liability.[72]

Comparing the aforementioned decision with Polish law, the researcher notes that: in Polish law, claims for damages (regardless of whether they arise from the provisions of tort law or contract law) are inherited on general terms. The heirs are subject to claims and obligations for compensation, e. g. for compensation for property damage resulting from the destruction or damage to someone else's property, an infringement of personal rights or the non-performance or improper performance of an obligation. A claim for damages is transferred to the heirs of the injured party, and the obligation to compensate for it is transferred to the heirs of the perpetrator. Such claims are transferred to the heirs of the entitled party regardless of the nature of the obligation that has not been performed, the source of the obligation, and whether the rights and obligations resulting from a specific agreement were closely related to the parties.

Not only the deceased person's rights and obligations are inherited, but also the legal position they were in at the time of their death. … . This also applies to legal situations related to compensation law, which is clearly visible especially in a situation where, in certain factual circumstances before the deceased's death, some of the conditions for the liability in tort were fulfilled, but not all.[73]

For the purpose of comparison with Georgian law, we can note that under European legislation and practice, not only rights and obligations arising from a tort are transferred to heirs, but also the decedent's last expressed will and any ongoing contractual relationships entered into by him.

It is also worth noting that under German law, co-heirs are solidary debtors [§ 2058, GCC], which means that an estate creditor can sue any co-heir for the full amount of his claim. However, German law grants co-heirs the possibility to limit their liability to their share in the estate so long as the estate remains undivided [§ 2059, GCC]. This means that a creditor who obtains judgment against one co-heir will only be able to enforce it through attachment of his share in the inheritance (if

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[72] *Borysiak W.,* § 18 – Succession of Claims for Compensation for Property Damage Resulting from the Death of a Business Owner in: Shaping the Status of Heirs by Contractual Components under the Polish and German Inheritance Law, Comparative Challenges and the Perspective of Approximation of Legal Systems, *Bartosz K., Macierzyńska-Franaszczyk E., Rott-Pietrzyk E., Fryderyk Z. (eds.),* Osnabrück, 2023, 207-212.

[73] Ibid., 213-214

objection of undivided estate is raised, *Teilungseinrede*). A creditor who wishes to enforce his claim in the assets of the estate has to sue all co-heirs jointly and obtain judgment against all of them. (*Gesamthandsklage*). These rules clearly show that in case of co-heirs settlement of estate debts prior to distribution of the estate is the preferable solution.[74] A similar rule follows from the first sentence of Article 1334 of the Civil Code of Georgia, according to which: If there are several heirs, the estate, until it is divided among them, shall belong to all the co-heirs as coparcenary. In addition, Article 1484 provides for the liability of heirs within the limits of the inherited estate, therefore, it is impossible to satisfy creditors through the courts before the division of the estate, but heirs can voluntarily satisfy creditors, among others, and fulfill tortious obligations before the division of the estate.

7. Conclusion

Collecting debts in favor of creditors upon their request is not a means of protecting the rights of heirs; it is aimed at satisfying the interests of the testator's creditors.[75] This study focuses on Article 1484 of the Civil Code of Georgia, which defines the scope of satisfying a deceased person's creditors' interests. The conclusion reached is that heirs' liability for monetary tort obligations is limited to the inherited estate and apportioned according to each heir's share, rather than being joint. The article provides a detailed discussion of procedural issues arising in tort claims against heirs, clarifying the types of evidence required at trial and their relevance to satisfying tort victims' property claims. Emphasis was placed on the limited judicial practice and its crucial role in the interpretation of the norm. It was further observed that bringing claims for tortious obligations is often associated with procedural challenges. However, it should also be noted that the relative rarity of filing lawsuits to enforce tortious obligations may stem from creditors considering it unjustified to pursue damages resulting from the death of the heir responsible for the act.

This study addresses an issue that has received little attention in legal scholarship and judicial practice, and therefore should provide valuable material for further research on the tort liability of heirs.

Bibliography:

1. Civil Code of Georgia, 26/06/1997.
2. Criminal Procedure Code of Georgia, 09/10/2009.
3. Law of Georgia "On Freedom of Speech and Expression", 24/06/2004.
4. Law of Georgia "On Traffic", 24/12/2013.
5. *Akhvlediani Z.,* Commentary to the Civil Code of Georgia, Fifth Book, Family Law, Inheritance Law, Transitional and Final Provisions of the Civil Code, *Chanturia L., (chief ed.),* Tbilisi, 2000, 375, 383, 385, 516 (in Georgian).

[74] *Vukotić M.,* A Comparative Perspective on the Liability of Heirs, Anali Pravnog Fakulteta U Beogradu, 1/2024, 62-63 <https://anali.rs/xml/202-/2024c/2024-1c/Anali_2024-1c-04.pdf> [04.11.2025].

[75] *Zaika Y. O., Kukhariev O. Ye., Skrypnyk V. L., Mytnyk A. A.,* Peculiarities of Protection of Rights and Interests of Heirs: Theoretical Aspects, International Journal of Criminology and Sociology, 2021, 10, 361 <https://lifescienceglobal.com/pms/index.php/ijcs/article/view/7084/3703> [05.11.2025].

6. *Berekashvili D.,* The Compulsory Share in Inheritance Law**,** A Dissertation Submitted for the Academic Degree of Doctor of Law, Tbilisi, 2020, 143 (in Georgian) <https://www.tsu.ge/assets/media/files/48/disertaciebi5/Diana_Berekashvili.pdf> [25.09.2025].
7. *Bichia M.,* The Content of the Right in the Civil Law, Journal of Law, №2, 2023, 41 (in Georgian).
8. *Chanturia L.,* Commentary to the Civil Code of Georgia, Book Three, Law of Obligations, *Chanturia L., (chief ed.),* Tbilisi, 2001, 565 (in Georgian).
9. *Chikvashvili Sh.,* Delictual Obligations in Civil Law, Actual Problems of the State and Law, Anniversary Collection, Tbilisi, 2003, 181 (in Georgian).
10. *Dundua M*., Correlation Between Tort and Contractual Liabilities, Journal of Law, №1, 2009, 53 (in Georgian).
11. *Katamadze N.*, Defining Non-Property Value within Personal Non-Property Rights in Civil Circulation, Jornal of Law, N 1, 2020, 167, 175-176 (in Georgian).
12. *Kereselidze D.,* General Consepts of Private Law, Tbilisi, 2009, 97 (in Georgian).
13. *Thodua, M., Whilems H.,* Law of Obligations, Tbilisi, 2006, 37 (in Georgian).
14. *Tsvaigert K., Kotts H.,* Introduction of Comparative Jurisprudence to the Sphere of Private Law, Vol. 2, Contract, Unjust Enrichment, Delict, *Ninidze Th., (ed.) Sumbatashvili E., (translator),* Tbilisi, 2001, 287, 321, 370 (in Georgian).
15. *Tsvariani B.,* Legend of Law – Antonin Scalia, Journal "Legal Methods", №2-2018, 56 (in Georgian).
16. *Ujmajuridze I.,* "Maligora" Division, in: Encyclopedia "Georgia", Vol. 5th, Tbilisi, 2023, 482 (in Georgian).
17. *Zoidze B.,* Property-Related Liability for Breach of Obligations. Tbilisi, 1989, 7 (in Georgian).
18. *Ansay T.,* Law of Succession, in: Introduction to Turkish Law, *Ansay T., Wallace D. Jr. (eds.),* 6th Edition, Alpen aan den Rijn, 2011, 144.
19. *Borysiak W.,* § 18 – Succession of Claims for Compensation for Property Damage Resulting from the Death of a Business Owner in: Shaping the Status of Heirs by Contractual Components under the Polish and German Inheritance Law, Comparative Challenges and the Perspective of Approximation of Legal Systems, *Bartosz K., Macierzyńska-Franaszczyk E., Rott-Pietrzyk E., Fryderyk Z. (eds.),* Osnabrück, 2023, 207-212, 213-214.
20. *Du Plessis P. J., Borkowski's* Textbook on Roman Law, 6th edition, Oxford, 2020, 330, 337-338, 340, 346, 350.
21. *Geneviéve V.,* Tort Liability, in: Introduction to French Law, *Bermann G. A., Etienne P. (eds.),* Alphen aan den Rijn, 2008, 244.
22. *Koziol H.,* Basic Questions of Tort Law from a Germanic Perspective, Wien, 2012, 1.
23. *Lintl A.,* Austria, in: European Succession Laws, 2nd edition, *ed. by Hayton D*., Cornwall, 2002, 34.
24. *Mousourakis G.,* Fundamentals of Roman Private Law, Berlin, 2012, 98, 260, 263.
25. *Örücü E.,* Something Old, Something New in Comparative Law, Journal of International and Comparative Law, 2015, 336 <https://www.jicl.org.uk/journal/december-2015/something-old-something-new-in-comparative-law> [05.11.2025].
26. *Reid K. G C., Schmidt J. P., Zimmermann R.,* Administration of Estates, *Reid K. G C., Schmidt J. P., Zimmermann R., (eds.),* Oxford, 2025, 110, 288, 299.
27. *Verboke A., Zantbek von A.,* Belgium, in: European Succession Laws*,* 2nd edition, *ed. by Hayton D.,* Cornwall, 2002, 37-38.
28. *Vicente D. M.,* Comparative Law of Obligations, Cheltenham, 2021, 267.

29. *Vukotić M.,* A Comparative Perspective on the Liability of Heirs, Anali Pravnog Fakulteta U Beogradu, 1/2024, 54, 62-63, 65 <https://anali.rs/xml/202-/2024c/2024-1c/Anali_2024-1c-04.pdf> [04.11.2025].
30. *Wacke A.,* Casum Sentit Dominus: Liability for Accidental Damages in Roman and Modern German Law of Property and Obligation (A shortened and revised English version of article) 1 <https://heinonline.org/HOL/LandingPage?handle=hein.journals/jsouafl1987&div=49&id=&page=> [23.09.2025].
31. *Zaika Y. O., Kukhariev O. Ye., Skrypnyk V. L., Mytnyk A. A.,* Peculiarities of Protection of Rights and Interests of Heirs: Theoretical Aspects, International Journal of Criminology and Sociology, 2021, 10, 361. https://lifescienceglobal.com/pms/index.php/ijcs/article/view/7084/3703 [05.11.2025].
32. *Zimmermann R.,* The Law of Obligations, Roman Foundations of the Civilian Tradition, Oxford, 1996, 154, 907.
33. Judgment of February 27, 2025 of the Chamber of Civil Cases of the Tbilisi City Court.
34. Decision of July 26, 2017 № as-650-616-2015 of the Civil Cases Chamber of the Supreme Court of Georgia.
35. Decision of April 18, 2017 № as-171-160-2017 of the Civil Cases Chamber of the Supreme Court of Georgia.
36. Decision of October 16, 2015 № as-567-538-2015 of the Civil Cases Chamber of the Supreme Court of Georgia.
37. Decision of October 7, 2017 № as-143-136-10 of the Civil Cases Chamber of the Supreme Court of Georgia.
38. Decisison of March 4, 2002 № 3k/441-01, of the Great Chamber of the Supreme Court of Georgia.
39. BGH, 20.02.1962, VI ZR 65/61 ob. NJW 1962, N 20, 911-912.

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Privatization as a Historical Component of the Acquisition of Land Ownership Rights in Georgian Law

The right to property is a constitutionally guaranteed right, the full realization of which, both for the state and for each subject of civil turnover, is the most important factor in the development of a number of directions, which in turn implies the emergence and realization of the right to property over real estate.

In order to ensure the realization of ownership rights to land plots, within the framework of the measures taken by the state, multiple mechanisms for the acquisition of ownership rights have been developed, as well as many levers for ensuring and guaranteeing the full existence of this right in its content, including land reform, numerous cases of privatization of state-owned real estate, and the transfer of relevant documents confirming the right to private law entities.

The aim of the current study is to identify the fundamental right of ownership, the historical way of the acquisition of property rights, the importance of privatization and the state measures surrounding it in Georgian property law, which still affect the registration of the property rights of individuals to immovable property in the public registry and the strengthening of citizens' property rights in general. As a result, the role of measures implemented by the state will be revealed in relation to the origin of existing or potential rights of citizens, the legal bases for the registration of property rights and the scope of the demand.

The subject of the research is the discussion of the historical component of land reform, presented as one of the main ways of obtaining ownership rights over real estate, in particular over land plots, in the form of privatization, as a measure of specific importance, and a summary of the results under past and current legislative regulation, in the wake of the current legal order.

Keywords: *Real Estate, Acquisition of Property Rights, Land Reform, Privatization of Real Estate, Documents Certifying Title, Registration of Property Rights, Legal Status of Private Owners.*

1. Introduction

In the countries of the Soviet Union, the absence of private property rights for individuals and legal entities was a natural and usual phenomenon. A person did not have the right to produce his own goods, since real estate was the property of the state, and every citizen was obliged to pursue agricultural activities for the realization of the collective ideology and to hand over the outcome of his

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power, hard work and effort to someone else, in this case, to the state. However, after the collapse of the Soviet Union, one of the factors causing this was the strong desire of citizens to have something of their own, to create and produce on their own land, and to fully and properly use the results of their hard work for their families, which ultimately led to the inefficiency and even collapse of the system. In order to transition from socialist economic systems to a modern economic market, states considered the privatization of state property as the main direction of reforms.

In Georgia, too, notably, the official privatization of state-owned real estate began after the collapse of the Soviet Union. Despite the fact that before the establishment of collective farms, Georgian peasants considered certain territories to be their property, and this was characteristic of the population of the entire territory of Georgia at that time, citizens did not have the specified real estate transferred to them in official documents. Within the framework of Soviet reality, despite the fact that the private property of a citizen was only his personal and necessary belongings,[1] people still did not suppress their inner desire to acquire private ownership of real estate, which was expressed in the fact that the peasants themselves took care of such territories that were not cultivated collectively and were not owned by the state during the Soviet Socialist Republic and secretly engaged in family farming. The aforementioned result was that after the collapse of the Soviet Union, citizens actually distributed certain territories of their own free will and refrained from encroaching on each other's private property. Later, when the state officially began the process of transferring real estate considered its property to citizens, that is, privatization, people received documents confirming both ownership and lawful possession of the territories that they already considered their property and cared for as their own, as a result of the privatization of land, which, even after many decades, still constitutes a reliable legal basis for the legal registration of property rights in the public registry.

In the post-Soviet period, the privatization of state property in Georgia, along with other reforms, with its diversity, turned out to be a fundamental component in the issues of the acquisition of property rights to real estate. In the wake of this multi-year process, citizens had to face numerous difficulties and pressures in order to protect their property rights and have the opportunity to realize this right fully, as established by law and guaranteed by the Constitution. This article deals with the clarification of the above-mentioned process, the identification and characterization of difficulties, as well as this fundamental and historical element of the acquisition of property rights, based on the reconciliation of existing and past legislative regulations and practical components.

The current research is conducted using historical-legal, normative, systemic analysis and synthesis methods, where one of the ways of acquiring ownership of real estate – privatization, will be discussed, with all the aspects of development that are characteristic of it and which ultimately had a turning point in the process of the emergence of citizens' property rights and the full realization of this right in the legal reality of post-Soviet Georgia, which is still a topical and problematic issue from a scientific and practical point of view.

[1] Georgian Soviet Encyclopedia, Vol. 8, Tbilisi, 1984, 587 (in Georgian).

2. The Essence of the Privatization of State-owned Real Estate

The essence of privatization of state-owned real estate is the transfer of ownership and right to dispose of land, buildings, or other real estate from the state to private individuals. This process aims to reduce the influence of the state on the economy and increase the role of the private sector in the management and development of the above-mentioned assets.[2] Privatization may include both the transfer of state-owned real estate and the transfer of responsibility for the performance of various state tasks to private individuals.[3] However, since in this case the object of discussion is the privatization of agricultural land, attention will be focused only on the discussion of the privatization of state-owned real estate.

Privatization of state property is the process of transformation of a state property object from public ownership to private ownership.[4] As a result of this process, private individuals appear as owners of privatized objects, real estate, which should result in the development of civil turnover, ensuring the involvement of private individuals in this process, increasing economic indicators and improving the social conditions of citizens. Despite all the above-mentioned benefits, which can be said to mainly serve the interests of the state, since in essence each of them alleviates certain responsibilities for the state or at least relieves it from these responsibilities, it is inevitable to emphasize the importance of the realization of the right to property, recognized and secured by the Constitution, and the exercise of this right, which brings specific benefits to the individual, especially in the wake of the reality of post-Soviet Georgia.

The socialist republics that were part of the Soviet Union, including Georgia, did not actually recognize the right to private property and considered property rights only to be the property of state and collective institutions (collective farms, trade unions, or other public organizations), and Soviet legislation considered land to be state property only.[5] Still under Soviet conditions, against the backdrop of the economic crisis, during the initial period of the transition of the countries of the Union to a market economy, when in 1990 or 1991 no other republic had a single case of privatization, Georgia witnessed the first act of privatization in the entire Soviet space in 1991, which was the privatization of the Goliath store through open public trading, through an auction, which was included in the list of several dozen objects allocated for trial and demonstration privatization, the privatization of which was planned before the collapse of the Soviet Union, but did not happen.[6] After the collapse of the Union, in the conditions of the economic crisis that had begun before, taking into account all the above-mentioned goals and state interests, it became necessary to denationalize the real estate accumulated in state ownership, that is, transfer it to private individuals. Since all property rights,

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2 *Imomniyozov D.,* Economic and Legal Nature of The Concept Of Privatization, Central Asian Journal of Theoretical and Applied Sciences, Vol. 04, Issue: 01, 2023, 81.

3 *Turava P.*, General Administrative Law, Tbilisi, 2018, 62 (in Georgian).

4 *Nellis J.*, The World Bank, Privatization and Enterprise Reform in Transition Economics: A Retrospective Analysis, Washington D.C., 2002, 22.

5 *Bokhashvili V.,* Land Law, Reader – Auxiliary Textbook, Tbilisi, 2020, 31 (in Georgian).

6 *Vachnadze N., Tomadze N.,* Defeated Georgia (December-January Events in Tbilisi 1991-1992) Part II, Tbilisi, 2019, 107 (in Georgian).

along with property, are considered the centre of absolute rights[7] and play a major role in the development of civil turnover and the economy, it became necessary for the most important link involved in civil turnover, that is, private individuals, to transfer this right, which is surprising, through the implementation of appropriate measures and the establishment of appropriate legislative regulation.

3. Historical Signs of Privatization within the Framework of Land Reform

3.1. The 1992 Land Reform as the First Stage of Privatization

With the adoption of the Resolution No. 48 of the Cabinet of Ministers of the Republic of Georgia "On Agricultural Land Reform in the Republic of Georgia" of January 18, 1992 and the mass denationalization of land plots, agricultural land reform began. Within the framework of the aforementioned reform, land plots were divided into state-owned lands and land reform funds, of which the lands of the land reform fund were subject to privatization first of all. Under the aforementioned reform, land was transferred in private ownership, possession and use only to citizens of Georgia, both rural and urban residents, regardless of whether they were engaged in agricultural activities. However, land plots were transferred to foreign citizens or stateless persons only for use.[8]

According to the Resolution No. 48 of the Cabinet of Ministers of the Republic of Georgia of January 18, 1992 "On Agricultural Land Reform in the Republic of Georgia", the aforementioned Resolution served the purpose of establishing market relations in agriculture by transferring land to private ownership, enriching food production and overcoming the economic crisis.[9] In order to effectively achieve this goal in the shortest possible time and successfully implement the reform, based on the current economic situation in the country, the persons specified in the same Resolution, citizens of the Republic of Georgia, were transferred to private ownership free of charge homestead, garden and countryside lands within the limits established by law.[10] This shows that, unlike most post-Soviet countries, private property or real estate was transferred to Georgian citizens without compensation, which in most cases was ensured by transferring to them the relevant documentation, ownership and lawful possession documents. The main land fund was precisely the aforementioned lands, in the event of their paid privatization, a completely different economic situation could have emerged in the country, however, taking into account the interests of society and given the difficult social conditions, it would have been unjustified to impose the aforementioned tax on them, since the goal established by law might not have been achieved at all and citizens would have been denied access to agricultural land plots and appropriate farming, which in turn was a vital circumstance for the country's recovery from the economic crisis.

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7 *Seiler J.,* von Staudingers Komm. zum BGB mit Einführungsgesetz und Nebengesetzen, Berlin, 2005, 878.

8 *Bokhashvili V.,* Land Law, Reader – Auxiliary Textbook, Tbilisi, 2020, 18 (in Georgian).

9 "On Agricultural Land Reform in the Republic of Georgia" Resolution No. 48 of the Cabinet of Ministers of the Republic of Georgia of January 18, 1992, Resolutions of the Cabinet of Ministers of the Republic of Georgia, 1, 31/01/1992.

10 Ibid., Article 5.

In substance, the 1992 land reform contained all the elements characteristic of the concept of privatization and can be freely considered the first wave of privatization of state-owned real estate, in the history of independent Georgia, which covered the largest scale and which affected the property rights of almost all citizens, since as a result of the aforementioned reform, real estate that was considered state property before official, legal privatization was transferred to citizens living in both urban and rural areas.

The land reform process, notably, had its own characteristic criteria and certain prerequisites. For example, citizens living in rural areas were issued homestead plots of land according to households registered as of January 1, 1992 from land reform funds,[11] which were created at the expense of state-owned agricultural lands.[12] In order to avoid the purposeless and chaotic alienation of lands, as well as to exclude the abuse of existing opportunities by citizens, after the above-mentioned date, the emergence of new households could only occur as a result of the divorce/division of an existing one, in the event that two or more adult children were registered in an already existing household and one of them remained the heir of the household, to whom a homestead plot of land would not be allocated separately, and the satisfaction of the new household resulting from the divorce would be carried out from the land reserve funds created for this purpose.[13]

"On Additional Measures for the Practical Implementation of the Resolution No. 48 of the Cabinet of Ministers of the Republic of Georgia of January 18, 1992 on Agricultural Land Reform in the Republic of Georgia" Resolution No. 128 of the Cabinet of Ministers of the Republic of Georgia of February 6, 1992 determined the maximum areas of land to be transferred, taking into account local natural conditions and opportunities, according to household categories, which meant that citizens permanently residing in rural areas and employed in agriculture and agricultural specialists permanently residing in rural areas would be allocated up to 1 hectare of land in the lowland and upland regions, and in those regions where this was possible – up to 1.25 hectares, in mountainous regions – up to 5 hectares (including lands under cultivation – up to 1 hectare); For workers and employees of other fields permanently residing in rural areas in the plains and uplands – up to 0.75 hectares, and in mountainous areas – up to 5 hectares (including lands under cultivation – up to 0.75 hectares); for urban residents who had received a residential house or part of a house by ownership, and for those citizens living in cities who wanted to receive homestead land plots in the countryside in suburban zones – up to 0.15 hectares, in the plains and uplands – up to 0.25 hectares, and in mountainous areas – up to 1 hectare (including lands under cultivation – up to 0.25 hectares); For citizens permanently residing and working in agriculture within the approved borders of cities and towns of regional subordination, up to 0.75 hectares of land were allocated, and for workers and employees of other fields (who live on lands attached to agricultural enterprises) up to 0.5 hectares of

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11 *Bokhashvili V.,* Land Law, Reader – Auxiliary Textbook, Tbilisi, 2020, 18 (in Georgian).

12 "On Agricultural Land Reform of the Republic of Georgia" Resolution of the Cabinet of Ministers of the Republic of Georgia No. 48 of January 18, 1992, Article 4, Resolutions of the Cabinet of Ministers of Georgia, 1, 31/01/1992.

13 "On Additional Measures for the Practical Implementation of the Resolution No. 48 of the Cabinet of Ministers of the Republic of Georgia of January 18, 1992 on Agricultural Land Reform in the Republic of Georgia" Resolution No. 128 of the Cabinet of Ministers of the Republic of Georgia of February 6, 1992, Article 2, Resolutions of the Cabinet of Ministers of the Republic of Georgia, 9, 30/09/1992.

land were allocated.[14] According to the same resolution, a kind of control mechanism was determined, which was to ensure the achievement of the goals set by the reform. The mentioned control mechanism envisaged the seizure of the plot of land transferred as a homestead by the household in the event of non-use and misappropriation for agricultural purposes for two consecutive years, and the transfer of this land to the reserve land fund.[15] The above indicates that the goal of the land reform was not to provide citizens with the opportunity to realize their property rights, but primarily to pull the state out of the economic crisis, which should have been ensured by the full utilization of the privatized land resources, over which the imposition of certain control would have created a kind of guarantee for the state that the property it had given away free of charge and privatized would be properly used by citizens. Accordingly, it turns out that the property rights transferred under the aforementioned reform did not represent a full, guaranteed and inviolable right and in the event of failure to comply with the requirements established by the state and provided for by law, which would have been their non-use and misappropriation for agricultural purposes, they could even be lost.

3.2. Title Documents Issued for Land Plots Privatized as a Result of the 1992 Land Reform

Within the framework of the reform, the responsible body for the alienation of land plots was the local self-government body, in agreement with the State Committee for Land Resources and Land Reform of the Republic of Georgia.[16] "On the Regulation of the Execution of Documentation on Land Plots Transferred for Use to Citizens of the Republic of Georgia" Resolution No. 503 of the Cabinet of Ministers of the Republic of Georgia of June 28, 1993 approved the form of the act of acceptance and delivery of a land plot allocated for use to citizens, which was used until the completion of the land reform.

Under the reform, one of the adult members of the family received the land plot allocated to the family officially, who in most cases was the head of the household according to the household register, and this was the person with whom the acceptance and delivery act or other document establishing the right was drawn up. For this reason, on the basis of the acceptance and delivery act, the ownership right is registered not only for the person indicated in the act, but also for all members of the registered household, since if an acceptance and delivery act was issued to a family, this all means that the state has completed the land reform towards this family.[17] However, before the acceptance and delivery acts were drawn up for the land plots issued within the framework of the reform, which ultimately constitute a document establishing the right to ownership, as usual, this process was preceded by the drawing up/issuance of documentation confirming lawful possession. In general, documents

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14 "On Additional Measures for the Practical Implementation of the Resolution No. 48 of the Cabinet of Ministers of the Republic of Georgia of January 18, 1992 on Agricultural Land Reform in the Republic of Georgia" Resolution No. 128 of the Cabinet of Ministers of the Republic of Georgia of February 6, 1992, Article 1, Resolutions of the Cabinet of Ministers of the Republic of Georgia, 9, 30/09/1992.

15 Ibid., Article 5.

16 "On Agricultural Land Reform in the Republic of Georgia" Resolution No. 48 of the Cabinet of Ministers of the Republic of Georgia of January 18, 1992, Article 11, Resolutions of the Cabinet of Ministers of the Republic of Georgia, 1, 31/01/1992.

17 *Bokhashvili V.,* Land Law, Reader – Auxiliary Textbook, Tbilisi, 2020, 74 (in Georgian).

establishing rights are divided into these two groups, documents establishing ownership rights and documents establishing lawful possession, from the perspective of the law.

According to the Law of Georgia "On the Procedure for Systematic and Sporadic Registration of Rights to Land Plots and Improvement of Cadastral Data", the documents establishing ownership rights are a) the act of acceptance and delivery; b) the certificate of ownership issued by the recognition commission and c) the documents establishing ownership of agricultural land plots issued by the state, while the documents establishing legitimate ownership (use) are a) a certificate confirming registration in the technical inventory archive as the owner (user) of the immovable property until October 4, 2004; b) an extract from the household book; c) a gardener's book; d) a list of taxpayers for the use of agricultural land or non-agricultural land; e) The list of land distribution compiled by the Land Reform Commission established by the decision of the local government bodies of the village (town) and approved at the village (town) congress (general meeting) in accordance with the Resolution No. 48 of the Cabinet of Ministers of the Republic of Georgia "On Agricultural Land Reform in the Republic of Georgia" of January 18, 1992; f) Decisions made by the general meeting of workers of a cooperative agricultural enterprise and the session of the cooperative agricultural enterprise on the territory of the Autonomous Republic of Adjara and g) Other documents confirming the lawful possession (use) of the land.[18] Some of the listed documents were still produced during the Soviet period, while some are documents compiled and issued during the period of land reform. For example, certificates-descriptions, household books, gardener's books are documentation of the pre-reform period. However, unlike the gardener's book and certificate-description, amendments to household books were made during the reform period as well. In relation to the gardener's book and certificate-description, the land reform made such a change that after conducting an inventory of these plots, land plots in legal possession were transferred to the subjects specified in the aforementioned documents, and to confirm this, an appropriate acceptance-delivery act was drawn up for most of them, or a land registration certificate was issued.[19]

Within the framework of the land reform, when the privatization of the lands of the state land fund and the land reform fund and their distribution to citizens according to the legal threshold was underway, the municipality carried out an inventory, on the basis of which the list of land plots was drawn up. Therefore, the list of land distribution is a document drawn up under the land reform, which reflects the areas of land plots registered with the household, actually occupied by them and additionally allocated under the reform.[20] According to practice, the distribution lists produced during the reform period were documents containing various requisites and information. Every region or municipality produced lists with different levels of information. For example, while some of them contained detailed information on the name, surname, father's name, household category, number of household members, land area registered with the household before the land reform, the area of land in actual use during the reform period, and the area of land allocated additionally within the framework of the reform, the tax list produced in some regions did not contain any additional information other

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18 Law of Georgia "On the Procedure for Systematic and Sporadic Registration of Rights to Land Plots and Improvement of Cadastral Data", Article 3, Paragraph 1, Subparagraphs p) and q), Legislative Herald of Georgia, website, 17/06/2016.

19 *Bokhashvili V.,* Land Law, Reader – Auxiliary Textbook, Tbilisi, 2020, 86 (in Georgian).

20 Ibid., 91.

than the name, surname, and the area of land transferred under the reform, which makes it even more difficult to identify a person/household and confirm the fact of the allocation of land to them. However, despite the fact that the aforementioned lists contain a number of shortcomings, and sometimes do not reflect complete and correct information, in the case of some municipalities, where for certain reasons there are no archival records of registered households and no land transfer certificates have been issued to the population, or all of the above were destroyed as a result of fire, or systematic land registration has not been carried out and registration certificates have not been issued, the land distribution lists produced by municipalities are the only document establishing rights, on the basis of which the registering authority may make a decision on the registration of the ownership rights of a specific person to a specific land plot.

To mark the completion of the land reform for a family/household, an adult family member would be issued a document establishing ownership rights – an acceptance and delivery act. The Law of Georgia "On the Procedure for Systematic and Sporadic Registration of Rights to Land Plots and Improvement of Cadastral Data" establishes the criteria for legalization of the document, according to which rights to agricultural land plots are registered on the basis of registration documents drawn up in accordance with the procedure established by the legislation of Georgia, and an acceptance and delivery act issued by the Land Reform Commission is considered to be drawn up in accordance with the procedure established by the legislation of Georgia if it indicates the owner and area of the land plot and bears the seal of the Land Reform Commission, municipality or other authorized body, regardless of whether it indicates the year of issuance of the acceptance and delivery act, also, the acceptance and delivery act, which does not comply with the form approved by the Resolution No. 503 of the Cabinet of Ministers of the Republic of Georgia of June 28, 1993 "On the Regulation of the Execution of Documentation on Land Plots Transferred for Use to Citizens of the Republic of Georgia", but meets the above requirements.[21] According to the early practice of the National Agency of Public Registry of the Ministry of Justice of Georgia, as a registering authority, acceptance and delivery acts issued after the completion of the land reform, February 1, 1999, did not have legal force.[22] This means that the registering authority did not consider such acceptance and delivery acts to be a sufficient document for reflecting the ownership right in the register and made a decision to refuse the requested registration proceedings based on such a document. However, after the legislative amendment of January 1, 2020, the above-mentioned practice changed and such a requirement for the acceptance and delivery act was removed, since a new article was added to the Law of Georgia "On the Procedure for Systematic and Sporadic Registration of Rights to Land Plots and Improvement of Cadastral Data", according to which if the document confirming the right drawn up before September 20, 2007 does not meet the minimum mandatory requirements established by this Law, but it indicates the identity of the interested person, the address of the immovable property (city, town and/or village) and the area, this document may be used as the basis for registration in accordance with the procedure established by Article 41 of this Law, provided that the identity of the land plots and the actual ownership of the land plot by the interested person are confirmed by a representative of the

[21] Law of Georgia “On the Procedure for Systematic and Sporadic Registration of Rights to Land Plots and Improvement of Cadastral Data”, Article 17, Paragraph 2, Subparagraphs a) and b), Legislative Herald of Georgia, website, 17/06/2016.

[22] *Bokhashvili V.,* Land Law, Reader – Auxiliary Textbook, Tbilisi, 2020, 74 (in Georgian).

municipality.[23] According to the Supreme Court of Georgia, the act of acceptance and delivery of a land plot cannot be considered an individual administrative-legal act. "According to Article 2.1.d of the General Administrative Code of Georgia, an administrative act establishes, changes, terminates or confirms the rights and obligations of a person or a limited circle of persons. Although the act of acceptance and delivery is issued by an administrative body, the action taken by issuing the act is not directed towards the emergence of a direct legal result in accordance with the will of the administrative body, unilaterally and with binding force, i.e. by the act of acceptance and delivery of land, the administrative body transfers the land, and the person takes the land plot, thereby the administrative body expresses not a unilateral will to alienate the land and forces the land recipient to take the land plot with the binding force assigned to the act by law, but rather expresses the will of both parties. When issuing the act of acceptance and delivery There is an expression of the parties' mutual will towards a common goal".[24] Based on the above, which is also confirmed by the legal record (the document confirming the right of ownership – administrative agreement (the act of acceptance and delivery or other document)[25]), the act of acceptance and delivery of a land plot, by its legal nature, is an administrative agreement (transaction), although it fundamentally differs from the classical understanding of the privatization agreement established today.

As a result of the liberalization of the issue of legalization of the acceptance and delivery act and other documents issued on privatized land plots under the reform, we have the following circumstance: the law established the minimum requisites of the acceptance and delivery act, which the act must contain, in order for it to serve as the basis for registration of ownership rights in the public registry and determination of the existence of the ownership right of an individual to a specific land plot. The mentioned criteria are the owner of the land plot indicated in the acceptance and delivery act, the area of the land, and the seal of the Land Reform Commission, municipality or other authorized body affixed to it. The owner may be indicated in the act by name, surname, father's name, initials of the name or without it, however, in order to determine the ownership of the specified document to a person, it is mandatory that the surname be indicated in full in the act. Also, for registration purposes, it is important that the acceptance and delivery act has at least 1 stamp, be it the stamp of the local municipality or the land management department, which must be legible.[26]

4. Results of Land Reform and the Legal Status of Private Owners

The land reform that began in 1992 has been ongoing for several years. As part of the reform, the state transferred the agricultural land fund, mainly arable land plots and a large part of perennial crops, to the population for use and ownership, although the issue of the formal existence of property

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23 Law of Georgia "On the Procedure for Systematic and Sporadic Registration of Rights to Land Plots and Improvement of Cadastral Data", Article 7, Paragraph 15, Legislative Gazette of Georgia, website, 17/06/2016.

24 Ruling of September 19, 2006 in Case No. BS-282-268(K-06) of the Administrative and Other Category Cases Chamber of the Supreme Court of Georgia.

25 "On the Rules of Systematic and Sporadic Law on Rights to Land Plots and the Completeness of Cadastral Data" Law of Georgia, Article 3, Paragraph 1, Subparagraph p), Legislative Herald of Georgia, website, 17/06/2016.

26 *Bokhashvili V.,* Land Law, Reader – Auxiliary Textbook, Tbilisi, 2020, 76 (in Georgian).

rights remained out of focus.[27] In addition, the population itself did not have proper information about the foundations of property rights, nor did it have the desire and ability to exercise this right. During the reform, the main principles of land use were neglected, as land plots were fragmented and very small plots of land were transferred to the population. Basic infrastructure needs, issues of separation of rights between the public and private sectors, and other important factors that were necessary for the development of the land market in the country were also not taken into account. As a result, road infrastructure, irrigation canals, windbreaks, and other public buildings were massively damaged.[28]

As a result of the reform and the privatization of the state-owned land fund, the demands of all segments of the Georgian population were more or less met, since both rural and urban residents, regardless of whether they were engaged in agricultural activities, were given land plots. Taking into account all of the above and against the background of the acute problems of the 1990s, it was almost impossible to implement the land reform thoroughly. Nevertheless, despite a number of serious shortcomings, it should be considered that weak but necessary precursors for the formation of the property class were indeed created.[29]

It is worth emphasizing that at the initial stage of the reform, the state-maintained control over hayfields and pastures, while at the same time the process of leasing the remaining state-owned land fund began. The leased territories mainly included large tracts of land, the actual owners of which were the relatively wealthy population of villages or cities, and this process was most likely to some extent irregular and opaque.[30]

Within the framework of the reform in 1992-1995, according to statistical data, the state transferred approximately 760 thousand hectares of land to the population, and a large part of the approximately 460 thousand hectares remaining in its possession was leased.[31] In accordance with the threshold areas of land to be transferred by household categories, determined by the Resolution of the Cabinet of Ministers of the Republic of Georgia No. 48 of January 18, 1992 “On Additional Measures for the Practical Implementation of the Agricultural Land Reform in the Republic of Georgia” No. 128 of February 6, 1992, the population was allocated the specified areas of land. However, according to the resolution of the Parliament of Georgia of March 22, 1996 on the enactment of the Law “On Ownership of Agricultural Land”, households (families) that owned a plot of land under the reform, but had not transferred it in accordance with the established procedure and in the amount, were granted ownership of the plots of land free of charge within one year of the adoption of the Law “On Ownership of Agricultural Land”.[32] Later, this period was extended until January 1, 1999. Based on the aforementioned resolution, the number of private owners expanded even further, as the status of families living in rural areas who were active in the fields of medicine, education, and culture was

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27 Current State of the Land Market, Analysis and Recommendations, USAID GEORGIA, Economic Policy Research Center, 2013, 3.

28 Ibid.

29 Ibid., 4.

30 Ibid.

31 Terra Institute, LTD for USAID: Georgia Land Market Development Project Final Report, October, 2005, 4.

32 Resolution of the Parliament of Georgia of March 22, 1996 on the Enactment of the Law "On Ownership of Agricultural Land", Article 3, Parliamentary Gazette, 007, 30/04/1996 (Invalid – 25.06.2019).

equalized to that of those employed in the agricultural sector, and land distribution was planned for them, which depended on the size of the existing land resource and was limited to the maximum size designated for the first category.[33]

It is worth noting that the land plots privatized within the framework of the reform were distributed, divided into small areas, located in 3-4 and often more locations, unlike the leased land plots, which were distinguished by their large size and much lower degree of fragmentation.[34] It can also be said that the natural characteristics of the leased land plots were much better characterized than the small-sized lands privatized among the population, which was also reflected in the infrastructural arrangement.[35] Ultimately, the land plots transferred to private ownership as a result of the reform were extremely fragmented lands, a large part of which was unsuitable for commercial production, although they provided an excellent basis for establishing private ownership of land plots in the Georgian legal space, the largest wave of privatization and stabilization of the economic situation.

Despite the measures taken, after the reform was completed, it was still difficult to determine how much land was privately owned and how much remained state-owned. Taking this into account, since it was excluded and actually impossible to leave the legal status in an uncertain state, the state-initiated land reform on many occasions. This type of reform in 2012 was, it can be said, unsuccessful, since, based on the Resolution No. 231 of the Government of Georgia of June 28, 2012 "On the Regulation of Certain Issues Related to the Registration of Ownership Rights to Agricultural Land Plots in the Territory of Georgia and the Improvement of Cadastral Data", under the state project, ownership rights were registered on more than 450 thousand land plots without a document establishing the right, which as a result created a more chaotic situation in terms of ensuring ownership rights than before. This factor was largely due to the inconsistency of the location of land plots and registered data, the absence of legal grounds for registration, and the neglect of documents confirming ownership and lawful possession issued under the reform or before. In order to correct this major shortcoming, the Law of Georgia "On the Special Rule for Systematic and Sporadic Registration of Rights to Land Plots and Improvement of Cadastral Data within the Framework of the State Project" adopted in 2016 introduced a number of innovations, as a result of which, by establishing a special rule for systematic and sporadic registration of rights and based on the analysis of the registration results, it became possible to refine and revise the existing regulatory legislation.[36]

It is no wonder that the land reform was not completed within the framework of the above-mentioned project. The numerous shortcomings of the past period, which accompanied the emergence of ownership rights to real estate for years, have led the country to the reality that the initial registration, reflecting the ownership rights in the public registry, has not been fully completed to this day, and is still a problematic issue that does not lose its relevance and requires constant updating. The state has been offering this opportunity to citizens continuously since 2016 and, by extending the

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33 Law of Georgia on Amendments to the Law of Georgia "On the Enactment of the Law of Georgia "On Ownership of Agricultural Land", Parliamentary Gazette, 15-16, 30/04/1998 (Invalid – 02.07.2019).

34 Current State of the Land Market, Analysis and Recommendations, USAID GEORGIA, Economic Policy Research Center, 2013, 4.

35 Ibid.

36 *Bokhashvili V.,* Land Law, Reader – Auxiliary Textbook, Tbilisi, 2020, 47 (in Georgian).

deadlines for projects and reforms, is trying to promote the realization of the most important right called the right to property. As a result, from August 1, 2016 to October 1, 2019, more than 730,000 land plots were registered, with a total area of approximately 515,382 hectares (for comparison, from the restoration of independence until August 1, 2016, a total of 1,280,000 land plots were registered, with a total area of 1,212,173 hectares), and the total amount saved by the population during this period amounted to 40 million GEL.[37] Legislative changes implemented since 2020 have simplified the acquisition of property rights and the registration process has become more tailored to the interests of citizens. This process continues to this day throughout the country, in the form of a systematic land registration project, which has resulted in increased civic awareness, deepening citizens' interest in property rights, and involving more private owners in civil turnover.

5. Modern Aspects of the Privatization of State-owned Land Plots

Unlike the first stage of the land reform, the management and disposal of state-owned property, as of today, in cases provided for by the Law of Georgia "On State Property", is carried out by the LEPL – National Agency of State Property, which is part of the system of the Ministry of Economy and Sustainable Development of Georgia.[38] The same law separates the concepts of immovable property and real estate from each other in relation to state property, which allows for a kind of differentiation and ultimately gives the legislator the right to establish a different rule for the process of separation of immovable property and real estate. In particular, according to the law, immovable property is state-owned real estate, agricultural land, forest and forest land, protected landscape, multipurpose territory, while real estate is a state-owned non-agricultural land plot with or without a building (under construction, built or demolished) on it, a building unit (under construction, built or demolished), a linear structure and perennial plants on the land.[39] Therefore, the law separately defines the forms of privatization of state-owned agricultural land and state-owned real estate, the bodies implementing privatization, and the general rules.

Given the current situation in the land market, when privately owned land plots have been identified and the state has somehow determined which property is its property or which is likely to become it in the future, the process of privatizing state property has been much simplified in terms of rights than it was in the post-Soviet period. The simplification of the process, unfortunately or fortunately, does not mean the lack of stages to be passed or the ease of privatization and universal accessibility, but rather, it means that from the state's perspective, separately from the already privatized real estate, the state-owned land plots that are currently in disuse can be freely disposed of and receive economic benefits, so that the property rights of others are not infringed, because the inventory process is mostly completed today, the land plots in state ownership are registered, and half of the stages of the procedure required for their privatization have been completed in advance. Given

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37 *Khutsishvili E.,* Work of the 2019 Autumn Session of the Parliament of Georgia, Democracy Index – Georgia, Tbilisi, 2020, 22 (in Georgian).

38 Law of Georgia "On State Property", Article 1, Paragraph 6, LHG, 48, 09/08/2010.

39 Ibid., Article 2, Subparagraphs t) and t)[1].

that the first land reform in the country was carried out practically free of charge, the transfer of land plots to private owners took place in such a way that it did not generate direct income for the state budget. In addition, the reform was carried out with many shortcomings and the fate of the owners remained uncertain, while the current reality, it can be said, is completely different from the situation several decades ago and represents a classic form of privatization in the Georgian legal and economic space.

Privatization of state-owned agricultural land can be carried out in three ways: through auction, direct sale and free transfer of ownership. The direct sale form, in turn, has two more sub-forms, such as direct sale based on competitive selection and direct sale of leased agricultural land.[40] The current legislative framework fully regulates the rules for the privatization of state property, according to which a free, competitive and transparent land market has been created, while taking into account the principle of proportionality between public and private interests.

Despite the fact that currently, the cases of land expropriation with compensation represent an extraordinary mechanism for the circulation of quite large sums of money and replenishment of the state budget, the existing legislative regulation still envisages the transfer of certain categories of land plots from private owners to private individuals completely free of charge. Such land plots are land plots that were unauthorised occupied before September 20, 2007,[41] to which the recognition of ownership rights is actually free of charge within the framework of the systematic land registration carried out by the state,[42] on the basis of an individual administrative legal act issued by an administrative body.[43]

Despite numerous reforms and projects implemented by the state, the fact is that the process of identifying private owners of land plots has not been fully completed and is still a rather urgent and problematic issue. The shortcomings of the post-Soviet period, which appeared very soon after the completion of the 1992 land reform, have not been fully eliminated to this day, therefore, along with the classical privatization of state property for a fee and the free transfer of state-owned agricultural land, a mechanism for the privatization of state land is still being implemented, which has a special regulation and is not regulated by the Law of Georgia "On State Property".[44] Within the framework of

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40 Law of Georgia "On State Property", Article 7, Paragraph 1, LHG, 48, 09/08/2010.

41 Unauthorized occupied land – a plot of state-owned agricultural or non-agricultural land unauthorized occupied by a natural person before the entry into force of this Law, on which a residential house (built, under construction or demolished) or a non-residential building (built, under construction or demolished) is located, as well as an unauthorized occupied plot of land (with or without a building) adjacent to a plot of land owned or legally owned by an interested natural person, the total area of which in a bar does not exceed 1.25 hectares, and in a high-mountainous settlement determined in accordance with the Law of Georgia "On the Development of High-Mountain Regions" – 5 hectares – Law of Georgia "On Recognition of Ownership Rights to Land Plots in the Ownership (Use) of Natural Persons and Legal Entities of Private Law", Article 2, Subparagraph c), LHG, 29, 27/07/2007.

42 Law of Georgia "On Recognition of Ownership Rights to Land Plots in the Possession (Use) of Individuals and Legal Entities of Private Law", Article 6, Paragraph 4^1, LHG, 29, 27/07/2007.

43 Ibid., Article 4.

44 This Law does not apply to the cases provided for by the Law of Georgia "On Recognition of Ownership Rights to Land Plots in the Possession (Use) of Individuals and Legal Entities of Private Law" and to the

the State Project for Systematic Land Registration, in addition to requesting registration of ownership of land plots issued to them individually and to their households during the reform period by interested persons, namely citizens of Georgia, may also request recognition of ownership rights to land plots owned by the state, but unauthorized occupied by citizens before September 20, 2007. Notably, the law establishes all the prerequisites that must be met by both the person with the right to request registration of ownership rights, as well as the immovable property owned by the state to be recognized as property. As of today, throughout the country, except for self-governing cities, the authorized body for recognizing ownership rights to such and other types of immovable property, in accordance with the Law of Georgia "On Recognition of Ownership Rights to Land Plots in the Possession (Use) of Individuals and Legal Entities of Private Law", the Law of Georgia "On the Procedure for Systematic and Sporadic Registration of Rights to Land Plots and Improvement of Cadastral Data", the Order No. 487 of the Minister of Justice of Georgia of December 31, 2019 on Approval of the Instruction "On the Public Registry", and the Law of Georgia "On State Property", is the LEPL of the Ministry of Justice of Georgia – the National Agency of the Public Registry, which provides services related to the aforementioned process to citizens completely free of charge and establishes their ownership of the immovable property of interest.

6. Conclusion

Within the framework of this study, the influence of one of the unique factors characteristic of the Georgian legal and economic space, in relation to the realization of the property right guaranteed by the Constitution, the factor called land reform, which created the necessary precedents and played a major role in the formation of the class of owners and the establishment of the social and legal order, was clearly revealed. For Georgia in the post-Soviet period, in order to get out of the economic crisis, the necessary condition was precisely the privatization of land areas considered state property, i.e. privatization and an increase in the number of private owners, because Georgian peasants would be able to cultivate their own territories, engage in agricultural activities, sell the corresponding products and create solid social conditions, thereby helping the state overcome the existing poverty and crisis.

Although the primary objectives of land reform were directed toward addressing state interests, it is impossible not to emphasize the intensifying and awakening of that private legal interest, a core absolute right, which is called the right of ownership. In the Soviet past, in the reality of which the concept of private property did not exist in society and people were eager to create their own farms or other sources of income, which was accompanied by extreme socio-economic problems, land reform and in general, the free transfer of state-owned lands, was a kind of relief act, which still has a great influence on Georgian civil turnover, since the absolute majority of owners today are owners of territories transferred as a result of the land reform, who are actively involved in those private legal relations that were unimaginable several decades ago.

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relations provided for by the Law of Georgia "On the Procedure for Systematic and Sporadic Registration of Rights to Land Plots and Improvement of Cadastral Data", Law of Georgia "On State Property", Article 1, Paragraph 5, Subparagraphs c) and d^1), LHG, 48, 09/08/2010.

As a result of the above-mentioned research, the factors and determining circumstances were identified, on the basis of which it can be safely said that the 1992 land reform, in its essence and characteristics, fully corresponds to the concept of classical privatization and represents a historical component of the emergence of property rights in the Georgian legal space, the scale of which is so large that it is not found in any other post-Soviet country. Moreover, no such process has been implemented in any other country with such characteristics. The mentioned land reform is a major act of privatization, namely the free transfer of state-owned lands to private individuals, which has been ongoing for many years and has positively affected the property rights of the majority of the population of Georgia.

Despite numerous shortcomings and obstacles, land reform reached a certain climax over a certain period, although it has not been fully completed, which is also confirmed by the ongoing systematic land registration project. At the first stage of this large-scale act of privatization, albeit imperfectly, but still, the formation of land legislation was carried out, the delegation of relevant powers, the distribution of land areas to citizens in accordance with the criteria established by law, land inventory and a documentary description of all this. Based on the shortcomings identified during this period, the legislative regulation was changed and improved from year to year, which allowed the state to come closer to achieving the goals that were set from the very beginning.

The most important thing that resulted from this process is clearly the issuance of documents confirming the ownership and lawful possession, and in some cases, the issuance of documents confirming the already registered ownership rights. This circumstance has been repeatedly confirmed both in the privatization of state-owned real estate in general, as well as in the current systematic registration process and in the process of the many land reforms that our country has undergone. The 1992 land reform created the basic soil on the basis of which private owners emerged and the state was able to differentiate the territories under its ownership in order to ensure the achievement of the goals set in the future. This resulted in an improvement in civil turnover, the formation of a fairly strong class of owners, the identification of future privatization objects in terms of economic development, and the strengthening of the institution of property rights by transferring to citizens the documentation that was created during the reform period. The aforementioned documentation, whether it is a document confirming the right to ownership or legal possession of land, which was created within the framework of the land reform, or before the land reform and/or edited in the current process, is in fact a reliable basis for registering a person's ownership rights in the public registry, since such documentation is of a unique nature and content, which has withstood time and numerous obstacles. Accordingly, within the framework of the current study, it became clear on what legal basis a citizen's request for registration of ownership rights to an immovable property in the public registry should be based, what scope a request related to the realization of ownership rights may include, and what criteria should be taken into account by the registering authority.

Contemporary privatization in Georgia differs significantly from the historical model implemented during the land reform period that Georgian society encountered. As of today, the transfer of state property for free is a very rare event, which, notably, has its own explanation and justification. The body authorized to dispose of state property and the entire process that the act of privatization entails has also been changed. Legislative regulation has been refined, detailed

regulations have been laid out, the process is much more transparent and public than it could have been in the reality of post-Soviet Georgia. Based on established practice, it can be said that administrative bodies are trying their best to cause as little harm to private individuals as possible in the process of implementing the public interest, which is ensured by maximum involvement and full coordination between various agencies, at the expense of sharing positions with each other and reconciling opinions.

Considering the current situation, in addition to the historical significance that the privatization of state-owned land plots had in the Georgian legal space, it can be said that privatization fully serves the country's economic development and the enrichment of the state budget, which is also confirmed by statistical data. Despite the fact that the process of identifying private owners is still not fully completed and is still an ongoing project, the bodies with the right to dispose of state property have assumed a secondary role in the process of the acquisition of property rights and have given way to other agencies, since within the framework of a number of land reforms they have almost exhausted themselves and, depending on the needs identified in terms of the acquisition and registration of property rights, different steps have been taken by the state. The greatest example of this is the completion of a number of land distribution reforms and projects and the implementation of measures to facilitate the registration of existing rights in the public registry, as well as the transfer of state-owned and other land plots to private individuals through the recognition of citizens' ownership rights within the framework of the ongoing systematic land registration project, which does not lose its relevance even today, is a rather problematic issue and the greatest object of citizen interest. Within the framework of the mentioned measure, the state has again maintained an accessibility policy and the actions necessary for the registration process are carried out completely free of charge, which contributes to the increase in the number of owners, the identification of privately-owned immovable property, the timely reflection of ownership rights in the public registry, and the realization of property rights.

Bibliography:

1. “On Agricultural Land Reform in the Republic of Georgia” Resolution No. 48 of the Cabinet of Ministers of the Republic of Georgia of January 18, 1992, Resolutions of the Cabinet of Ministers of the Republic of Georgia, 1, 31/01/1992.
2. “On Additional Measures for the Practical Implementation of the Resolution No. 48 of the Cabinet of Ministers of the Republic of Georgia of January 18, 1992, on Agricultural Land Reform in the Republic of Georgia” Resolution No. 128 of the Cabinet of Ministers of the Republic of Georgia of February 6, 1992, Resolutions of the Cabinet of Ministers of the Republic of Georgia, 9, 30/09/1992.
3. Resolution of the Parliament of Georgia of March 22, 1996 on the Enactment of the Law “On Ownership of Agricultural Land”, Parliamentary Gazette, 007, 30/04/1996 (Invalid – 25.06.2019).
4. Law of Georgia on Amendments to the Law of Georgia “On the Enactment of the Law of Georgia “On Ownership of Agricultural Land”, Parliamentary Gazette, 15-16, 30/04/1998 (Invalid – 02.07.2019).
5. Law of Georgia “On Recognition of Ownership Rights to Land Plots in the Possession (Use) of Individuals and Legal Entities of Private Law”, LHG, 29, 27/07/2007.
6. Law of Georgia “On State Property”, LHG, 48, 09/08/2010.

7. Law of Georgia "On the Procedure for Systematic and Sporadic Registration of Rights to Land Plots and Improvement of Cadastral Data", Legislative Herald of Georgia, website, 17/06/2016.
8. *Bokhashvili V.,* Land Law, Reader – Auxiliary Textbook, Tbilisi, 2020, 18, 31, 47, 74, 76, 86 (in Georgian).
9. Current State of the Land Market, Analysis and Recommendations, USAID GEORGIA, Economic Policy Research Center, 2013, 3-4.
10. Georgian Soviet Encyclopedia, Volume 8, Tbilisi, 1984, 587 (in Georgian).
11. *Imomniyozov D.,* Economic and Legal Nature of the Concept of Privatization, CENTRAL ASIAN JOURNAL OF THEORETICAL AND APPLIED SCIENCES, Volume: 04, Issue: 01, 2023, 81.
12. *Khutsishvili E.,* Work of the 2019 Autumn Session of the Parliament of Georgia, Democracy Index – Georgia, Tbilisi, 2020, 22 (in Georgian).
13. *Nellis J.,* The World Bank, Privatization and Enterprise Reform in Transition Economies: A Retrospective Analysis, Washington D.C., 2002, 22.
14. *Seiler J.,* von Staudingers Komm. zum BGB mit Einführungsgesetz und Nebengesetzen, Berlin, 2005, 878.
15. *Turava P.,* General Administrative Law, Tbilisi, 2018, 62 (in Georgian).
16. Terra Institute, LTD for USAID: Georgia Land Market Development Project Final Report, October, 2005, 4.
17. *Vachnadze N., Tomadze N.,* Defeated Georgia (December-January Events in Tbilisi 1991-1992) Part II, Tbilisi, 2019, 107 (in Georgian).
18. Ruling of September 19, 2006 in Case No. BS-282-268(K-06) of the Administrative and Other Category Cases Chamber of the Supreme Court of Georgia.

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Presumption of the Mandator's Property in Private Law Doctrine and Judicial Practice

In both substantive civil law relations and civil procedural law, the category of presumptions has crucial importance. Legal doctrine and judicial practice recognize and apply two types of presumptions: legal (statutory) presumptions and factual, or judicial presumptions. The significant role of presumptions is due to, on the one hand, by the need for accurate legal qualification of the legal relationship existing between the parties and, on the other hand, by the necessity of the correct allocation of the burden of proof.

The subject matter of this research is narrow in scope. It does not aim to provide a comprehensive analysis of the category of presumptions in law, which would in any event be impossible within the framework of a single article. Instead, the study focuses on one specific legal presumption, the presumption of the mandator's property in private law. The provision containing this presumption, enshrined in Article 716 of the Civil Code of Georgia, is a multifaceted norm, which leads to difficulties in qualifying the legal relationships regulated by it.

In Georgian legal scholarship, this problem has not been examined as an independent subject of research. However, practice clearly demonstrates the practical significance of legal relationships that arise in one's own name but at the expense of the mandator. The correct application of the norm is impossible without adequate scholarly research. Accordingly, the aim of this study is to determine the precise legal meaning of the provision on the presumption of the mandator's property, its scope of application, the addressee of the norm, the content and nature of the legal relationship arising from it, and whose interests the given norm serves.

As a result of examining this problem, the functional purpose of the institution provided for by the norm will be identified, along with the cases in which the application of the norm is permissible and the types of relationships regulated by it. This, in turn, will enable courts to apply the norm correctly, contribute to the formation of consistent judicial practice, and foster the development of private law doctrine.

Keywords: *Mandator, mandatary, mandatary's creditor, mandator's property and rights, presumption, mandate, entrustment of ownership, commission agreement.*

1. Introduction

This article concerns a provision reflected in the rules governing the contract of mandate (Article 716 of the Civil Code of Georgia)[1], which contains a construction different from the classic mandate agreement and embodies the presumption of the mandator's property.

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Unlike the classical construction of the mandate agreement, which presupposes that the mandatary acts in the name and at the expense of the mandator (Article 709 of the Civil Code) on the basis of authorization, Article 716 of the Civil Code addresses the opposite situation: the mandatary's action at the expense of the mandator, but in the mandatary's own name. Hence, the purpose of the article is to answer the following questions: What justifies qualifying action taken in one's own name as a legal relationship between the mandatary and the mandator? What specific characteristics distinguish acting in one's own name but at another person's expense? Does the relationship envisaged by the cited provision constitute an independent case, distinct from relationships arising on the basis of representation or a commission agreement[2]? How precise is the wording of Article 716 of the Civil Code, and what legal consequences follow from treating the property implied therein as the property of the mandator? What type of obligation relationship is generated by such a presumption? Answering these questions is impossible without analysing the procedural aspects of the problem alongside its substantive-law dimensions.

In Georgian civil law scholarship, the presumption of the mandator's property has not been studied in a monographic manner. In practice, however, disputes frequently arise from relationships governed by Article 716 of the Civil Code. The study of case law demonstrates that such disputes are often resolved incorrectly due to improper legal qualification.

In practice, there are numerous instances where a person acquires a proprietary legal benefit in their own name, but at another person's expense. Whether such cases fall within the scope of Article 716 of the Civil Code depends on determining the legal nature of the relevant provision. All of the above underpins the relevance and timeliness of this research. It is evident that conducting such a study is impossible without considering the systemic nature of law. Inevitably, this also requires an examination of foreign experience, both the approaches of continental European legal systems and those of Anglo-Saxon (common law) systems. Hence, the research employs systemic-structural and comparative-law methods. The former makes it possible to analyse Article 716 of the Civil Code within the broader system of similar legal constructions, such as commission agreements, entrustment of ownership, and mandate contracts. The comparative-law method, in turn, allows for conclusions to be drawn as to whether the presumption of the mandator's property provided for in Article 716 of the Civil Code is an autonomous institution or whether functionally analogous provisions exist within continental European legal systems, as well as to identify similarities and distinguishing features in comparison with analogous rules. Both the systemic and comparative methods enable a clear determination of the legal nature of the presumption of the mandator's property in Georgian private law, its practical function, and the effectiveness of its application in practice. This, in turn, will

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1 Hereinafter – Civil Code

2 As noted in the legal literature, the contracts in question differ from one another primarily in that a mandate contract constitutes a contract of representation, i.e. the mandatary acts in the name of the mandator on the basis of authorization, whereas a commission contract does not give rise to a relationship of representation. Although the commission agent acts in accordance with the interests of the mandator (commitment), they act in their own name, which excludes the possibility of the emergence of a representative relationship. *Skhirtladze K.,* Legal Regulation of the Commission Contract, David Aghmashenebeli University of Georgia, Seminar Paper in Research Skills, Doctoral Program in Law, Tbilisi, 2022, 12 (In Georgian).

contribute to the development of Georgian private law doctrine, ensure the proper exercise of the rights and obligations of the parties to a mandate contract, promote a coherent understanding of the significance of this institution in practice, and ultimately foster the development of law itself.

With regard to the issue at hand, there are almost no valuable interpretations in judicial practice. The scarcity of judicial reasoning further complicates the research. For instance, in one claim based precisely on Article 716 of the Civil Code of Georgia, the court ruled in favour of the claimant[3], and this ruling was upheld by the Civil Chamber of the Tbilisi Court of Appeal. The court decisions were based on the recognition as proven of the factual circumstances set out in the statement of claim, according to which the claimant transferred funds to the defendant from abroad. Using these funds, the defendant purchased an apartment in their own name. The claimant sought the attribution of ownership of the apartment to themselves. Although the satisfaction of the claim was based solely on treating the circumstances alleged in the claim as undisputed facts, and neither court (neither the Tbilisi City Court nor the Tbilisi Court of Appeals) provided a fundamental interpretation of Article 716 of the Civil Code in their decisions, the fact that the circumstances set out in the claim were considered legally justified by the courts means that the claim itself was deemed well-founded precisely on the basis of Article 716 of the Civil Code.

In another case, the claim was also based on Article 716 of the Civil Code. According to the plaintiff, they transferred an amount to the defendant, with which the latter purchased a plot of land and registered it in their own name. According to the Supreme Court's interpretation[4], a mandate contract can also be concluded orally; however, when the mandate involves the acquisition of immovable property, the execution of such a mandate is impossible without a written power of attorney, which is necessary to confirm the agent's authority to acquire immovable property in someone else's name and to register it in the Public Registry.

The Supreme Court concluded that even if it were established that the subject of the oral mandate contract was indeed a specifically defined immovable property, the agent could not execute the mandate without the mandator's actions, which should have been expressed through the granting of powers of attorney. It is evident that the court did not distinguish between the mandate contract and the power of attorney. The power of attorney must be separated from the relationship implemented or to be implemented on its basis (the basic relationship), which stems from the principle of abstraction characteristic of German law[5]. This is entirely justified and, therefore, is consistent with Georgian law as well.

On the contrary, the court held that, although no mandatory special form is established for a mandate contract (Articles 709-723 of the Civil Code) and, therefore, such a contract can be concluded orally, even when the mandate concerns the acquisition of immovable property, for all contracts, including oral mandate contracts, the rule established in the first part of Article 327 of the Civil Code applies. This rule requires that an agreement be reached on all essential terms of the contract, which

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3 Tbilisi City Court, Civil Cases Panel, Default Decision of 14 November 2023, Case №2/23757-22 (In Georgian).

4 Supreme Court of Georgia, Civil Cases Chamber, Ruling of 30 April 2018, Case №ას-260-248-2017 (In Georgian).

5 *Shubert C.,* Münchener Kommentar zum BGB, 10 Auflage, 2025 §164, Rn. 25.

must be reflected through compliance with the corresponding form. According to the court, this provision of Article 327 implies that when the subject of a mandate contract is the acquisition of immovable property, it is important, in case of a dispute, that the contract clearly indicate which immovable property it concerns. If the subject of the contract is not specified[6], then, under Article 715 of the Civil Code, the mandator can only demand the return of the funds provided to the agent within the scope of the mandate, and not the return of the immovable property itself. It is evident that in the cases mentioned, which were based on similar circumstances, different outcomes were reached. Moreover, the Supreme Court's interpretations do not fully reflect the essence of Article 716 of the Civil Code.

In another case, the Supreme Court of Georgia also emphasized that, for the recognition of the mandator's ownership rights over a disputed property, it is necessary to confirm the existence of a mandate contract between the parties for the acquisition of the property and the transfer of funds to the mandatary for the purchase of the disputed property under that contract[7]. As can be inferred from the analysis of practice, not every instance of representation automatically produces legal effects in favor of the mandator.

As practice shows, when a dispute concerns immovable property arising from a mandate contract, including under Article 716 of the Civil Code, courts focus not only on the confirmation that the mandatary received the funds or property necessary to acquire the rights, but also on ensuring that the form of the transaction is observed. In doing so, the requirements of Articles 103 and 107 of the Civil Code (as well as Article 327) must be taken into account.

2. For the Matter of the Relationship between the Letter of Authority, Commission Contracts, and Mandate Contracts

Both the granting of a letter of authority and the conclusion of a mandate contract are based on trust. Contrary to one of the views in the literature[8], both constitute fiduciary transactions. At the same time, they differ from each other in their legal nature.

While the legal effects of entering into a transaction based on a power of attorney are relatively clear (considering Article 104 of the Civil Code), acting in one's own name but at the expense of the mandator is a multifaceted matter and, therefore, requires consideration of numerous factors. In one of its rulings, the Supreme Court of Georgia emphasized that the interest in granting authority may arise from both personal and contractual relationships between the mandator and the mandatary, which is not a fact of essential significance when assessing the mandatary's authority. According to the court, it is essential to establish the authenticity of the mandator's will. If the will is properly expressed, it is presumed that actions taken by the mandatary within the scope of their authority correspond to the mandator's interests. This presumption derives from the law, which, in the words of the court, is

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6 In other words, it is not confirmed that the mandatary acquired the disputed immovable property specifically in connection with the performance of the authorized act.

7 Supreme Court of Georgia, Civil Cases Chamber, Ruling of July 31, 2017, Case №ას-712-665-2017. (In Georgian.)

8 *Tuhr A.,* Allgemeiner Teil des schveizerischen Obligationenrechts, Tubingen, 1924, Halb bd 1, 181.

"almost irrefutable" [9] and ensures the stability of civil circulation. According to the same decision, the legal relationship arising from the granting of a power of attorney is independent of any contractual relationship existing between the mandator and the mandatary.

While a letter of authority confirms the representative's authority to perform certain acts in the name of the principal, a mandate contract governs the relationship between the mandator and the mandatary. Therefore, even if the mandatary breaches the mandate contract vis-à-vis the mandator, this cannot affect the validity of the authority defined by the letter of authority

Another important point is: Article 716 of the Civil Code refers to a person acting in their own name as a mandatary. Consequently, acquiring the status of a mandatary does not require that a letter of authority be issued to a particular person. Moreover, the "mandatary" referred to in Article 716 must also be understood to include a person acting on the basis of sub-authorization (delegation), since delegation does not constitute a transfer of authority as such, but rather the granting of new authority by the representative (mandatary) in the name of the represented person (mandator). This new authority must, in its content, correspond to the original authority.[10] As a result of delegation, the previous authority is terminated, and the new mandatary of the mandator takes its place.

As for the distinction between representation and a commission contract, apart from the fact that the latter is primarily used in commercial circulation, there is another important difference: the legal effects of a transaction concluded by a representative arise directly for the represented person. When a mandatary concludes a transaction with a third party, the mandatary does not become a party to the legal relationship arising between the mandator and the third party as a result of the mandate contract, nor does the mandatary acquire any rights or obligations under that transaction.

By contrast, a commission agent becomes a party to the transaction concluded with a third party and acquires rights and obligations thereunder. The person who contracts with the commission agent does not become a party to the commission contract itself. The rules governing commission contracts do not apply to legal relationships arising with the participation of third parties. The commission agent is not a party to transactions concluded in accordance with their interests, whereas the principal is deemed to be a party to transactions concluded by the commission agent with third parties and, accordingly, acquires the rights and obligations provided for by those transactions, since such transactions are concluded for the principal. It should also be noted that a commission contract is always onerous, whereas a mandate contract may be either onerous or gratuitous.[11]

3. Historical-Comparative Aspect of the Study

First of all, it should be noted that the need to refine the forms and methods of participation in civil circulation (the market) has led to the emergence of various types of legal relationships between parties, one of which is the use of services provided by a third party. Such a third party (the service provider) is not a party to the transactions concluded within the scope of the service. This refers to

[9] Supreme Court of Georgia, Civil Cases Chamber, Decision of December 13, 2013, Case №ას-398-377-2012 (In Georgian).

[10] *Larenz K., Wolf M.,* Allgemeiner Teil des Bürgerlichen Rechts. 8. Aufl. München, 1997, 911.

[11] Skhirtladze, K., *Legal Regulation of the Commission Contract*, David Aghmashenebeli University of Georgia, Research Skills Seminar Paper, Doctoral Programme in Law, Tbilisi, 2022, 13 (In Georgian).

representation. In commercial relations, a specific form of such a relationship has developed – commercial representation. Examples include the *Prokurist* in German law and the *commis voyageur* in French law, among others. In many cases, the represented person, for various reasons, does not wish to act independently and, at times, is not even able to do so. Consequently, they prefer to rely on the services of a representative. Such a representative concludes transactions with third parties. It is precisely for this reason that the legislator employs different legal constructions to describe such actions. Specifically, the law refers to the performance of acts "upon the instruction of another person," "in the name of another person," "at another person's expense," "in accordance with the interests of the owner," while Article 716 of the Civil Code introduces the construction of acting "in one's own name, but at the expense of the mandator."

In private-law circulation, alongside representatives, various types of intermediaries also play a significant role. An intermediary, as a rule, acts in their own name; for this reason, intermediation does not fall within the legal definition of representation. The purpose of an intermediary's (broker's) activity is to facilitate the conclusion of a transaction, which is achieved by identifying counterparties interested in entering into the transaction or by participating in the preparation of the contractual terms.

For example, in Germany this role is performed by the commercial broker (*Handelsmakler*)[12], while in France it is the *courtier*[13] (which exists in several forms, including commercial, maritime, insurance, and others).

Representative and intermediary functions are sometimes closely intertwined; however, the legal status and functions of a commercial representative and an intermediary (broker) are distinct. [14]

There is also another category of independent legal subjects who act in their own name, at the expense of a third party, and in accordance with their own interests. Such subjects include wholesale and retail sellers who participate in the distribution of goods and who are neither representatives nor intermediaries of the manufacturer. In modern civil circulation, such relationships are structured – both in the internal market and in foreign trade in goods – through commission contracts[15], which may also cover relationships arising from ship chartering as well as banking operations, the subject of which is primarily securities, and other types of transactions.

The purchase and sale of securities are often carried out through banks operating on a commission basis.

Using the comparative-law method, the literature has rightly concluded that the regulation of relationships arising from the use of services of third parties (representatives, brokers, agents) differs between Anglo-Saxon and continental legal systems[16].

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12 German Commercial Code – Commercial Code of Germany, Book 1, Part 8

13 Commercial Code of France – Commercial Code of the Republic of France, Book 1, Title III, Chapter I.

14 *Schmittgoff C.,* Agency in International Trade. A Stude of Corporative Law, Collected Courses of the Hague Academy of International Law, Vol. 129, 1970; *Leloup J. M.,* Les agents commerciaux. Statuts juridiques. Strategies professionelles. Paris: Delmas, 1993.

15 *Gotua L., Some Legal Aspects of the Regulation of Factoring in Georgia*, "Law Journal," No. 2, 2018, 24 (In Georgian).

16 *Civil and Commercial Law of Foreign Countries,* textbook, edited by Buzbakh V.V. and Puchinsky V.K., Moscow, MCFER, 2004, 210–211 (In Russian).

In the continental legal systems, a system of contractual relationships has been developed and expressed through various types of contracts. The designation of a contract depends on the nature of the participation of the third party within that contractual relationship. Such contracts may include commercial representation, mandate contracts, and commission contracts.

In countries of the Anglo-Saxon legal system, by contrast, regardless of the legal nature of the relationships that arise (in particular, whether they constitute factual or legal relationships), the parties to the contract are referred to as the "agent" and the "principal," and the contract itself is termed an agency contract[17].

In other words, any form of contractual relationship between a principal (that is, a person who gives various types of instructions to an agent) and an agent, irrespective of its content and legal consequences, is classified in Anglo-Saxon legal systems as an agency contract or agency relationship. Consequently, conclusions regarding the scope of the agent's authority and the boundaries of the contractual relationship between the parties can be drawn solely from the content of the contract itself or from the powers conferred upon the agent.

In international commercial circulation, depending on the role of the agent in the relationship between the principal commercial operator (the principal) and the third parties to whom the agent offers its services or goods for acquisition, the following forms can be identified: (a) Direct representation, where the agent concludes a contract in the name of and on the instructions of the principal. As a result, the allocation of roles is clear to all parties connected with the contract, first and foremost as regards who exactly is a party to the contract and, consequently, who acquires rights and assumes obligations thereunder. This form is characteristic of commercial representation and mandate contracts. (b) Indirect representation, where, in a legal perspective, the agent is the party to the contract, while in an economic perspective the contract is concluded either at the expense of the principal and in accordance with the principal's interests, with the principal remaining the owner of the goods (same as commission and consignment contracts), or is concluded independently by the agent, who becomes the owner of the goods, but whose actions nevertheless correspond to the principal's economic interests. In the latter case, the principal's interest is expressed, in particular, in the expansion of the market for the sale of goods or services and their promotion on the market.[18]

Such forms of representation are also reflected in the Principles of European Contract Law (Chapter 3, Articles 3-101–3-304)[19], which contain provisions on the "authority of agents"[20].

The Principles of European Contract Law (Article 3-102) distinguish between direct and indirect representation. Chapter 3, Section 2, on direct representation, provides that direct representation occurs when the agent acts in the name of the principal; it is irrelevant whether the identity of the principal is known from the outset or becomes known later. Chapter 3, Section 3, on

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17 In English – agency agreement.

18 *Vilkova N.G., Contract Law in International Circulation*, Moscow, Statut, 2002, 221-222; 273-274 (In Russian).

19 The principles of European Contract Law (PECL) <https://pecl.php.net/≥ [25.09.2025].

20 These provisions govern the authority of the agent or other intermediary to bind their principal under contracts concluded with third parties, but they do not address the internal relationships between the agent or intermediary and their principal.

indirect representation, contemplates two cases: first, when an intermediary acts not in the name of the principal but in their own name or acts according to the instructions and mandate of the principal; second, when the intermediary acts solely on the principal's instructions, of which the third party is unaware and has no reason to be aware.

These Principles reflect the provisions of the United Nations Convention of 17 February 1983 (the Geneva Convention) [21] concerning agency in the international sale of goods.

It is noteworthy that the general principle characteristic of the modern institution of representation, according to which the legal effect is produced for the represented person, was not recognized in Roman law.

As noted in the literature, initially (referring to Roman law – the emphasis is the author's) direct representation was not recognized by any legal rule[22]. Such representation was considered a "legal miracle," which became practically possible only when proponents of natural law returned to justifying contract law based on the idea of freedom of will and autonomy[23]. Hugo Grotius regarded it as permissible to conclude an agreement "in the name of the person to whom the item is to be delivered." In such a case, ownership rights are acquired directly by the person "in whose name the act is performed"[24]. And vice versa, under the condition that an authorized person must conclude a transaction with a third party in the "name" of the principal, it follows that the transaction produces no legal effect for the principal if the authorized person, although acting within the scope of the mandate, did not act in the principal's name. If the contract is concluded in the name of the contracting party themselves, then no representation occurs. In such cases, only the person concluding the contract acquires rights and obligations under the transaction, even if this person is authorized by the principal to conclude it. The contracting party must act at the principal's "expense" and provide an account to the principal for their actions, receiving appropriate remuneration for the work performed. This reflects the approach of continental law.

By contrast, Anglo-Saxon law does not recognize such limitations. The distinction in continental European law between acting "in one's own name" and "in another's name" is unacceptable and unclear to English lawyers, who question why acting solely in another's name creates rights and obligations for the principal.

Thus, in continental European law, the distinction between acting in one's own name and acting in another's name is clearly recognized, but it is not strictly enforced. Evidence of this is the fact that

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21 The Geneva Convention does not contain a provision similar to the presumption of ownership under Article 716 of the Civil Code of Georgia. The Convention reflects the principles of the two main legal systems (continental European and Anglo-Saxon) and is intended for use in cases where the principal and the agent have their commercial enterprises in different states, and the agent is authorized by the principal to conclude sales contracts with third parties. At the same time, the acts performed by the agent that are binding on the principal are not defined by the Convention and, accordingly, depend on the agreement concluded between the agent and the principal.

22 *Zweigert K., Kötz H.,* Einführung in die Rechtsvergleichung, 3. Aufl. J.C.B. Mohr (Paul Siebeck) Tübingen, 1996, 130-141.

23 Ibid, 130-141.

24 Ibid,130-141.

in countries of this legal system, acting in one's own name can still produce legal effects for the person at whose expense the action is taken.

In both cases – acting in one's own name or in another's name, the economic purpose of the parties' actions plays an important role[25]. When one person instructs another to acquire a certain asset or right on their behalf, the essence of the parties' conduct is that the instructed person ensures that the principal becomes the owner of the asset or right, determines the price of the sale or transaction, reimburses the instructed person for the expenses, and pays remuneration. The order is executed irrespective of whether, in the course of negotiations, the instructed person informs[26], the third party or indicates that they are acting for the principal (who may be either known or anonymous).

Considering the above, it is reasonable to conclude that, from an economic perspective, acting in one's own name and acting in another's name are "branches of the same tree"[27]. For this reason, Anglo-Saxon law, with its broader conception of agency,[28] better accommodates the aspects of acting in one's own name and in another's name than continental law.

4. For the Right Qualification of the Relationship Regulated under Article 716 of the Civil Code

In the Georgian legal literature, there is an opinion that there was no need for the legislator to single out Article 716 of the Civil Code[29]. This view is difficult to share, since the relationship regulated by this provision is not covered by any other institution provided for in the Civil Code of Georgia. On the other hand, it is correct to conclude that this provision is closest in nature to Article 392(2) of the German Commercial Code[30]. However, this does not imply an absolute similarity between the relationships under the Civil Code of Georgia and the German Commercial Code. The cited provision of the German Commercial Code regulates the rights and obligations of the committent and the commission agent, and its main purpose is to ensure enhanced protection of the committent's rights.[31] According to the provision, claims arising from a commission contract are considered the property of the committent,[32] even if, formally, they are registered in the name of the commission agent.[33] Hence, the statutory (legal) presumption of ownership in favor of the committent applies, and

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25 *Zweigert K., Kötz H.,* Einführung in die Rechtsvergleichung, 3. Aufl. J.C.B. Mohr (Paul Siebeck) Tübingen, 1996, 427-438.

26 And might not have revealed anything about it.

27 *Zweigert K., Kötz H.,* Einführung in die Rechtsvergleichung, 3. Aufl. J.C.B. Mohr (Paul Siebeck) Tübingen, 1996, 427-438

28 That this is the agent's performance.

29 *Rusiashvili G.,* Contract for the management of another's affairs (Geschaftsbesorgungsvertrag) and fiduciary ownership, Georgian German Journal of Comparative Law, 43-57, <https://lawjournal.ge/3244235235-2/> [25.09.2025] (In Georgian).

30 Ibid.

31 *Koller I., Kindler P., Roth W-H., Drüen K-D.,* Handelsgesetzbuch: Kommentar, 9. Aufl., C.H. Beck 2019, 1027-1029.

32 *Lieder J., Wüstenberg T.,* Kommissionsgeschäft und Forderungszuordnung – Dogmatische Grundsatzfragen des § 392 Abs. 2 HGB, JURA 2016, 38 (11), 1229–1240.

33 Interpretation of the High Fereral Court of Germany: BGH Urteil vom 12. März 2003 – VIII ZR 179/02:

the provision protects only the interests of the committent. The scope of the provision in German law covers commercial relations, and its purpose is to ensure the security[34] and stability of these relationships[35]. Some scholars, however, believe that the aim of the provision is to determine the real status of the property (the status of the true owner) [36], as it constitutes an exceptional rule to the formal principle[37] on which ownership generally arises (i.e., the acquisition of ownership rights).

Article 392 of the German Commercial Code is based on the principle of economic reality, according to which ownership should correspond to the factual relationship between the parties. Therefore, despite formal or legal (titular) ownership, this presumption produces legal effects in favour of the committent. In practice, the emphasis is placed on protecting the owner from enforcement mechanisms applied by creditors[38], since the property is considered the committent's. Accordingly, any property or funds received by the mandatary or commission agent must be returned to the committent.

These views are not mutually exclusive. Similarly to German law, the significance of the presumption provided for in Article 716 of the Civil Code of Georgia can be understood along the same lines. However, the provision in the Georgian Civil Code covers a much broader range of relationships, as evidenced by the separate regulation of commission contracts (Article 723 of the Civil Code). Commission contracts are also governed by the Georgian Law "On Entrepreneurs." Although the regulatory provisions for commission contracts are unfortunately no longer included in the current Law "On Entrepreneurs," relationships arising from commission contracts remain numerous in practice. Commission contracts are always onerous, whereas mandate contracts may arise from every day (non-commercial) relationships. Other distinguishing features of commission contracts and the relationships governed by Article 716 could also be discussed, but such analysis falls beyond the scope of this article.

5. On the Incompleteness of the Norm Laying Down the Presumption of the Property of the Mandator

From the content of Article 716 of the Civil Code of Georgia, it is clear that the property referred to therein, and therefore the principal's property, is considered as such in the context of the mandatary's dealings with a creditor. This raises two questions: first, who is meant by "creditor"? Second, whose interests and rights does the provision protect? Both questions are linked inseparably. First of all, the wording of the provision is incomplete, as it focuses solely on the relationship between the mandatary and the creditor. On the one hand, the provision is correct, because the mandatary may,

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34 *Schmidt K.,* Gesellschaftsrecht, 5. Aufl., 2022, 403.

35 *Zimmermann R.,* The Law of Obligations, Oxford University Press, 1996, 230.

36 *Canaris C.-W.,* Handelsrecht, München: C.H. Beck, 2001, 241-243.

37 In the Civil Code, these are Articles 183 and 327, as well as the provision regulating the acquisition of rights in movable property. Hence, the same exception applies to immovable property as in German law. When establishing a relationship under Article 716 of the Civil Code, compliance with the imperative rules for acquiring rights in immovable property is no longer required.

38 Oberlandesgericht Köln, Urteil vom 16.09.2010 – 18 U 87/09.

in turn, be obligated to a third party and therefore have a creditor. The creditor should not have the right to enforce payment from property that, in reality, does not belong to the mandatary (in this case, the creditor's debtor). The question of who qualifies as a creditor must be clarified. The term should be understood broadly. Specifically, the mandatary's creditor may exist independently of the relationship under Article 716, or the creditor's right may arise from that very relationship. Moreover, a third party may not be a creditor at all but simply delay the transfer of an asset or right – in which case, this person is the seller. Consequently, the term "creditor" does not fully or accurately capture the essence of the relationship. Furthermore, the property referred to in Article 716 must be considered as such not only in the context of the mandatary's dealings with creditors or third parties but also in the relationship between the mandatary and the principal. If the property is immovable and the mandatary is registered as its owner, the presumption of the accuracy and completeness of the registered data of the immovable ceases to operate upon the principal's initiation of a claim.

As for the second question on whose interests the provision protects: it primarily protects the mandator, since the creditor of the mandatary may not enforce payment against this property on account of the mandatary's debts. The provision also protects the interests of the principal's creditors, as they may have claims against the principal and should therefore be able to enforce payment from the principal's property. Ultimately, by correctly determining the ownership of property or rights, the provision prevents unjust enrichment of any subject.

6. Legal-Procedure Aspects of the Study

Based on the relationship under Article 716 of the Civil Code of Georgia, the procedural addressee of the mandator's claim in a dispute may be either the mandatary, the creditor mentioned in the provision, or both, depending on who currently holds the property or right to be transferred to the mandator. Hence, the procedural question must be resolved. When both are respondents, joint participation is permissible. The necessity of joint participation arises when the creditor has not yet transferred the property or right to the mandatary. In such a case, joint participation is required because the mandator is dealing with both parties regarding the property or right.

Article 716 does not provide for the protection of the mandatary's rights. Therefore, when the mandator submits a claim for the transfer of property to the mandatary or to the creditor covered by Article 716, or requests the assignment of a right, the question arises whether the mandatary has a right of retention. The rules governing mandate contracts do not provide guidance on the right of retention. For this reason, the matter must be resolved under Article 369 of the Civil Code.

The issue is that a remunerated mandate contract is a synallagmatic (bilateral) contract, which means that both parties simultaneously have rights and obligations arising from the contract. If remuneration is not provided for the mandatary, but the mandatary has incurred expenses in performing the mandate, the contract should still be regarded as bilateral, though incompletely so. In such contracts, the right to withhold performance[39] provided under Article 369 should be qualified as a

[39] I.e., the mandatary's counter-right regarding the transfer of the property, to withhold the item until the mandator reimburses expenses, damages, etc.

right of retention with respect to the transfer of property[40]. By its legal nature, the right of retention is of a dilatory character[41], the exercise of which restricts or delays the enforcement of the mandator's claim to transfer the property to the mandatary[42].

7. Conclusion

There are many cases in which a person receiving money or property from another abuses their rights and concludes transactions in their own name but at the expense of someone else's property. Such cases fall within the scope of Article 716 of the Civil Code. This provision prevents the mandatary from unjustifiably using the principal's property to satisfy their own creditors. It is common, for instance, in banking and commercial transactions involving commission agents (brokers, agents) or various types of representatives, for funds belonging to others to be deposited in the agent's own accounts to execute the assigned tasks. Research has shown that the purpose of Article 716 is both to protect the mandator from the mandatary and to safeguard the mandator's creditors. This factor necessitates a broad interpretation of the provision. Until legal ownership vests in the mandator over the property received by the mandatary, that property exists in the hands of the mandatary only *de facto*. This applies not only to property received in connection with the performance of the mandate but also to property transferred for the purpose of fulfilling the mandate. Such a provision enhances the mandator's protection in dealings with third parties. A comparative analysis with Article 392, paragraph 2, of the German Commercial Code shows that the goal of both provisions is to minimize economic risk. Both norms contribute to legal certainty and clearly separate the claims of the committent and the commission agent, as well as those of the principal and the mandatary. The mandatary cannot treat claims acquired through the mandate as their own. Both provisions are important because they prevent liability arising from the mandatary's obligations and avert conflicts of interest between the mandatary and the principal. Commission agents or representatives sometimes have their own obligations, including tax liabilities. Due to these obligations, it is impermissible to enforce claims against the principal's property.

For the provision to function in favour of the mandator, it is not necessary for a mandate to have been issued. A contract of mandate should be regarded as a contract concerning representation. The contract of mandate differs from a commission contract or a contract for the transfer of ownership (trust/escrow). The relationship envisaged by Article 716 of the Civil Code, while incorporating certain classical features of both the mandate and the commission contract, constitutes an independent legal relationship, fully consistent with the principle of freedom of contract. Thus, the relationships governed by this provision are broader and more multifaceted. The rule set forth in Article 716 serves as a mechanism to protect the principal and to prevent abuse of form in determining ownership. This provision has significant practical importance in both procedural and enforcement contexts, as it allows the principal, in dealings with the mandatary's creditors, to demand the segregation of their

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40 *Hopt K.J., Kumpan Ch., Leyens P.C., Merkt H., Roth M.,* Handelsgesetzbuch: HGB, Beck'sche Kurz-Kommentare; Band 9, 41., neubearbeitete Auflage 2022, 1744-1787.

41 *Gernhuber J.,* Das Schuldverhaltnis. Tübingen, 1989, 670.

42 *Larenz K.,* Lehrbuch des Schuldrechts. 14 Aufl. München, 1987, Bd. 1, 12.

property and rights from the assets of the mandatary that are subject to enforcement. Consequently, the mandator's property, whether transferred to the mandatary or acquired by the mandatary on the mandator's behalf, cannot be subjected to various public-law restrictions or enforcement measures. This property must be kept separate from the mandatary's own assets. Therefore, Article 716 establishes a high standard of legal certainty in relationships between the parties. By protecting the mandator's ownership and firmly defining their legal status as owner, it minimizes legal risks, and its application has proven effective. Generally, the acquisition of ownership is excluded when there is a formal or substantive imbalance in the underlying transaction. The presumption under Article 716 restores balance between form and substance. Consequently, any requirement that the relationship between the principal and the mandatary exist in a mandatory written form, as sometimes interpreted in practice, is incorrect. Ownership rights vest in the principal over any property acquired by the mandatary, including immovable property, regardless of the form of the mandate contract, provided that the existence of such a contract between the parties is established.

The study established that Article 716 of the Civil Code does cover intermediary relationships. It also became evident that, compared to Continental law, the institution of representation in Anglo-Saxon law has a broader scope, which better accounts for the aspects of acting in one's own name versus on behalf of another. A comparative analysis of the functional purpose of the presumption of ownership in Georgian private law with German private law showed that the presumption of the mandator's property in Georgian law is not limited to commercial relations and has a considerably wider scope of application. Thus, it is more effective than the arrangement provided under German law. Therefore, the provision in §392(2) of the German Commercial Code does not constitute a functional equivalent or an exact copy of Article 716 of the Georgian Civil Code. Article 716 applies to commission relationships, natural persons, as well as commercial relations.

It can be recommended that the wording of Article 716 should be revised. A suitable formulation could be: "Property acquired by the mandatary in the course of performing the assigned act at the expense of the mandator and in the mandatary's own name, or property transferred by the mandator to the mandatary to perform the assigned act, shall be deemed the mandator's property in the relationships between the mandatary and the mandatary's creditors, or between the mandatary and any third party, including the mandatary's creditors, regardless of the form of the mandate agreement between the mandator and the mandatary."

Bibliography:

1. Civil Code of Georgia, 26/06/1997 (In Georgian).
2. Convention on the "Representation of the International Trade of Goods", 17/02/1983.
3. Law of Georgia on Entrepreneurs, 02/08/2021 (In Georgian).
4. The Civil Procedure Code of Georgia, 14/11/1997 (In Georgian).
5. *Gotua L.,* Some Legal Aspects of the Regulation of Factoring in Georgia, "Law Journal," No. 2, 2018, 24 (In Georgian).
6. *Rusiashvili G.,* Contract for the Management of Another's Affairs (Geschaftsbesorgungsvertrag) and fiduciary ownership", Georgian German Journal of Comparative Law , 43-57 <https://lawjournal.ge/3244235235-2/> [25.09.2025] (In Georgian).

7. *Skhirtladze K.,* Legal Regulation of the Commission Contract, David Aghmashenebeli University of Georgia, Seminar Paper in Research Skills, Doctoral Program in Law, Tbilisi, 2022, 12 (In Georgian).
8. Supreme Court of Georgia, Civil Cases Chamber, Ruling of 30 April 2018, Case №ას-260-248-2017 (In Georgian).
9. Supreme Court of Georgia, Civil Cases Chamber, Ruling of 31 July 2017, Case №ას-712-665-2017 (In Georgian).
10. Supreme Court of Georgia, Civil Cases Chamber, Decision of 13 December 2013, Case №ას-398-377-2012 (In Georgian).
11. Tbilisi City Court, Civil Cases Panel, Default Decision of 14 November 2023, Case №2/23757-22 (In Georgian).
12. The principles of European Contract Law (PECL).
13. German Commercial Code, 10/05/1897.
14. Commercial code of France, 18/09/2000.
15. *Canaris C.-W.*, Handelsrecht, München: C.H. Beck, 2001.
16. *Gernhuber J.*, Das Schuldverhältnis. Tübingen, 1989.
17. *Koller I., Kindler P., Roth W.-H., Drüen K.-D.*, Handelsgesetzbuch: Kommentar, 9. Aufl., C.H. Beck 2019.
18. *Larenz K.*, Lehrbuch des Schuldrechts. 14. Aufl. München, 1987.
19. *Larenz K., Wolf M.*, Allgemeiner Teil des Bürgerlichen Rechts. 8. Aufl. München, 1997.
20. *Leloup J.-M.*, Les agents commerciaux. Statuts juridiques. Strategies professionelles. Paris: DELMAS, 1993.
21. *Lieder J., Wüstenberg T.*, Kommissionsgeschäft und Forderungszuordnung – Dogmatische Grundsatzfragen des §392 Abs. 2 HGB, Jura, 2016.
22. *Schmidt K.*, Gesellschaftsrecht, 5. Aufl., 2022.
23. *Schmittgoff C.*, Agency in International Trade. Collected Courses of the Hague Academy of International Law, (In Georgian), Vol. 129, 1970.
24. *Shubert C.*, Münchener Kommentar zum BGB, 10 Auflage. 2025.
25. *Tuhr A.*, Allgemeiner Teil des schweizerischen Obligationenrechts. Tübingen, 1924, Halb bd 1.
26. *Vilkova N. G.,* Contract Law in International Circulation, Moscow, Statut, 2002, 221–222; 273-274 (In Russian).
27. *Zimmermann R.*, The Law of Obligations, Oxford University Press, 1996.
28. *Zweigert K., Kötz H.*, Einführung in die Rechtsvergleichung, 3. Aufl. Tübingen, 1996.
29. *Buzbakh V.V., Puchinsky V. K. (ed.),* Civil and Commercial Law of Foreign Countries, textbook, Moscow, MCFER, 2004, 210–211 (In Russian).
30. Oberlandesgericht Köln, Urteil vom 16.09.2010 – 18 U 87/09.
31. Oberlandesgericht München, Beschluss vom 25.01.2017 – 34 Wx 359/16.
32. BGH Urteil vom 12. März 2003 – VIII ZR 179/02.

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The Scope of the Prohibition of Employment Discrimination against Persons with Mental Health Conditions

This article examines the scope of the prohibition of employment discrimination against persons with mental health conditions and analyses its legal nature. The substantial increase in mental health problems in the post-pandemic period has rendered this issue particularly salient, as employment constitutes, on the one hand, a fundamental basis for social inclusion and well-being, while, on the other hand, the absence of employment or unequal treatment in the workplace represents a significant risk factor for the deterioration of mental health.

The article identifies the legal aspects of discrimination on the grounds of mental health at various stages of employment, including the pre-contractual phase, the contractual employment relationship, and the termination of employment. It places particular emphasis on reviewing the international legal framework and relevant judicial decisions, highlights the practical challenges associated with employing persons with mental health conditions, and familiarises the reader with best practices in this field. Special attention is devoted to reasonable accommodation as a key instrument for the implementation of the principle of equal treatment, without which genuine equality and effective workplace integration of persons with specific needs cannot be achieved.

The subject of the research is the determination of the scope of the prohibition of discrimination against persons with mental health conditions through an examination of the international legal framework and best practices. The article concludes that mental health should be recognised as an independent protected ground within anti-discrimination law, as a necessary response to a progressive problem with tangible social and legal implications. Such an approach would lay the foundation for the dignified and equal inclusion of persons with mental health conditions in the labour market.

Keywords: *mental health law; prohibition of employment discrimination; reasonable accommodation.*

1. Introduction

According to data from the World Health Organisation, at least one in four people worldwide exhibits signs of mental health problems,[1] with a marked progression of these indicators beginning particularly in the post-pandemic period.[2] Today, the active use of social media may act as a

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1 *WHO*, Mental Disorders, Key Facts, 2022, <https://www.who.int/news-room/fact-sheets/detail/mental-disorders> [15.12.2025].

2 *Juraszek P., Sobczyk K., Grajek M.,* Mental health in a post-pandemic perspective: economic and social costs, Journal of Education, Health and Sport, №69, 2024, 3.

provoking factor in the development of mental health problems, including anxiety, stress, low mood, and increased irritability or agitation.[3]

As a general matter, the term "mental health" is, even from a linguistic perspective, only rarely used to denote well-being; rather, it is almost invariably associated with serious or acute mental disorders and functions as a euphemistic substitute for "mental illness".[4] In reality, however, it also encompasses "mild" and "temporary" forms of mental health problems, which may not necessarily be linked to a serious clinical diagnosis.[5]

Furthermore, research demonstrates that public discourse on mental health issues is frequently associated with negative perceptions,[6] while persons with mental health problems are often portrayed as dangerous, incompetent, or unstable.[7] Stigma commonly originates in linguistic stereotypes that reinforce hostile attitudes towards individuals with mental health problems from an early age.[8] As a result, studies confirm that persons with mental health problems face not only the risk of social isolation but also significant discrimination across virtually all spheres of public life, including educational institutions, access to employment and conditions at the workplace, as well as the healthcare system.[9]

This issue is particularly sensitive in the context of labour law relations. For persons with mental health problems, the right to work represents, on the one hand, an opportunity for social inclusion and, on the other hand, a means of securing their livelihood.[10] At the same time, unemployment or the loss of employment constitutes one of the factors contributing to the onset or aggravation of mental health problems.[11]

According to 2021 data, 84,142 cases of diagnosed mental and behavioural disorders were registered in Georgia,[12] of which approximately 80 per cent concerned individuals of working age.[13]

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3 *Durlofsky P.,* Logged In and Stressed Out – How Social Media Is Affecting Your Mental Health and What You Can Do About It, UK, The Rowman & Littlefield Publishing Group, 2020, 9.

4 *Price H.,* The Language of Mental Illness: Corpus Linguistics and the Media, Cambridge: Cambridge University Press, 2022, 124.

5 For the purposes of classification, see *American Psychiatric Association*, Diagnostic and Statistical Manual of Mental Disorders: DSM-5-TR, Fifth Edition, Text Revision (2022). This classification encompasses "temporary" and "mild" mental health conditions, including, inter alia, depression, seasonal affective disorder (SAD), dysthymia, persistent mood instability, premenstrual dysphoric disorder, and related conditions, etc.

6 *Rössler W.,* The stigma of mental disorders: A millennia-long history of social exclusion and prejudices, EMBO reports, 2016, Vol. 17, No 9, 1250.

7 *Corrigan W. P. et al.,* The Impact of Mental Illness Stigma on Seeking and Participating in Mental Health Care, Psychological Science in the Public Interest, 2014, Vol. 15(2), 42.

8 *Hinshaw S. P.,* The Mark of Shame: Stigma of Mental Illness and an Agenda for Change. New York: Oxford University Press, 2007, 34.

9 Ibid., 131.

10 *Subramaniam M.* et al, Employment of young people with mental health conditions: making it work, Disability and Rehabilitation, 2020, 5.

11 *Stolove A. C., et al.,* Emergence of depression following job loss prospectively predicts lower rates of reemployment, analysis of the US Health and Retirement Study, Psychiatry Research 253, 2017, 79-80.

12 National Center for Disease Control and Public Health (NCDC), Health Care in Georgia – Statistical Yearbook 2021, 2022, 82 <https://test.ncdc.ge/pages/user/News.aspx?ID=ea1784b5-d3d0-4dd9-b29f-1369f5d6bbec> [15.12.2025] (in Georgian).

Compared to 2020, this figure represents an increase of 34.3 per cent.[14] Despite this, within the Georgian context there is no coherent political or strategic approach aimed at promoting the employment of persons with mental health problems. Moreover, the only provision in the Mental Health Strategy of Georgia for 2022-2030 relating to the promotion of employment for persons with mental health problems, namely, the development of a legislative reform package envisaged for implementation in 2022, has remained merely declaratory. To date, no concrete and effective measures, including the promised package of legislative amendments, have been developed.[15] The Public Defender has assessed a substantial part of the action plan concerning mental health development as declaratory in nature and has noted that the Strategy fails to set out clear pathways for its implementation.[16]

In Georgia, the practical aspects of the realisation of the right to work for persons with mental health problems are also problematic. Individuals with such needs are often unable to obtain employment due to their mental health condition, while the disclosure or manifestation of a mental health problem in the workplace typically becomes grounds for dismissal. A growing trend can be observed whereby employers, in order to avoid potential legal consequences, construct formal legal grounds for terminating employment.[17]

The aim of this article is to examine the legal nature of discrimination on the grounds of mental health in the workplace, to determine its scope, and to highlight the importance of an accessible and inclusive working environment.

2. Defining Mental Health

Mental health constitutes an integral component of an individual's overall health and well-being.[18] According to the World Health Organization, health is defined as a state of complete well-being and is not merely the absence of disease or infirmity.[19]

Mental health refers to a state of emotional, psychological, and social well-being[20] in which an individual realises their own abilities, is able to cope with the normal stresses of life, works productively and fruitfully, and contributes to the life of their community.[21]

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13 Ibid., 83.

14 National Statistics Office of Georgia (GeoStat), Health Care Indicators (2021), 2022, 1 (in Georgian).

15 Public Defender of Georgia, Report on the State of Protection of Human Rights and Freedoms in Georgia 2022, 2023, <https://bit.ly/4b9705e> [15.12.2025] (in Georgian). Public Defender of Georgia, Report on the State of Protection of Human Rights and Freedoms in Georgia 2023, 2024, <https://bit.ly/4bdxd2D> [15.12.2025] (in Georgian).

16 Public Defender of Georgia, Statement on World Mental Health Day 2022, <https://bit.ly/4ewiJ0F> [15.12.2025] (in Georgian).

17 Judgement on the case No/AS-1279-2021, the chamber of Civil cases of Supreme Court of Georgia (in Georgian).

18 *Prince M., Patel V., Saxena S., Maj M., Maselko J., Phillips R.M., Rahman A.,* No Health without Mental Health, The Lancet 370, no. 9590, 2007, 859–877.

19 *WHO*, Comprehensive Mental Health Action Plan 2013–2030, <https://www.who.int/publications/i/item/9789240031029> [04.09.2025].

Mental health influences the way we think and feel and determines how we act. It is grounded in the capacity to make decisions, establish relationships, and, ultimately, to shape and understand the world in which we live.[22] As an internal condition of the individual, mental health has an instrumental function, enabling connection with others, effective functioning, problem-solving, and the attainment of personal and professional goals.[23]

Mental health is determined by three core dimensions: emotional, psychological, and social well-being.

Emotional well-being is a key component of mental health. It directly affects how individuals think, feel,[24] and behave in their everyday lives and encompasses elements such as self-awareness, emotional regulation and expression, resilience, positive relationships, and adaptability.[25]

Psychological well-being is understood as a multidimensional construct that "encompasses the individual's general happiness, life satisfaction, purpose in life, and mental and emotional health".[26]

Social well-being refers to the "appraisal of one's circumstance and functioning in society".[27] It is measured through five dimensions:[28] Social Integration [A Sense Of Belonging];[29] Social Contribution;[30] Social Coherence; Social Actualization;[31] And Social Acceptance.

The determinants of mental health include both individual characteristics and broader social, cultural, economic, political, and environmental factors.[32] In this regard, living conditions or personal traits that reduce the risk of developing mental health problems (protective factors) in one context may,[33] in another, increase the likelihood of negative outcomes (risk factors).[34] Moreover, mental

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20 *Makhashvili N., Silagadze K.,* A Practical Guide To Pressing Mental Health Issues, 2023, 9 (In Georgian). Also, Mental Health America (n.d.)., Living well: How mental illness affects our lives, <https://bit.ly/3RpnXS0> [17.12.2025].

21 *WHO*, Mental Health: Strengthening Our Response, 2018, <https://bit.ly/3KGDc5i> [17.12.2025].

22 WHO, World mental health report: transforming mental health for all, 2022, 11, <https://www.who.int/publications/i/item/9789240049338> [04.09.2025]

23 Ibid.

24 *Keyes L. M. C.*, Mental Illness and/or Mental Health? Investigating Axioms of the Complete State Model of Health, Emory University, 2005, 539-540.

25 *Keyes L. M. C.*, The Structure of Psychological Well-Being Revisited, 1995, 720.

26 *Yiğit B., Çakmak Y. B.,* Discovering Psychological Well-Being: A Bibliometric Review, Springer, 2024, 43.

27 *Keyes, C. L. M.*, Social Well-Being, Social Psychology Quarterly, Vol. 61, No. 2, 1998, 122.

28 Ibid., 121-123.

29 Ibid., 122. "Social integration is the evaluation of the quality of one's relationship to society and community".

30 Ibid., 122. "Social contribution is the evaluation of one's social value. It includes the belief that one is a vital member of society, with something of value to give to the world".

31 Ibid., 123. "Social actualization is the evaluation of the potential and the trajectory of society. It is the belief in the evolution of society and the belief that society has potential which is being realized through its institutions and citizens".

32 WHO, mhgap community toolkit: field test version, 2019, 3, <https://bit.ly/3tvva4e> [17.12.2025].

33 *Substance Abuse and Mental Health Services Administration (SAMHSA)*, Risk and Protective Factors for Mental, Emotional, and Behavioral Disorders Across the Life Cycle, <https://iod.unh.edu/sites/default/files/media/Project_Page_Resources/PBIS/c3_handout_hhs-risk-and-proetctive-factors.pdf > [17.12.2025].

34 *WHO*, Promoting Mental Health: Concepts, Emerging Evidence, Practice, 2005, 133.

health is both a determinant of overall health and, conversely, is influenced by physical health, with the two being inextricably interconnected.[35]

3. Mental Health in the Workplace

Decent work has a positive impact on an individual's mental health. It serves not only as a means of securing one's livelihood but also as a space for structured activity, the development of positive relationships, the pursuit of goals, and the attainment of recognition.[36] Moreover, for persons with mental health problems, employment is increasingly regarded as part of a new treatment paradigm.[37]

Conversely, unemployment or precarious employment, as well as poor working conditions – including discrimination and inequality, excessive workload, insufficient or excessive job control, and the lack or absence of a sense of safety in the workplace – may constitute significant sources of stress and pose a threat to an individual's mental health.[38] According to World Health Organisation data from 2019, 15 per cent of working-age adults were affected by a mental disorder.[39] In the United States, nearly one-fifth of employed persons (19 per cent) assess their mental health as fair or poor and report approximately four times more unplanned absences due to mental health problems than their colleagues without such difficulties.[40] Other studies indicate that mental health problems are among the primary reasons for employees leaving their jobs. For example, according to 2025 data, 61 per cent of employees in the United Kingdom who have left or intend to leave their employment cite deteriorating mental health as the main reason.[41]

It is widely acknowledged that employees' mental health is a direct indicator of business success.[42] Conversely, frequent absenteeism, reduced productivity and motivation, and the resulting costs borne by employers constitute a significant burden arising from the absence of an inclusive working environment.[43]

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35 *Nabi H., Kivimaki M., De Vogli R., Marmot Mg., Singh-Manoux A.,* Positive and negative affect and risk of coronary heart disease: Whitehall II prospective cohort study, Bmj 337, 2008, 9-11.

36 *Subramaniam M. et al,* Employment of young people with mental health conditions: making it work, Disability and Rehabilitation, 2020, 5.

37 *Drake R. E., Wallach A. M.,* Employment is a critical mental health intervention, Epidemiology and Psychiatric Sciences 29, e178, 2020, 1-3.

38 *WHO*, Mental health at work, 2022, <https://www.who.int/news-room/fact-sheets/detail/mental-health-at-work> [06.01.2025].

39 Ibid.

40 *Gallup*, The Economic Cost of Poor Employee Mental Health, 2022, <https://bit.ly/3xnuW79> [06.01.2025].

41 *Spill chat,* The cost of workplace mental health in the UK, 2025, <http://bit.ly/4mnOz2g> [06.09.2025].

42 *Montano D., Reeske A., Franke F., Hüffmeier J.,* Leadership, followers' mental health and job performance in organizations: A comprehensive meta-analysis from an occupational health perspective, Journal of Organizational Behavior, 38, 2017, 327-350.

43 *Health and Safety Executive,* Managing the causes of work-related stress: a step-by-step approach using the management standards, 2007, 42.

In the workplace, mental health risks may be associated, inter alia, with the nature and content of work, working hours, specific characteristics of the workplace, and opportunities for career development.[44]

A wide range of mental health problems may manifest in the workplace. Research suggests that depression and/or anxiety are most commonly observed in occupational settings.[45] In addition, employees may experience stress, chronic fatigue, burnout, and even suicidal ideation.[46] Notably, mental disorders such as depression, bipolar disorder, attention deficit hyperactivity disorder (ADHD), and anxiety typically manifest differently in the workplace than in other environments.[47]

While psychosocial risk factors may be present across all sectors, certain workplaces are considered to entail heightened risks.[48] These include occupations involving a high emotional burden or a greater likelihood of exposure to potentially traumatic events, such as the healthcare system, emergency services, the penitentiary system, and similar fields.

4. The Prohibition of Employment Discrimination against Persons with Mental Health Problems

4.1. The Prohibition of Employment Discrimination

Discrimination, understood as any distinction, exclusion, or preference aimed at denying equal rights or their protection, constitutes a violation of the principle of equality and an infringement of human dignity.[49] Discrimination entails arbitrary and unjustified unequal treatment of persons who are substantially equal, as well as unjustified and arbitrary equal treatment of substantially unequal persons.[50]

According to the ILO Convention No. 111 concerning Discrimination (Employment and Occupation),[51] discrimination includes: (a) Any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation; and (b) Such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation as may be determined by the Member

44 *WHO*, guidelines on mental health at work, 2022, <https://bit.ly/4c4mTew> [06.01.2025].

45 *Rugulies R. et al,* Work-related causes of mental health conditions and interventions for their improvement in workplaces, 2023, 1370.

46 *WHO*, Mental health at work: policy brief, 2022, 4, < https://bit.ly/3XjDkiC> [06.01.2025].

47 *SoCal Empowered*, Examples of Mental Health Issues In The Workplace, <https://socalempowered.com/guide-mental-health-in-the-workplace/> [06.01.2025].

48 *WHO*, Mental health at work: policy brief, 2022, 4, <https://bit.ly/3XjDkiC> [06.01.2025].

49 *Nadareishvili M.,* Human Rights, Liberty Institute, Tbilisi, 2005, 119 (in Georgian).

50 *Eremadze K.,* Fundamental Rights for Freedom, Tbilisi, 2020, 20 (in Georgian). Also See Handbook on European non-discrimination law, European Union Agency for Fundamental Rights, Council of Europe, 2010, 21 (in Georgian).

51 *ILO*, The Discrimination (Employment and Occupation) Convention, 1958 (No. 111).

concerned after consultation with representative employers' and workers' organisations, where such exist, and with other appropriate bodies.[52]

The conventional definition of discrimination comprises three elements: discriminatory treatment (the act) – "any distinction, exclusion, or preference"; the ground of discrimination (the reason) – "made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin"; and the effect of the discriminatory treatment – "which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation".[53] At the same time, any distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof shall not be deemed to be discrimination.[54]

The United States Equal Employment Opportunity Commission (EEOC), whose mandate extends to all employers operating within the US market, defines employment discrimination as any unjustified adverse action against a job applicant or employee in hiring, promotion, discharge, pay, fringe benefits, job training, classification, referral, or other aspects of employment on the basis of a protected characteristic.[55]

Similarly, Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation sets out minimum standards for combating discrimination on the grounds of disability.[56]

Furthermore, the Convention on the Rights of Persons with Disabilities affirms the equal right of persons with disabilities to just and favourable conditions of work, including equal opportunities and equal remuneration for work of equal value, safe and healthy working conditions, protection from violence and harassment, and access to effective remedies.[57]

Accordingly, the prohibition of employment discrimination aims to address the inherent imbalance characteristic of labour relations by limiting and neutralising structural asymmetries of rights between the parties through labour law regulation.[58]

4.2. Mental Health as a Distinct Prohibited Ground

Anti-discrimination law is inherently a response to specific manifestations of inequality that are deeply embedded in a given society's historical and political context.[59] Such legislation can be

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52 Ibid., article 1 (1).

53 ILO Curriculum on Building Modern and Effective Labour Inspection Systems, Labour inspection and non-discrimination, module 13, 3.

54 *ILO*, The Discrimination (Employment and Occupation) Convention, 1958 (No. 111). Article 1 (2).

55 EEOC, Equal Employment Opporunity is THE LAW.

56 Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

57 Convention on the Rights of Persons with Disabilities, Article 27.

58 *Goldin A.,* Global Conceptualizations and Local Constructions of the Idea of Labour Law in Davidov G. and Langille B. (eds), *The Idea of Labour Law* (Oxford University Press 2011) 70, quoted in *Bakakuri N., Tordia T., Shvelidze Z. et al.,* Georgian Labor Law and International Labor Standards – A training manual for judges, lawyers and legal educators, 2017, 14.

59 *Fredman s.,* Discrimination Law, Oxford University Press USA, 2, 2011, 38.

effective only insofar as it is formulated in direct relation to the forms of inequality that have developed within that society.[60]

A ground of discrimination (also referred to as a "prohibited ground", "protected ground", "characteristic", or "criterion") is a personal attribute on the basis of which differential treatment occurs in the exercise of a particular right.[61]

The enumeration of grounds of discrimination serves several important objectives in legal, social, and policy-making contexts.[62] From a broader perspective, these objectives include ensuring clarity and precision in legislation, promoting inclusiveness and equality, protecting vulnerable groups, facilitating the effective administration and enforcement of justice, and enhancing public awareness.

International anti-discrimination instruments list a wide range of grounds of discrimination.[63] At the same time, they consistently emphasise that such lists are not exhaustive and that discrimination on any other ground is impermissible where it (i) causes or perpetuates systemic disadvantage; (ii) undermines human dignity; or (iii) seriously restricts the equal enjoyment of human rights and freedoms in a manner substantially comparable to discrimination on already prohibited grounds.[64]

None of the international instruments explicitly identifies "mental health" as a separate ground of discrimination; rather, it is typically subsumed under the broader grounds of health status[65] or disability[66]. The sole exception is the United Nations General Assembly Resolution on the Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care,[67] which

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60 Ibid.

61 *Kintsurashvili N.,* Basic Concepts of Discrimination in International Law, 5, quoted in *Kvachadze, M., E. Ghvinjilia, Jugheli N.*, The Reflection of International Anti-Discrimination Standards in National Judicial Practice, 2017, 36 (in Georgian).

62 European network of legal experts in gender equality and non-discrimination, brochure about A comparative analysis of non-discrimination law in Europe, 2017.

63 Inter alia, Article 14 of the European Convention on Human Rights prohibits discrimination on grounds such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. In addition, European Union equality directives prohibit discrimination on the grounds of racial or ethnic origin (Directive 2000/43/EC), religion or belief, disability, age or sexual orientation (Directive 2000/78/EC; see also Proposal COM(2008)462), and sex (Directives 2006/54/EC and 2004/113/EC).

64 *Equal Rights Trust*, Declaration of Principles on Equality, 2008, 5, 6.

65 The European Court of Human Rights has, in several cases, found violations of the prohibition of discrimination on grounds of health status, including in situations concerning persons with mental health conditions. For example, in Cînța v. Romania [2020] ECHR, the Court recognized that differential treatment linked to a person's mental health condition may amount to discriminatory treatment contrary to Article 14 of the Convention.

66 The Americans with Disabilities Act (ADA) does not expressly identify mental health conditions as a separate protected ground. However, through judicial interpretation and the practice of the U.S. Equal Employment Opportunity Commission (EEOC), it has become well established that discriminatory treatment directed at an individual with a mental health condition is assessed as discrimination on the ground of disability.

67 Principles for the protection of persons with mental illness and the improvement of mental health care, General Assembly resolution 46/119, Principle 1 (4), 1991

explicitly considers discrimination on the grounds of mental illness to be impermissible. The same Resolution clarifies that special measures aimed exclusively at protecting or advancing the rights of persons with mental illness shall not be regarded as discriminatory.

Given the progressive and pervasive impact of mental health problems across virtually all areas of life, it is essential to recognise "mental health" as a prohibited ground of discrimination in cases where an individual's mental health condition is evident and where unequal treatment is demonstrably linked to that condition. Even when assessed solely within the field of employment, research indicates that mental illness causes annual economic losses of approximately USD 48 billion to the United States economy,[68] while globally, around 12 billion working days are lost each year due to depression and anxiety alone, resulting in economic losses estimated at USD 1 trillion.[69]

4.3. The Scope of the Prohibition of Employment Discrimination against Persons with Mental Health Problems

Research confirms that the employment of persons with mental health problems remains problematic and that those who are employed tend to earn lower incomes than persons without such conditions.[70] Although a core requirement of labour law relations is adherence to the principle of equal pay for work of equal value, studies indicate that persons with mental health problems earn approximately 22 per cent less than their colleagues without such problems,[71] whereas the average gender pay gap stands at around 16 per cent.[72]

At the same time, employment can have a positive effect on the economic[73] and psychosocial[74] well-being of persons with mental health problems. In certain cases, mental health conditions may serve as grounds for refusing employment, while in others, employees refrain from disclosing their health-related needs or requesting reasonable accommodation out of fear of dismissal.[75]

The ILO Convention on Equal Treatment is universal in scope and is not limited strictly to the existence of a formal employment relationship.[76] Pre-contractual negotiations and the process of agreeing on contractual terms give rise to specific obligations for the parties involved.[77]

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68 *Gallup*, The Economic Cost of Poor Employee Mental Health, 2022, <https://bit.ly/3xnuW79> [11.01.2025].

69 *WHO*, Mental health at work: policy brief, 2022, 4, <https://bit.ly/3XjDkiC> [11.01.2025].

70 *Levinson D. et al.,* Associations of serious mental illness with earnings: results from the WHO World Mental Health surveys, British Journal of Psychiatry, 2010, 197.

71 *Money and Mental Health Policy Institute*, The link between money and mental health, 2019, <https://bit.ly/45pZAJG> [11.01.2025].

72 *American Association of University Women*, The Gender Pay Gap, 2022, <https://www.aauw.org/issues/equity/pay-gap/> [11.01.2025].

73 *Cook J.A. et al.,* The employment intervention demonstration program: major findings and policy implications, Psychiatric Rehabilitation Journal, 2008, 31.

74 *Fabian ES.,* Work and the quality of life, Psychosocial Rehabilitation Journal, 1989, 12.

75 *WHO*, Mental health at work: policy brief, 2022, 4, <https://bit.ly/3XjDkiC> [11.01.2025].

76 ILO, Equality of Treatment (Social Security) Convention, N 118, 1962.

During the pre-contractual phase, the prohibition of discrimination applies to the determination of selection criteria and employment conditions, as well as to access to career advancement at all levels of the professional hierarchy, irrespective of the sector of activity.

The recruitment process typically constitutes a chain of interconnected stages.[78] The initial step is the public announcement of a job opportunity through the publication of a vacancy. This is followed by the selection phase, during which the employer independently evaluates applicants based on their perceived capacity to perform the work, a process that may be influenced by bias.[79]

A classic form of discriminatory treatment at the pre-contractual stage is the refusal to hire a candidate on a prohibited ground.[80] In such cases, despite the candidate meeting the relevant qualification requirements, the protected characteristic becomes the decisive factor leading to a negative hiring decision.

The widespread stigma surrounding persons with health problems creates a significant barrier to their employment.[81] Research shows that employers seek to recruit the most "productive" candidates[82] and, due to limited information about individual applicants, often make decisions based on subjectively perceived characteristics attributed to certain groups. Stereotypical perceptions of persons with mental health problems are commonly associated with addictive behaviour, unreliability, lower competence, and reduced productivity, and in some instances, perceived dangerousness.[83] Consequently, the difficulties faced by persons with mental health problems in accessing employment are closely linked to employers' archetypal and stereotypical assumptions.

The use of overtly discriminatory language against persons with mental health problems in job advertisements constitutes a form of discriminatory treatment at the pre-contractual stage and may take the form of explicit or implicit discriminatory statements. Examples include criteria such as "the candidate must be mentally stable", "the candidate must not have mental health problems", or "must not be prone to depression". Likewise, the direct reference to specific manifestations of mental health conditions as selection criteria should be regarded as explicit discriminatory language.

Implicit discriminatory language refers to cases where the wording or criteria used in vacancy announcements indirectly exclude or deter individuals from applying, without an explicitly stated

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77 *Bakakuri, N., Tordia, T., Shvelidze, Z., et al.,* Georgian Labor Law and International Labor Standards – A training manual for judges, lawyers and legal educators, 2017, 130 (in Georgian).

78 *Frissen R., Adebayo J. K., Nanda R.,* A machine learning approach to recognize bias and discrimination in job advertisements, AI & Society 38, 2 (2023), 1027.

79 *Österlund P,* Preventing discrimination in recruiting through unconscious biases, 2020, 37.

80 *Kereselidze, D., Chachava, S., Zaalishvili, V., Shvelidze, Z., Meskhishvili, K.,* Commentary on the Labour Code of Georgia, 2023, 41 (in Georgian).

81 *ILO*, Occupational Safety and Health Convention, №155, 1981. Promotional Framework for Occupational Safety and Health Convention, N 187, 2006.

82 *Dennis J. A., Cain G. G.*, Statistical theories of discrimination in labor markets, *Ilr Review* 30, 2, 1977, 175-187.

83 *Angermeyer M. C., Dietrich S.,* Public Beliefs about and attitudes towards people with mental illness: a review of population studies, Acta Psychiatrica Scandinavica 113, 3 (2006), 163-179.

discriminatory intent.[84] This includes, for example, giving preference to candidates described as possessing "high emotional stability" or "exceptional resilience".

The statutory prohibition of discrimination also applies throughout the duration of the employment relationship.[85] Its scope extends to conditions of work, remuneration, and termination of employment; access to vocational guidance, promotion, vocational training, advanced training, and retraining at all levels of the professional hierarchy (including practical work experience); membership of and participation in workers' or employers' organisations or other professional associations; and access to employment-related social protection, including social security and healthcare.

The obligation to uphold the principle of equal treatment requires the provision of reasonable accommodation in the workplace,[86] and an unjustified refusal to provide such accommodation likewise constitutes discrimination.[87] Reasonable accommodation entails the necessary and appropriate modifications or adjustments to enable persons with specific needs to enjoy their rights on an equal basis, by overcoming unjustified barriers, without imposing a disproportionate or undue burden on the employer.[88]

According to the standard established by the Court of Justice of the European Union,[89] the dismissal of a person with mental health problems without the provision of reasonable accommodation must be regarded as discriminatory. Furthermore, national courts are obliged to assess whether the efforts undertaken by the employer were sufficient to qualify as reasonable accommodation within the meaning of the relevant Directive.[90]

General Comment No. 6 of the Committee on the Rights of Persons with Disabilities (CRPD/C/GC/6)[91] identifies six core principles for ensuring reasonable accommodation:[92]

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84 *Mullainathan S., Bertrand M., Chugh D.,* Implicit Discrimination, American Economic Review 95(2), 2005, 96.

85 *ILO*, Equality of Treatment (Social Security) Convention, №118, 1962.

86 Council Directive 2000/78/EC – establishing a general framework for equal treatment in employment and occupation, Article 5.

87 UN General Assembly by resolution A/RES/61/106, Convention on the Rights of Persons with Disabilities, 2006.

88 Committee on the Rights of Persons with Disabilities, general comment No. 6 (2018), para. 18 (c), quoted in Committee on the Rights of Persons with Disabilities, General comment No. 8 (2022) on the right of persons with disabilities to work and employment, 2022, para. 19, 5.

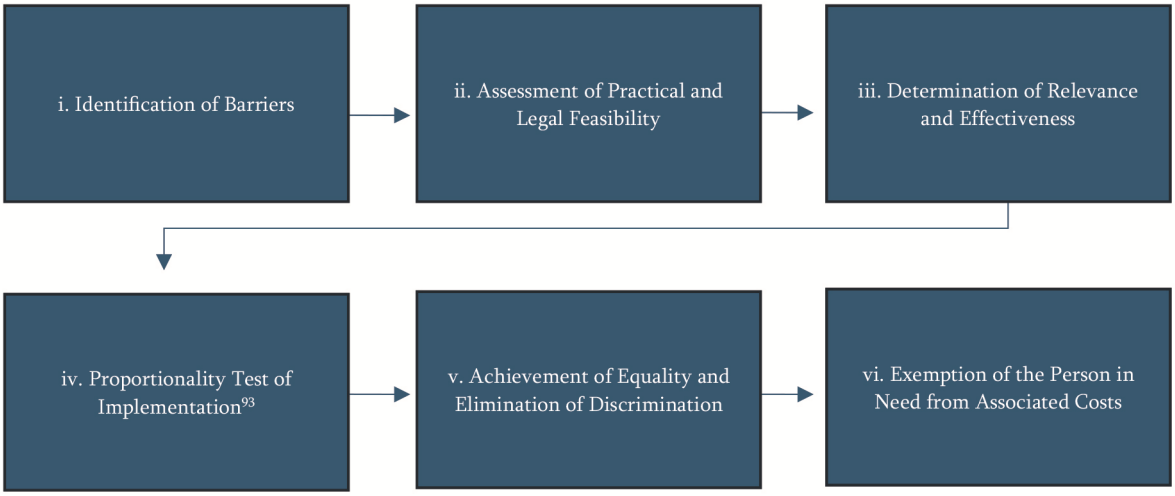
89 Case C-397/18, DW v Nobel Plastiques Ibérica SA, Judgment of the Court (First Chamber), 11 September 2019, EU:C:2019:703, para. 63-69.

90 Council Directive 2000/78/EC – establishing a general framework for equal treatment in employment and occupation.

91 Committee on the Rights of Persons with Disabilities, General comment No. 6 on equality and non-discrimination, 2018.

92 Ibid., para 26, 7.

93 Does it not impose a disproportionate and excessive burden on the employer? The employer is relieved of this obligation where the accommodation cannot be objectively justified or where its practical implementation would require a disproportionate effort.



In the context of prohibiting discrimination, reasonable accommodation is an essential element for enabling persons with mental health problems to enjoy the rights and freedoms guaranteed under the Convention.[94] Best practices demonstrate successful examples of implementing reasonable accommodations, particularly for individuals with mental health conditions. Approaches vary widely, ranging from technical adaptations and flexible working schedules to the provision of support staff and training programmes. Such measures not only enhance the integration of persons with mental health problems into the labour market but also generate positive outcomes for the employer and organisation.[95]

The prohibition of discrimination also applies to termination of employment, prohibiting dismissal on discriminatory grounds.[96] The European Social Charter obliges States to recognise every employee's right not to be dismissed without just cause, ensuring that any termination relates to the employee's capacity, conduct, or the operational requirements of the enterprise or service.[97]

According to US federal appellate case law, behaviour resulting from a mental health condition should be considered part of the individual's health status rather than as an independent undesirable conduct.[98] Consequently, before imposing sanctions on an employee with such a condition, employers must reasonably assess whether the individual qualifies as a "person with needs" and whether the behaviour is potentially attributable to the employee's mental health condition. In general, employers are expected to tolerate eccentric or unusual conduct resulting from an employee's mental health condition, provided the employee is able to perform essential job functions satisfactorily.[99]

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94 *Ferri D., Lawson A.*, A legal analysis of the situation in EU Member States, Iceland, Liechtenstein and Norway, European Commission 2016, 48, <https://bit.ly/3xZrAos> [13.01.2025].

95 *KMU Forschung Austria*, Practices of providing reasonable accommodation for persons with disabilities in the workplace: 24 company case studies across Europe, 2008, 17.

96 *ILO*, The Discrimination (Employment and Occupation) Convention, 1958 (No. 111).

97 Article 24 (a).

98 Gambini v. Total Renal Care, Inc., 486 F.3d 1087, 2007.

99 Chandler v. Specialty Tires of Am. (Tennessee), Inc., 134 F. App'x 921, 2005.

Under international labour standards, a general guiding principle holds that when an employer considers dismissing an employee due to health conditions, they must justify their decision not only under anti-discrimination law but also in accordance with standards developed through best practice principles. Factors to consider include the severity and nature of the health condition, the employee's skills and performance, and the impact of the health condition on overall productivity.[100]

Case law from the European Court of Human Rights establishes key standards for dismissals due to health conditions. The Court has ruled that dismissal on the grounds of health must involve proportionate mechanisms to achieve legitimate aims while fully respecting the principle of equality. Furthermore, individual assessment, procedural fairness, and access to effective legal remedies must be ensured to protect employees from unjustified termination due to health status.[101]

The US Americans with Disabilities Act (ADA) prohibits discrimination against employees with disabilities, including temporary impairments that affect their ability to perform essential job functions. Modern human resource management approaches, particularly with respect to employees with mental health problems, emphasise the employer's obligation to provide reasonable working conditions unless doing so would impose undue hardship.[102]

The International Labour Organisation requires employers, before proceeding with dismissal, to adapt the employee's working conditions, obtain a medical assessment of the health condition, explore alternative employment options, and, if termination is unavoidable, provide a clear and objective justification.[103]

The practical implementation of reasonable accommodation is fundamentally the employer's responsibility, reflecting the imbalance of market power and influence over employment relations compared with the employee. It ensures that persons with mental health problems can enjoy equal rights and participate fully in the workforce without bearing disproportionate burdens.

5. Conclusion

This study highlights a significant and timely issue: the protection of the employment rights of persons with mental health problems and the prohibition of discrimination against them.

Existing stigma prevents individuals with mental health conditions from fully participating in various spheres of life, as they are often perceived in public discourse as less competent or potentially dangerous.

The research demonstrates that, alongside the increasing prevalence of mental health problems, their impact on the field of employment is also growing. Conversely, the influence of employment on an individual's mental health is directly proportional: dignified and meaningful work has a positive

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100 ILO Standards and Actions for the Elimination of Discrimination and the Promotion of Equality of Opportunity in Employment, Equality and Prohibition of Discrimination in Employment.

101 Carson and Others v. United Kingdom (2010).

102 For the purposes of the Americans with Disabilities Act (ADA), the term encompasses any limitation of an individual's abilities, including those of a temporary nature.

103 *ILO*, Convention No. 158 concerning Termination of Employment at the Initiative of the Employer, 1982.

effect on mental well-being, whereas unemployment or unstable working conditions pose significant risks.

The study reviews the international legal framework prohibiting discrimination, emphasises the necessity of ensuring reasonable accommodation, and illustrates best practices for the integration of persons with mental health problems in the workplace. Furthermore, it underscores the need to recognise mental health as a distinct protected ground. In addition, the paper contributes to the broader discussion on the legal dimensions of mental health, providing a foundation for ongoing scholarship and policy development in this area.

Bibliography:

1. Council Directive 2000/43/EC.
2. Council Directive 2000/78/EC Establishing a General Framework for Equal Treatment in Employment and Occupation.
3. Council Directive 2004/113/EC.
4. Council Directive 2006/54/EC.
5. International Labour Organisation (ILO), Discrimination (Employment and Occupation) Convention (No. 111), 1958.
6. International Labour Organisation (ILO), Equality of Treatment (Social Security) Convention (No. 118), 1962.
7. International Labour Organisation (ILO), Occupational Safety and Health Convention (No. 155), 1981.
8. International Labour Organisation (ILO), Convention No. 158 Concerning Termination of Employment at the Initiative of the Employer, 1982.
9. International Labour Organisation (ILO), Curriculum on Building Modern and Effective Labour Inspection Systems, Labour Inspection and non-discrimination, module 13.
10. American Association of University Women, The Gender Pay Gap, 2022.
11. American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders: DSM-5-TR. 5th ed., Text Revision, 2022.
12. *Angermeyer M. C., Dietrich S.,* Public Beliefs about and Attitudes towards People with Mental Illness: A Review of Population Studies, Acta Psychiatrica Scandinavica 113, no. 3, 2006.
13. *Bakakuri N., Tordia T., Shvelidze Z. et al.,* Georgian Labour Law and International Labour Standards: A Training Manual for Judges, Lawyers and Legal Educators, 2017 (in Georgian).
14. *Bertrand M., Mullainathan S., Chugh D.,* Implicit Discrimination, American Economic Review 95, no. 2, 2005.
15. Committee on the Rights of Persons with Disabilities. General Comment No. 6 on Equality and Non-Discrimination, 2018.
16. Committee on the Rights of Persons with Disabilities. General Comment No. 8 (2022) on the Right of Persons with Disabilities to Work and Employment, 2022.
17. *Cook J. A. et al.,* The Employment Intervention Demonstration Program: Major Findings and Policy Implications, Psychiatric Rehabilitation Journal 31, 2008.
18. *Corrigan P. W. et al.,* The Impact of Mental Illness Stigma on Seeking and Participating in Mental Health Care, Psychological Science in the Public Interest 15, no. 2, 2014.

19. *Dennis J. A., Cain G. G.,* Statistical Theories of Discrimination in Labour Markets, ILR Review 30, no. 2, 1977.
20. *Drake R.E., Wallach A.M.,* Employment Is a Critical Mental Health Intervention, Epidemiology and Psychiatric Sciences 29, 2020.
21. *Durlofsky P.,* Logged In and Stressed Out: How Social Media Is Affecting Your Mental Health and What You Can Do About It. London: Rowman & Littlefield, 2020.
22. Equal Rights Trust, Declaration of Principles on Equality, 2008.
23. *Eremadze K.,* Fundamental Rights for Freedom, 2020 (in Georgian).
24. European Court of Human Rights. Cînța v. România, 2020.
25. European network of legal experts in gender equality and non-discrimination, brochure about A comparative analysis of non-discrimination law in Europe, 2017.
26. *Fabian E. S.,* Work and the Quality of Life, Psychosocial Rehabilitation Journal 12, 1989.
27. *Ferri D., Lawson A.,* A Legal Analysis of the Situation in EU Member States, Iceland, Liechtenstein and Norway. European Commission, 2016.
28. *Fredman S.,* Discrimination Law, 2nd ed. Oxford: Oxford University Press, 2011.
29. *Frissen R., Adebayo J. K., Nanda R.,* A Machine Learning Approach to Recognise Bias and Discrimination in Job Advertisements, AI & Society 38, no. 2. 2023.
30. Gallup, The Economic Cost of Poor Employee Mental Health, 2022.
31. *Goldin A.,* Global Conceptualisations and Local Constructions of the Idea of Labour Law, In Davidov and Langille (eds.), The Idea of Labour Law, Oxford University Press, 2011.
32. Handbook on European non-discrimination law, European Union Agency for Fundamental Rights, Council of Europe, 2010.
33. Health and Safety Executive, Managing the Causes of Work-Related Stress: A Step-by-Step Approach Using the Management Standards, 2007.
34. *Hinshaw S.P.,* The Mark of Shame: Stigma of Mental Illness and an Agenda for Change. New York: Oxford University Press, 2007.
35. ILO Standards and Actions for the Elimination of Discrimination and the Promotion of Equality of Opportunity in Employment, Equality and Prohibition of Discrimination in Employment
36. *Juraszek P., Sobczyk K., Grajek M.,* Mental Health in a Post-Pandemic Perspective: Economic and Social Costs, Journal of Education, Health and Sport 69, 2024.
37. *Kereselidze D., Chachava S., Zaalishvili V., Shvelidze Z., Meskhishvili K.,* Commentary on the Labour Code of Georgia, 2023 (in Georgian).
38. *Keyes C. L. M.,* Social Well-Being, Social Psychology Quarterly 61, no. 2, 1998.
39. Keyes L. M. C., Mental Illness and/or Mental Health? Investigating Axioms of the Complete State Model of Health, Emory University, 2005.
40. *Keyes L. M. C.,* The Structure of Psychological Well-Being Revisited, 1995.
41. KMU Forschung Austria, Practices of Providing Reasonable Accommodation for Persons with Disabilities in the Workplace, 2008.
42. *Levinson D. et al.,* Associations of Serious Mental Illness with Earnings, British Journal of Psychiatry, 2010.
43. *Makhashvili N., Silagadze K.,* A Practical Guide to Pressing Mental Health Issues, 2023 (in Georgian).
44. Mental Health America. (n.d.)., Living well: How mental illness affects our lives.
45. Money and Mental Health Policy Institute, The Link between Money and Mental Health, 2019.

46. *Montano D., Reeske A., Franke F., Hüffmeier J.,* Leadership, Followers' Mental Health and Job Performance in Organizations, Journal of Organisational Behaviour 38, 2017.
47. *Nabi H. et al.,* Positive and Negative Affect and Risk of Coronary Heart Disease, BMJ 337, 2008.
48. *Nadareishvili M.,* Human Rights. Tbilisi: Liberty Institute, 2005 (in Georgian).
49. National Center for Disease Control and Public Health (NCDC). Health Care in Georgia – Statistical Yearbook (2021), 2022. <https://test.ncdc.ge/pages/user/News.aspx?ID=ea1784b5-d3d0-4dd9-b29f-1369f5d6bbec> [25.03.2025] (in Georgian).
50. National Statistics Office of Georgia (GeoStat), Health Care Indicators (2021), 2022.
51. *Österlund P.,* Preventing Discrimination in Recruiting through Unconscious Biases, 2020.
52. *Price H.,* The Language of Mental Illness: Corpus Linguistics and the Media. Cambridge: Cambridge University Press, 2022.
53. *Prince M. et al.,* No Health without Mental Health, The Lancet 370, no. 9590, 2007.
54. Public Defender of Georgia, Report on the State of Protection of Human Rights and Freedoms in Georgia 2022, 2023 <https://bit.ly/4b9705e> [25.03.2025] (in Georgian).
55. Public Defender of Georgia, Report on the State of Protection of Human Rights and Freedoms in Georgia 2023, 2024 <https://bit.ly/4bdxd2D> [25.03.2025] (in Georgian).
56. *Rössler W.,* The Stigma of Mental Disorders, EMBO Reports 17, no. 9, 2016.
57. *Rugulies R. et al.,* Work-Related Causes of Mental Health Conditions, 2023.
58. *Stolove A. C. et al.,* Emergence of Depression Following Job Loss, Psychiatry Research 253, 2017.
59. *Subramaniam M. et al.,* Employment of Young People with Mental Health Conditions, Disability and Rehabilitation, 2020.
60. Substance Abuse and Mental Health Services Administration (SAMHSA), Risk and Protective Factors for Mental, Emotional, and Behavioural Disorders Across the Life Cycle.
61. United Nations General Assembly, Convention on the Rights of Persons with Disabilities, 2006.
62. World Health Organisation (WHO), Comprehensive Mental Health Action Plan 2013–2030.
63. World Health Organisation (WHO), Guidelines on Mental Health at Work, 2022.
64. World Health Organisation (WHO), Mental Disorders: Key Facts, 2022.
65. World Health Organisation (WHO), Mental Health at Work, 2022.
66. World Health Organisation (WHO), Mental Health at Work: Policy Brief, 2022.
67. World Health Organisation (WHO), Mental Health: Strengthening Our Response, 2018.
68. World Health Organisation (WHO), mhGAP Community Toolkit, 2019.
69. World Health Organisation (WHO), Promoting Mental Health: Concepts, Emerging Evidence, Practice, 2005.
70. World Health Organisation (WHO), World Mental Health Report: Transforming Mental Health for All, 2022.
71. *Yiğit B., Çakmak Y. B.,* Discovering Psychological Well-Being: A Bibliometric Review, Springer, 2024.
72. Gambini v. Total Renal Care, Inc. 486 F.3d 1087, 2007.
73. Chandler v. Speciality Tires of America (Tennessee), Inc. 134 F. App'x 921, 2005.
74. Judgement on the case No/AS-1279-2021, the chamber of Civil cases of Supreme Court of Georgia (in Georgian).

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The Scope of Judge's Questions in Adversarial Proceedings

The article discusses the compatibility of a judge's ability to pose a question to a witness with the principle of adversarial proceedings, within the adversarial model of the procedure. The aim of the research is to analyse whether both the regulation established under Article 25 of the Criminal Procedure Code of Georgia – which grants the judge the ability to pose a question to a witness – and the new practice introduced following the Constitutional Court's judgment – whereby the judge poses questions to witnesses without prior consultation with the parties – comply with constitutional and international standards.

The theoretical basis of the research is the dogmatic understanding of the principle of adversarial proceedings within the adversarial model of the procedure, the comparative analysis of the Georgian legal system, as well as the jurisprudence of the Constitutional Court of Georgia and the Supreme Court of the United States, and the case-law of the European Court of Human Rights.

In the concluding part of the article, it is established that despite the central importance of the principle of adversarial proceedings, the court is under an obligation to ensure fair trial. Accordingly, a judge may pose a question independently, provided that strict neutrality and self-restraint are observed, so as not to undermine the principle of adversarial proceedings. The concluding part of the article also presents recommendations for improving procedural provisions.

***Keywords**: principle of adversarial proceedings, adversarial model, role of the judge, witness examination, neutral arbiter, right to a fair trial, scope of a judge's question.*

1. Introduction

The Georgian criminal procedure is constructed in accordance with the adversarial model and is inclined towards the Anglo-American legal system.[1] Therefore, in Georgian criminal proceedings, there is always particular interest regarding positioning the court as a so-called "passive arbiter" for the adversary parties.

Within legal circles, including in Georgia, the subject of discussion remains the extent to which a judge's ability to pose a question to a witness independently, without the parties' consent, is compatible with the principle of adversarial proceedings in the adversarial model. The Constitutional Court of Georgia has deliberated on this issue significantly intensifying the debate.[2]

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1 *Akubardia I.,* Some Aspects of the Georgian Model of Adversarial Proceedings, *German-Georgian Criminal Law Journal,* No. 2, 2016, 11 (in Georgian).

2 Plenum Judgment No. 3/2/1478 of 28 December 2021 of the Constitutional Court of Georgia in the case "The Constitutional Submission of the Tetritskaro District Court regarding the constitutionality of the

In the Western legal doctrine, for example, Professor John D. Jackson points out that the adversarial model places the burden of proof on the parties; however, in practice judges often move beyond the role of an "arbiter" and actively intervene in witness examination. This, in turn, systematically weakens adversarial proceedings.[3] Literature that is more contemporary stresses that questioning frequently loses its substantive component of a fair trial and becomes a psychologically oppressive procedure, within which the judge's involvement and restraint of the parties are of importance.[4] It has also been observed that modern evidence law is increasingly based on reasoning rather than formal rules, which draws greater attention to fact-finding. Therefore, the issue of the judge's involvement in the examination of evidence, including during witness examination, becomes sensitive.[5] Furthermore, empirical studies indicate that the practice of judicial questioning in the adversarial model often shifts towards active interference.[6]

Accordingly, the current discourse raises the question of where the legitimate boundary lies in adversarial proceedings between a judge's right to pose a question to a witness independently and safeguarding adversarial proceedings between the parties. In other words, within the adversarial model, may the judge pose a question to a witness independently and, if so, what limits are established to ensure that the judge does not position himself or herself as a party? This is precisely the subject of research of the present article.

To analyse the above issues, qualitative research methods were applied. The questions raised were answered using historical, comparative-legal, deductive–inductive, dogmatic and analytical–synthetic methods. In preparing the article, a normative and precedent-based analysis of Georgian, European and United States law was used, as well as contemporary Western literature and research.

2. Model of Criminal Procedure

With regard to the model of the Georgian criminal procedure, the most relevant systems are those of common law (the so-called Anglo-American system) and civil law (the continental European criminal law system).[7]

The main difference between the above-mentioned legal systems lies in the manner in which the law is established.[8] The common law (the so-called Anglo-American) system is characterised by the

second sentence of Article 3.20, the third sentence of Article 25.2, Article 48.1 and Article 48.2, the first sentence of Article 48.5 and the first sentence of Article 48.7 of the Criminal Procedure Code of Georgia."

3 *Jackson J. D., Doran S.*, Addressing the Adversarial Deficit in Non-Jury Criminal Trials, Israel Law Review, Vol. 31, 1997, 664-665.

4 *Fairclough S.*, Resilience-building in Adversarial Trials: Witnesses, Special Measures and the Principle of Orality, Social and Legal Studies, 1-26, 2023, 2-4.

5 *Roberts P.*, Theorising Evidence Law, Oxford Journal of Legal Studies, Vol. 43, No. 3, 2023, 629-649.

6 *Lively J. C., Fallon L., Snook B., Fahmy W.*, Objection, Your Honour: Examining the Questioning Practices of Canadian Judges, Psychology, Crime and Law, 2022, 15.

7 *Melkadze O.,* Constitutionalism, Tbilisi, 2008, 350 (in Georgian). *Heger M.*, Adversarial and Inquisitorial Elements in the Criminal Procedure Legislation of European States as a Challenge of the Europeanisation of Criminal Procedural Law, German-Georgian Criminal Law Journal, No. 2, 2016, 4-6 (in Georgian).

8 *Kremens K.*, Inquisitorial and Adversarial Influences on the Examination of a Witness in the International Criminal Procedure, Przeglad Prawa I Administracji C/2 Wroclaw, 2015, 80.

adversarial model, also known as the party-led procedure, which implies the confrontation of two equal and antagonistic parties. In an adversarial procedure, the parties are responsible for conducting the proceedings and for obtaining and adducing evidence, while the court is responsible for delivering the judgment.[9] The civil law system of continental Europe, by contrast, is characterised by the inquisitorial model. In an inquisitorial procedure, the judge is actively involved in obtaining and examining evidence. Within this model, the court holds the prerogative both to conduct the proceedings and to adjudicate.[10]

In Western legal literature, it is considered that the strict distinction between adversarial and inquisitorial models has been significantly eroded in modern European law, and the procedural standards adopted from the United States create an "inoculation effect."[11] Even international criminal law represents a structural combination of inquisitorial and adversarial elements.[12]

The first Criminal Procedure Code of Georgia was adopted by the Parliament of Georgia on 20 February 1998.[13] This code was oriented towards the continental European criminal law system. Accordingly, the fundamental principles of the procedure were legality, inquisitorial proceedings and the establishment of the truth.[14] A number of provisions of the Code did not allow the defence to obtain evidence independently.[15] Therefore, despite the introduction of the principle of adversarial proceedings through amendments before the adoption of the new code, the previous Criminal Procedure Code of 1998 is still considered to represent predominantly an inquisitorial model of procedure.[16]

In 2009, the Parliament of Georgia adopted a new Criminal Procedure Code, which entered into force on 1 October 2010. The 2009 reform rendered the judge a "passive arbiter" and transferred

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9 *Jackson D. J.*, The Effect of Human Rights on Criminal Evidentiary Processes: Towards Convergence, Divergence or Realignment?, The Modern Law Review, Vol. 68, No. 5, 2005, 747; *Goodpaster G.*, On the Theory of American Adversary Criminal Trial, Journal of Criminal Law and Criminology, Vol. 78, No. 1, 1987, 119-121. *Akubardia I.*, Equality of Arms and the Role of the Judge in Adversarial Proceedings, Mzia Lekveishvili Jubilee Collection, 2014, 130 (in Georgian). Plenum Judgment No. 3/1/574 of 23 May 2014 of the Constitutional Court of Georgia in the case "Citizen of Georgia Giorgi Ugulava v. the Parliament of Georgia," II-75.

10 *Tumanishvili G.*, Criminal Procedure, General Part, Tbilisi, 2014, 75 (in Georgian). *Akubardia I.,* Some Aspects of the Georgian Model of Adversarial Proceedings, *German-Georgian Criminal Law Journal,* No. 2, 2016, 1 (in Georgian). *Eser A.,* Adversarial or Inquisitorial Procedure: In Search of Optimal Structures, German-Georgian Criminal Law Journal, No. 3, 2019, 77 (in Georgian).

11 *Grande E.*, Legal Transplants and the Inoculation Effect: How American Criminal Procedure Has Affected Continental Europe, The American Journal of Comparative Law, Vol. 64, No. 3, 2016, 586-588, 617-618.

12 *Kremens K.*, Inquisitorial and Adversarial Influences on the Examination of a Witness in the International Criminal Procedure, Przeglad Prawa I Administracji C/2 Wroclaw, 2015, 80–84.

13 Criminal Procedure Code of Georgia, Legislative Herald of Georgia, 20/02/1998, (Invalidated 01/10/2010).

14 *Laliashvili, T.*, Harmonious Convergence of the Anglo-American and Continental European Criminal Procedure Systems and Its Significance for the Georgian Criminal Justice System, Justice and Law, No. 4, 2016, 18 (in Georgian).

15 *Vepkhvadze, L.,* Principle of Adversarial Proceedings at the Investigation Stage in Georgian Criminal Procedure (Comparative Legal Analysis Based on the Example of Georgia), Justice and Law, No. 2, 2017, 119-120 (in Georgian).

16 *Kochlamazashvili B.*, The Possibility for a Party to Challenge and Examine Its Own Evidence in Criminal Proceedings, Justice and Law, No. 3, 2023, 6 (in Georgian).

initiative to the parties. The criminal procedure system shifted fundamentally from the continental European model towards the Anglo-American model.[17] Under the current version, the parties are able to obtain, adduce and examine evidence before the court.[18] At the stage of examination of evidence, the current Criminal Procedure Code grants the parties full authority and discretion to determine the sequence and scope of evidence to be examined.[19]

The analysis of the relevant provisions of the Criminal Procedure Code demonstrates that the judge's active role in the process of examining evidence is minimal, except for the possibility to pose a question to a witness as provided under Article 25 of the Criminal Procedure Code. However, these same provisions establish the judge's obligation to consider the parties' motions regarding the disallowance of questions, the inadmissibility of answers given to such questions, and the determination of a reasonable time limit for the party (or the witness).[20]

Overall, it is considered that the Criminal Procedure Code adopted in 2009 governs criminal justice in Georgia in accordance with the adversarial model.[21]

Accordingly, the compatibility of a judge's questioning of a witness with the principle of adversarial proceedings will be analysed precisely in the context of the adversarial model and assessed in terms of whether the judge has the prerogative to pose a question to a witness within an adversarial model.

3. Compatibility of Judicial Examination of a Witness with the Principle of Adversarial Proceedings

3.1. Relevance of the Issue

In accordance with Article 25(2) of the Criminal Procedure Code of Georgia, the judge was previously authorised, as an exception and with the consent of the parties, to ask a clarifying question if this was necessary to ensure a fair trial.[22] This regulation was subsequently amended by a judgment of the Constitutional Court.

Within Georgian legal circles, various views exist regarding this issue. Some argue that the Georgian Criminal Procedure Code, which establishes the so-called classical model of adversarial

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17 *Mskhiladze L.,* Principle of Adversarial Proceedings in Modern Legal Systems, Justice and Law, No. 4, 2021, 6 (in Georgian). See also *Khachvani T.*, Principle of Adversarial Proceedings (Comparative Analysis), Justice and Law, No. 2, 2012, 62 (in Georgian).

18 *Tumanishvili G.*, Criminal Procedure, General Part, Tbilisi, 2014, 74 (in Georgian). See also *Laliashvili T.,* Criminal Procedure – General Part, Tbilisi, 2015, 119-120 (in Georgian).

19 Criminal Procedure Code of Georgia, Legislative Herald of Georgia, Article 242, 03/11/2009.

20 *Guntsadze S.*, in Commentary on the Criminal Procedure Code of Georgia, edited by G. Giorgadze, Tbilisi, 2015, 709-712 (in Georgian).

21 Judgment No. 1/4/809 of 14 December 2018 of the Constitutional Court of Georgia in the case "Citizen of Georgia Titiko Chorgoliani v. the Parliament of Georgia," II-21. See also Judgment No. 2/13/1234,1235 of 14 December 2018 of the Constitutional Court of Georgia in the case "Citizens of Georgia – Roin Mikeladze and Giorgi Burjanadze v. the Parliament of Georgia," II-40.

22 *Liparteliani L.,* in Commentary on the Criminal Procedure Code of Georgia, edited by *Giorgadze G.,* Tbilisi, 2015, 149 (in Georgian).

proceedings, unlike the procedural legislation of the United States, deprives the judge of the ability to question a witness independently, which indicates a weakening of the judge's role.[23] This, in turn, restricts the judge from obtaining adequate information on matters to be adjudicated, thereby increasing the risk of adopting an uninformed judgment.[24] Moreover, it has been suggested that a judgment delivered by a "passive judge" may result in an innocent person being found guilty.[25]

Conversely, it is argued that by questioning a witness the judge becomes an active participant in the proceedings, interferes with the adversarial nature of the process and, in effect, determines its course. In such circumstances, the judge loses the function of a neutral arbiter and is perceived as advancing the interests of one of the parties.[26]

According to Professor Stephen A. Saltzburg, the Anglo-American legal system, and consequently the adversarial model of the procedure, is designed to help "discover the truth."[27] Therefore, proponents of adversarial proceedings partly reject the judge's function as a "passive listener" and maintain that, in order to establish the truth, the judge possesses broad powers, which are reflected in leading the hearing, providing instructions to the parties, in certain cases asking clarifying questions to a witness, and giving explanations to the jury.[28]

Modern academic research confirms that participants in adversarial proceedings tend to entertain strong cognitive biases, which creates the need for the judge to act not merely as a "passive listener" but as a neutral, yet cognitively engaged, subject.[29] According to recent scholarly findings, the direct examination of a witness during a hearing induces stress and inconsistency in interaction, which necessitates judicial intervention to avoid ambiguous testimony.[30]

Regarding the topic at hand, the Constitutional Court of Georgia deliberated on the matter and declared unconstitutional the normative content of the third sentence of Article 25.2 of the Criminal Procedure Code of Georgia, which restricted the judge's ability to pose questions. Accordingly, it is of particular and twofold interest, first, what argument(s) underpin a judge's authority to question a witness within the adversarial model and what limits are established in this regard, and second, whether the judgment of the Constitutional Court has corresponding dogmatic or practical justification.

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23 *Akubardia I.,* Some Aspects of the Georgian Model of Adversarial Proceedings, *German-Georgian Criminal Law Journal,* No. 2, 2016, 13 (in Georgian).

24 *Tordia V.,* Role of the Judge and the Legal Status of the Victim in Georgian Criminal Proceedings, Justice and Law, No. 2, 2017, 102 (in Georgian).

25 *Turava M*., Harmonious Convergence in International Criminal Procedure and Georgian Criminal Procedural Rules, in the Collection of Articles on Human Rights Protection and Legal Reform in Georgia, edited by K. Korkelia, Tbilisi, 2014, 74-75 (in Georgian).

26 *Vepkhvadze, L.,* Role of the Judge in Adversarial Proceedings, Justice and Law, No. 1, 2018, 122 (in Georgian).

27 *Saltzburg A. S.*, The Unnecessarily Expanding Role of the American Trial Judge, Virginia Law Review, Vol. 64, No. 1, 1978, 11.

28 *Tumanishvili G*., Criminal Procedure, General Part, Tbilisi, 2014, 76-77 (in Georgian).

29 *Simon D.*, Adversarial Bias, Annual Review of Law and Social Science, 2025, 362-363.

30 *Fairclough S*., Resilience-building in Adversarial Trials: Witnesses, Special Measures and the Principle of Orality, Social and Legal Studies, 1–26, 2023, 7-8.

3.2. Possibility for Judicial Examination of a Witness in the Adversarial Model

According to the Constitutional Court of Georgia, within the adversarial model the principle of adversarial proceedings does not release the court from the obligation, notwithstanding the party's activeness, to apply the fundamental principles of law correctly and properly.[31] While the state is free to choose the procedural model in accordance with its own approach, it is obliged, regardless of the system adopted, to ensure that the constructed procedure safeguards, on the one hand, publicity and, on the other hand, the interests of all participants in the proceedings.[32] One of the main interests and challenges is for the state to guarantee fair justice as a whole.[33]

Under the current edition of the Criminal Procedure Code, one of the main mechanisms at the court's disposal in the administration of justice is the ability to pose a question to a witness and thereby obtain information. The issue of judicial examination is addressed solely in Article 25.2. Prior to the judgment of the Constitutional Court, this provision imposed three conditions on the judge, namely: ***(1)*** the question had to be exceptional; ***(2)*** the question had to be agreed with the parties, otherwise the judge could not pose it; and ***(3)*** the question had to be clarifying in nature.[34]

It was for this reason that the Tetritskaro District Court raised the issue of the constitutionality of the content of the above provision. The submission stated that, in the absence of the parties' consent to the judge's questioning, the right to a fair trial might be violated.[35] In turn, the Plenum of the Constitutional Court deliberated on the compatibility of the third sentence of Article 25.2 of the Criminal Procedure Code – "*The judge is authorised, as an exception and with the agreement of the parties, to ask a clarifying question if this is necessary to ensure a fair trial*" – with the second sentence of Article 31.1 of the Constitution of Georgia – "*The right to a fair […] hearing is guaranteed*."[36]

The Plenum noted that a judge's participation in the examination of evidence, independently of the will of the parties, might influence the parties' strategy, and the questions posed may direct the

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31 Judgment No. 3/1/608,609 of 29 September 2015 of the Constitutional Court of Georgia in the case "Constitutional Submission of the Supreme Court of Georgia regarding the constitutionality of Article 306.4 of the Criminal Procedure Code of Georgia and the Constitutional Submission of the Supreme Court of Georgia regarding the constitutionality of subparagraph "g"of Article 297 of the Criminal Procedure Code of Georgia," II-21.

32 Judgment No. 1/8/594 of 30 September 2016 of the Constitutional Court of Georgia in the case "Citizen of Georgia Khatuna Shubitidze v. the Parliament of Georgia," II-29.

33 Judgment No. 1/4/557,571,576 of 13 November 2014 of the Constitutional Court of Georgia in the case "Citizens of Georgia – Valerian Gelbakhiani, Mamuka Nikolaishvili and Aleksandre Silagadze v. the Parliament of Georgia," II-91.

34 *Mskhiladze L.*, Commentary on Article 25 of the Criminal Procedure Code of Georgia, Justice and Law, No. 2, 2020, 11-13 (in Georgian).

35 For detailed information, see Constitutional Submission of the Tetritskaro District Court of 10 January 2020 in case No. 1478, para. 37.

36 Plenum Judgment No. 3/2/1478 of 28 December 2021 of the Constitutional Court of Georgia in the case "The Constitutional Submission of the Tetritskaro District Court regarding the constitutionality of the second sentence of Article 3.20, the third sentence of Article 25.2, Article 48.1 and Article 48.2, the first sentence of Article 48.5 and the first sentence of Article 48.7 of the Criminal Procedure Code of Georgia."

proceedings in a manner different from what the parties would have wished.[37] However, since the purpose of criminal proceedings is the establishment of the truth in the case and the administration of justice, the interest of a party to impede artificially the examination of a witness and the obtaining of information from the witness, which is necessary for a fair judgment, cannot be protected. In other words, the interest in establishing the truth cannot depend on the will or competence of the parties.[38]

The Court further indicated that restricting a judge's ability to pose questions does not stem from the right to a fair trial and, in substance, contradicts the aims of criminal proceedings. In turn, the principle of adversarial proceedings and equality of arms must not result in the artificial obstruction of establishing the truth in a criminal case.[39] Moreover, in an adversarial and equal process, the judge, when participating in the direct or cross-examination of a witness, must not hinder the parties in the proper examination of evidence. On the contrary, when posing questions, the court must act under conditions of reasonable self-restraint, which implies participation by the judge in the examination of evidence and witnesses in such a manner as to assist in clarifying ambiguous issues, rather than creating new evidence.[40]

As a result, by Judgment No. 3/2/1478 of 28 December 2021, the Plenum of the Constitutional Court of Georgia declared unconstitutional the normative content of the third sentence of Article 25.2 of the Criminal Procedure Code of Georgia, which restricted the ability of the trial judge to pose a question, in relation to the second sentence of Article 31.1 of the Constitution of Georgia.

This interpretation by the Court is, of course, not novel in the legal doctrine. On the contrary, the judgment is expressively based on the doctrinal understanding of the Anglo-American procedural model and on both the content of the United States procedural legislation and the judicial interpretations thereof.

In Western legal literature, it is recognised that if judges are under an obligation to establish the truth, they must accordingly have the right to participate actively in the examination of witnesses.[41] Nor does the European Court require an adversarial process in which procedural control lies entirely in the hands of the parties. Adversarial proceedings do not exclude judicial participation in questioning; moreover, judicial intervention in witness examination is permissible insofar as the parties' rights are not restricted.[42]

Professor Stephen A. Saltzburg considers that, in the Anglo-American legal system, the judge is permitted to conduct additional examination of a witness; however, this right is limited in the same manner as the right to summarise or comment prior to the adoption of the judgment. The judge may not use examination for the very purpose that is prohibited to him or her under the adversarial model.

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37 Ibid., II-39.

38 Ibid., II-40, 47, 50.

39 Ibid., II-41, 58

40 Ibid., II-42.

41 *Kremens K.*, Inquisitorial and Adversarial Influences on the Examination of a Witness in the International Criminal Procedure, Przeglad Prawa I Administracji C/2 Wroclaw, 2015, 104.

42 *Jackson D. J.*, The Effect of Human Rights on Criminal Evidentiary Processes: Towards Convergence, Divergence or Realignment?, The Modern Law Review, Vol. 68, No. 5, 2005, 752-753.

Otherwise, it would seriously alter the balance of power between the parties. The professor notes that active questioning by the judge is, constructively, incompatible with the adversarial model.[43]

Under Rule 614(b) of the United States Federal Rules of Evidence, the judge is entitled, on his or her own initiative, to call and examine a witness.[44] Rule 614 of the Federal Rules establishes the rules on calling and examining a witness by the judge. Pursuant to paragraph (a), the court is authorised to call and examine a witness either on its own or with the involvement of the parties, in which the parties also participate; under paragraph (b), the court may examine a witness irrespective of which party has called that witness; and, according to paragraph (c), a party may object to the court's calling or examining a witness, which must be considered in the absence of the jury.[45] Furthermore, according to the interpretation of the United States Supreme Court, Rule 614(b) of the Federal Rules of Evidence empowers the judge to examine witnesses and to act in a manner extending beyond that of a "mere moderator."[46] However, the judge must not abandon his or her function and must not assume the role of counsel.[47]

Accordingly, it is clear that the Plenum's judgment has both a dogmatic basis and practical precedent. Even within the adversarial model, where initiative is largely transferred to the parties, since it is the judge who guarantees the proper administration of justice, the judge must have the ability to question a witness and thereby obtain relevant information for establishing the law. This is in complete alignment with the doctrinal and practical experience of Western countries operating under the Anglo-American system. By virtue of the judgment adopted by the Plenum, the restriction imposed on the judge was removed; the third sentence of Article 25.2 of the Criminal Procedure Code was given a "new life" and was assigned normative content consistent with the Constitution.

3.3. Questions That Judge Must Not Ask

The Constitutional Court of Georgia indicates that a question posed by a judge must not create an impression of bias and must not place the judge in the position of a party to the proceedings.[48] In addition, the court must ensure compliance with the principles of adversarial proceedings and equality of arms.[49] Accordingly, the right to a fair trial, as one of the fundamental guarantees protecting

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43 *Saltzburg A. S.*, The Unnecessarily Expanding Role of the American Trial Judge, Virginia Law Review, Vol. 64, No. 1, 1978, 54-61.

44 Ibid., 52.

45 Rule 614 – Court's Calling or Examining a Witness, Federal Rules of Evidence, https://www.rulesofevidence.org/fre/article-vi/rule-614/, [15.11.2025]. Ibid., see Interpretation of Rule 614 of the United States Federal Rules of Evidence.

46 United States v. Green, District of Columbia Court of Appeals, 1976. See also Quercia v. United States, United States Supreme Court, 1933.

47 United States v. Adedoyin, United States Court of Appeals, Third Circuit, 2004.

48 Plenum Judgment No. 3/2/1478 of 28 December 2021 of the Constitutional Court of Georgia in the case "The Constitutional Submission of the Tetritskaro District Court regarding the constitutionality of the second sentence of Article 3.20, the third sentence of Article 25.2, Article 48.1 and Article 48.2, the first sentence of Article 48.5 and the first sentence of Article 48.7 of the Criminal Procedure Code of Georgia," II-36.

49 *Papiashvili L.,* in Commentary on the Criminal Procedure Code of Georgia, edited by G. Giorgadze, Tbilisi, 2015, 84 (in Georgian).

individuals from state arbitrariness, obliges the court to question a witness impartially, while respecting the principles of adversarial proceedings and equality of arms.[50]

The above interpretation by the Plenum provides an indicator on the basis of which a question posed by the judge may be challenged as interference incompatible with the principles of adversarial proceedings and equality of arms. However, the practice of the courts of general jurisdiction of Georgia is not sufficiently developed to determine the standards of the authority granted to the judge by the Constitutional Court of Georgia. Therefore, in this respect, it is important to review and take into account Western doctrinal experience and judicial practice.

In the Anglo-American system, the judge's questioning of a witness is permissible solely for the purpose of clarification and must not be construed as "interpreted as a license for judges to descend pell-mell into the arena of trial combat and conduct the questioning of witnesses unrestrained."[51] Based on Canadian empirical data, it is established that less than 1% of questions posed by judges are of an open format, whereas it is precisely this category of questions that tends to elicit the most informative testimony. The findings raise doubts as to whether judges – who are expected to serve as "gatekeepers" of evidence during proceedings – are adequately safeguarding the effectiveness of the information-gathering process, and in certain instances may themselves diminish the quality of the witness testimony.[52]

According to Western legal literature, judicial examination of a witness must never appear as "strategically ambivalent", since the judge does not pursue a competitive objective and is not a party to the proceedings. Accordingly, judicial intervention must be distinct from that of the parties, who are legally permitted to exert "pressure" on the witness. When the judge intervenes in a dominant manner, it disrupts the strategic balance between the parties.[53]

Researcher Karolina Kremens, from the perspective of international criminal procedure – which itself combines features of the continental European and Anglo-American legal systems – concludes that the establishment of the truth is not undermined if the judge waits until the party has completed the examination. On the contrary, even within the continental system it is considered confusing when the judge frequently interrupts a party's questioning. The judge may ask questions only in order to clarify issues that are unclear to him or her, or, after the party has completed the examination, to elicit additional circumstances that may serve the comprehensive consideration of the case. [54]

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50 Plenum Judgment No. 3/2/1478 of 28 December 2021 of the Constitutional Court of Georgia in the case "The Constitutional Submission of the Tetritskaro District Court regarding the constitutionality of the second sentence of Article 3.20, the third sentence of Article 25.2, Article 48.1 and Article 48.2, the first sentence of Article 48.5 and the first sentence of Article 48.7 of the Criminal Procedure Code of Georgia," II-43.

51 *Kremens K.*, Inquisitorial and Adversarial Influences on the Examination of a Witness in the International Criminal Procedure, Przeglad Prawa I Administracji C/2 Wroclaw, 2015, 99-100.

52 *Lively J. C., Fallon L., Snook B., Fahmy W.*, Objection, Your Honour: Examining the Questioning Practices of Canadian Judges, Psychology, Crime and Law, 2022, 14-16.

53 *Archer D.*, Cross-Examining Lawyers, Facework and the Adversarial Courtroom, Journal of Pragmatics, 43, 2011, 3216–3230.

54 *Kremens K.*, Inquisitorial and Adversarial Influences on the Examination of a Witness in the International Criminal Procedure, Przeglad Prawa I Administracji C/2 Wroclaw, 2015, 101.

According to the judicial practice of the United States, a judge has the right to question a witness summoned by either party in order to clarify any ambiguity in the evidence adduced during the trial.[55] However, the judge must not assume the functional role of cross-examination performed by the prosecution (or equally by the defence), so as not to emphasise, whether intentionally or unintentionally, the credibility of the prosecution's evidence or to cast doubt on the credibility of the defendant and his or her witnesses.[56] The judge's participation in questioning, and the questions posed, must not create in the minds of the jury the impression that the defendant is guilty.[57] It is important to assess whether the judge used leading questions (suggestive questions),[58] as leading questions may cause jurors to believe that the judge already knows a particular fact and is attempting to have the witness confirm it.[59]

According to Canadian practice, the analysis of the length of judges' utterances and witnesses' responses clearly demonstrated that the type of utterance has a direct impact on the amount of information provided by the witness. For example, open-ended questions resulted in the greatest amount of information from witnesses, with an average of more than 50 words per answer, despite the fact that the question itself was short (on average 10 words). Conversely, multi-part and forced-choice questions were the longest but elicited significantly shorter answers.[60]

The United States courts also note that judges hold particular authority in the eyes of jurors and society in general, and therefore must approach their conduct during the trial with particular caution.[61]

Even when the evidence adduced, such as a witness's testimony, leaves the judge with a negative impression, the judge must not show it, particularly in a manner perceptible to the jury.[62] The court must reduce the scope and duration of witness examination, as excessive diligence or attention may prove detrimental and lead to improper perceptions in the eyes of the jury.[63]

According to United States judicial practice, when assessing a breach of the rules of examination by a judge, attention should be paid, *inter alia*, to the following issues: whether the judge treated both parties equally during the examination; whether the instructions or interventions provided by the judge to the witness and the party during the examination were aimed at facilitating the proper conduct of the proceedings; whether the judge breached the duty of impartiality; whether the judge cast doubt on the witness's credibility, and so forth.[64] However, improper examination is not, in itself,

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55 Washington v. the Attorney Gen., United States Court of Appeals, Fourth Circuit, 2017. See also United States v. Ottaviano, United States Court of Appeals, Third Circuit, 2013.

56 United States v. Beaty, United States Court of Appeals, Third Circuit, 1983.

57 United States v. Nobel, United States Court of Appeals, Third Circuit, 1982.

58 A leading question is a type of questioning in which the form of the question suggests the answer. It is a question that suggests or prompts the respondent towards a certain answer. See Legal Information Institute, Cornell Law School, https://www.law.cornell.edu/wex/leading_question, [15/11/2025].

59 State v. Ross, Supreme Court of Tennessee, at Jackson, 2001.

60 *Lively J. C., Fallon L., Snook B., Fahmy W.*, Objection, Your Honour: Examining the Questioning Practices of Canadian Judges, Psychology, Crime and Law, 2022, 15.

61 United States v. Godwin, United States Court of Appeals, Fourth Circuit, 2001.

62 United States v. Beaty, United States Court of Appeals, Third Circuit, 1983.

63 United States v. Ottaviano, United States Court of Appeals, Third Circuit, 2013. See also United States v. Wilensky, United States Court of Appeals, Third Circuit, 1985.

64 United States v. Wilensky, United States Court of Appeals, Third Circuit, 1985.

the type of breach that automatically renders the trial unfair.[65] Accordingly, a judgment remains lawful if the error did not disregard the right to a fair trial.[66] Furthermore, there is no absolute rule for determining fairness.[67] In such cases, it must be assessed whether the proceedings were fair as a whole, despite the error or intervention by the trial judge.[68] A judicial error or intervention is considered immaterial if it did not determine the outcome of the case and the same result would have been reached in the absence of such breach.[69] When assessing whether the judge's intervention during examination amounted to an evident error or violation, the court reviewing the complaint must consider the judge's intervention in the context of the proceedings as a whole, rather than in isolation.[70] In this way, the court weighs the cumulative impact of multiple interventions and avoids being influenced by an individual, isolated instance (a moment detached from context).[71]

The fairness of the proceedings is understood and interpreted in the same manner in the case-law of the European Court of Human Rights. According to the Court's approach, the assessment must not be made in isolation; rather, it must be determined whether the proceedings as a whole were fair.[72]

Overall, it follows that a judge's participation in witness examination in an adversarial process is justified only when it serves to clarify ambiguous circumstances and not to create new evidence. According to the Constitutional Court and comparative law examples, three main criteria emerge: (1) Neutrality – the judge must formulate questions in a manner that does not give rise to doubts as to bias and does not place the judge in the position of a party; (2) Self-restraint – the questions must be solely clarifying in nature and directed at circumstances already examined; (3) Overall fairness of the proceedings – judicial intervention must not alter the parties' strategy, must not undermine equality of arms and must not result in the conviction of a person. Accordingly, intervention is legitimate only under strict conditions of self-restraint and where it is clearly necessary to ensure fair trial. Beyond this scope, any active intervention risks compromising the judge's role as an impartial arbiter and placing the fairness of the proceedings in doubt.

4. Impact of Court's Violation of the Principle of Adversarial Proceedings on a Criminal Case

Unlike Rule 614 of the United States Federal Rules of Evidence, the Criminal Procedure Code of Georgia does not recognise a mechanism for challenging a question posed by the judge. This is natural, as prior to the above-mentioned judgment of the Plenum, the court formulated questions based

65 United States v. Dominguez Benitez, Supreme Court of United States, 2004. See also United States v. Ottaviano, United States Court of Appeals, Third Circuit, 2013.
66 Lutwak v. United States, United States Supreme Court, 1953.
67 United States v. Beaty, United States Court of Appeals, Third Circuit, 1983.
68 United States v. Wilensky, United States Court of Appeals, Third Circuit, 1985.
69 United States v. Vosburgh, United States Court of Appeals, Third Circuit, 2010.
70 United States v. Rivera-Rodriguez, United States Court of Appeals, First Circuit, 2014.
71 Ibid.
72 Khan v. the United Kingdom, [ECtHR], App. No. 35394/97, 25 March 2000, § 34. See also Allan v. the United Kingdom, [ECtHR], App. No. 48539/99, 5 November 2002, § 42.

on the parties' prior consent and solely for the purpose of clarification. Consequently, there was no need to challenge a judge's question.

From this perspective, for example, the results of empirical research provide an important finding. Although the study did not examine how effectively judges are able to classify or select questions, the high rate of ineffective judicial examination suggests that judges may struggle to filter questions in situations where the party is not actively involved and does not object to the judge's questions.[73]

Accordingly, following the Plenum's interpretation and judgment, it is important, in the Georgian context, that the parties be granted the possibility to challenge and request the withdrawal of a question posed by the court, as well as to have the answer given to such a question declared inadmissible. In addition, the parties should be afforded the right to ask further questions after a judge's question in order to mitigate the consequences of any biased question posed by the judge, whether intentionally or unintentionally. Furthermore, when drafting new regulatory provisions, it would be advisable that the process of judicial questioning of a witness be subject to the requirements of Articles 244, 245 and 246 of the Criminal Procedure Code of Georgia.

Similarly to Georgia, in Canadian practice as well – unlike Rule 614 of the United States Federal Rules of Evidence – there is practically no mechanism for objecting during judicial examination of a witness, and the assessment takes place only at the appeal stage, which reduces the guarantee of a fair trial.[74]

The outcome of a judicial examination of a witness conducted in disregard of the right to a fair trial, which is reflected in conviction, must likewise be balanced in the context at hand through appealing the judgment.

When discussing the fair administration of evidence in the context of the right to a fair trial, it is important to refer to the case-law of the European Court of Human Rights, i.e. the interpretative guide to the European Convention on Human Rights, which, pursuant to Article 7 of the Law of Georgia on Normative Acts, constitutes a source of paramount relevance for the purposes of criminal proceedings compared to the Criminal Procedure Code.[75]

According to the European Court of Human Rights, although Article 6 of the European Convention guarantees the right to a fair trial,[76] it does not contain any rule concerning the admissibility of evidence. In the Court's view, the admissibility of evidence falls within the scope of regulation of domestic legislation.[77] Similarly, the determination of the relevance of evidence is a function of the national courts, and the Court does not intervene in this matter, as national courts are considered to be in a better position to assess it.[78] The Court adopts the same approach with regard to

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73 *Lively J. C., Fallon L., Snook B., Fahmy W.*, Objection, Your Honour: Examining the Questioning Practices of Canadian Judges, Psychology, Crime and Law, 2022, 15.

74 Ibid.

75 The Organic Law of Georgia on Normative Acts, Article 7, Legislative Herald of Georgia, 09/11/2009.

76 Convention for the Protection of Human Rights and Fundamental Freedoms, Council of Europe, 4/11/1950.

77 Schenk v. Switzerland, [ECtHR], Plenary, App. No. 10862/84, 12 July 1988, § 45-46.

78 *Niparishvili B.,* Admissibility of Evidence in Criminal Proceedings Under the Case-Law of the European Court of Human Rights, Justice and Law, No. 3, 2017, 32 (in Georgian).

the evaluation of the reliability of evidence.[79] In the event of a complaint, however, the European Court must address the question of whether the proceedings as a whole – including the examination of evidence – were fair.[80] In order to determine whether the proceedings were overall fair, it is important to establish how decisive that piece of evidence (the evidence that became contentious) was for the outcome of the criminal proceedings.[81]

Taking all of the above into consideration, in circumstances where there are no regulatory provisions governing judicial questioning of a witness, the party should challenge the judge's improperly conducted examination of the witness before a higher instance within the context of the overall fairness of the proceedings, as indicated in the case-law of the European Court of Human Rights.

5. Conclusion

The comparative analysis of procedural models has established that the Criminal Procedure Code currently in force in Georgia is based on the principle of adversarial proceedings. According to the interpretation of the Constitutional Court of Georgia, even within an adversarial model the court is obliged not only to uphold adversarial proceedings and equality of arms but also to ensure a fair trial. Accordingly, a judge's ability to pose a question to a witness is not, in itself, a violation of the principle of adversarial proceedings. Western legal doctrine, as well as judicial practice in the United States, confirm that judicial intervention in the proceedings is permissible; however, the judge's activeness must not place him or her in the position of a party. Otherwise, the presumption of judicial impartiality and the defendant's right to a fair trial would be infringed. As Professor Saltzburg would state, excessive judicial intervention serves neither the dignity of the court nor public confidence, and therefore judicial activeness must be carefully balanced, supportive, but never dominant.[82]

Accordingly, the research concludes that posing a question by a judge to a witness is permissible and justified only when aimed at clarifying ambiguous circumstances and conducted under strict conditions of neutrality and self-reflection.

In addition, in light of the judgment of the Constitutional Court of Georgia, it is advisable to establish in the Criminal Procedure Code clear mechanisms that would allow: (i) challenging a question posed by the judge; (ii) objecting to an answer given to a judge's question; and (iii) the parties asking clarifying questions following the judge's question.

It is evident that the article cannot exhaust the subject at stake; however, I believe that it will make a significant contribution to intensifying academic discourse around the issue.

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79 Ibid., 33.

80 Khan v. the United Kingdom, [ECtHR], App. No. 35394/97, 25 March 2000, § 34. See also Allan v. the United Kingdom, [ECtHR], App. No. 48539/99, 5 November 2002, § 42.

81 Gäfgen v. Germany, [ECtHR], GC; App. No. 22978/05, 1 June 2010, § 164.

82 *Saltzburg A. S.*, The Unnecessarily Expanding Role of the American Trial Judge, Virginia Law Review, Vol. 64, No. 1, 1978, 80-81.

Bibliography:

1. Convention for the Protection of Human Rights and Fundamental Freedoms, Council of Europe, 4/11/1950.
2. Constitution of Georgia, Departments of Parliament, 24/08/1995 (in Georgian).
3. Criminal Procedure Code of Georgia, Legislative Herald of Georgia, 20/02/1998, (invalidated 01/10/2010) (in Georgian).
4. Criminal Procedure Code of Georgia, Legislative Herald of Georgia, 09/10/2009 (in Georgian).
5. Law of Georgia on Normative Acts, Legislative Herald of Georgia, 09/11/2009 (in Georgian).
6. *Akubardia I.,* Some Aspects of the Georgian Model of Adversarial Proceedings, *German-Georgian Criminal Law Journal,* No. 2, 2016 (in Georgian).
7. *Akubardia, I.,* Equality of Arms and the Role of the Judge in Adversarial Proceedings, Mzia Lekveishvili Jubilee Collection, 2014 (in Georgian).
8. *Eser A*., Adversarial or Inquisitorial Procedure: In Search of Optimal Structures, German-Georgian Criminal Law Journal, No. 3, 2019 (in Georgian).
9. *Vepkhvadze, L.,* Role of the Judge in Adversarial Proceedings, Justice and Law, No. 1, 2018 (in Georgian).
10. *Vepkhvadze, L.,* Principle of Adversarial Proceedings at the Investigation Stage in Georgian Criminal Procedure (Comparative Legal Analysis Based on the Example of Georgia), Justice and Law, No. 2, 2017 (in Georgian).
11. *Tordia V.*, Role of the Judge and the Legal Status of the Victim in Georgian Criminal Proceedings, Justice and Law, No. 2, 2017 (in Georgian).
12. *Tumanishvili G*., Criminal Procedure, General Part, Tbilisi, 2014 (in Georgian).
13. *Kochlamazashvili B.*, The Possibility for a Party to Challenge and Examine Its Own Evidence in Criminal Proceedings, Justice and Law, No. 3, 2023 (in Georgian).
14. *Laliashvili, T.*, Harmonious Convergence of the Anglo-American and Continental European Criminal Procedure Systems and Its Significance for the Georgian Criminal Justice System, Justice and Law, No. 4, 2016 (in Georgian).
15. *Laliashvili T.,* Criminal Procedure – General Part, Tbilisi, 2015 (in Georgian).
16. *Melkadze O.,* Constitutionalism, Tbilisi, 2008 (in Georgian).
17. *Mskhiladze L.,* Principle of Adversarial Proceedings in Modern Legal Systems, Justice and Law, No. 4, 2021 (in Georgian).
18. *Mskhiladze L*., Commentary on Article 25 of the Criminal Procedure Code of Georgia, Justice and Law, No. 2, 2020 (in Georgian).
19. *Niparishvili B.,* Admissibility of Evidence in Criminal Proceedings Under the Case-Law of the European Court of Human Rights, Justice and Law, No. 3, 2017 (in Georgian).
20. *Turava M*., Harmonious Convergence in International Criminal Procedure and Georgian Criminal Procedural Rules, in the Collection of Articles on Human Rights Protection and Legal Reform in Georgia, edited by K. Korkelia, Tbilisi, 2014 (in Georgian).
21. Commentary on the Criminal Procedure Code of Georgia, edited by G. Giorgadze, Tbilisi, 2015 (in Georgian).
22. *Khachvani T*., Principle of Adversarial Proceedings (Comparative Analysis), Justice and Law, No. 2, 2012 (in Georgian).

23. *Heger M.,* Adversarial and Inquisitorial Elements in the Criminal Procedure Legislation of European States as a Challenge of the Europeanisation of Criminal Procedural Law, German-Georgian Criminal Law Journal, No. 2, 2016 (in Georgian).
24. Plenum Judgment No. 3/2/1478 of 28 December 2021 of the Constitutional Court of Georgia in the case "The Constitutional Submission of the Tetritskaro District Court regarding the constitutionality of the second sentence of Article 3.20, the third sentence of Article 25.2, Article 48.1 and Article 48.2, the first sentence of Article 48.5 and the first sentence of Article 48.7 of the Criminal Procedure Code of Georgia" (in Georgian).
25. Constitutional Submission of the Tetritskaro District Court of 10 January 2020 in case No. 1478 (in Georgian).
26. Judgment No. 2/13/1234,1235 of 14 December 2018 of the Constitutional Court of Georgia in the case "Citizens of Georgia – Roin Mikeladze and Giorgi Burjanadze v. the Parliament of Georgia."
27. Judgment No. 1/4/809 of 14 December 2018 of the Constitutional Court of Georgia in the case "Citizen of Georgia Titiko Chorgoliani v. the Parliament of Georgia" (in Georgian).
28. Judgment No. 1/8/594 of 30 September 2016 of the Constitutional Court of Georgia in the case "Citizen of Georgia Khatuna Shubitidze v. the Parliament of Georgia" (in Georgian).
29. Judgment No. 3/1/608,609 of 29 September 2015 of the Constitutional Court of Georgia in the case "Constitutional Submission of the Supreme Court of Georgia regarding the constitutionality of Article 306.4 of the Criminal Procedure Code of Georgia and the Constitutional Submission of the Supreme Court of Georgia regarding the constitutionality of subparagraph "g" of Article 297 of the Criminal Procedure Code of Georgia." (in Georgian).
30. Judgment No. 1/4/557,571,576 of 13 November 2014 of the Constitutional Court of Georgia in the case "Citizens of Georgia – Valerian Gelbakhiani, Mamuka Nikolaishvili and Aleksandre Silagadze v. the Parliament of Georgia" (in Georgian).
31. Plenum Judgment No. 3/1/574 of 23 May 2014 of the Constitutional Court of Georgia in the case "Citizen of Georgia Giorgi Ugulava v. the Parliament of Georgia" (in Georgian).
32. The US Federal Rules of Evidence (1975), https://www.rulesofevidence.org /fre/article-vi/rule-614/, [15.11.2025].
33. *Archer D.*, Cross-Examining Lawyers, Facework and the Adversarial Courtroom, Journal of Pragmatics, 43, 2011.
34. *Fairclough S.*, Resilience-building in Adversarial Trials: Witnesses, Special Measures and the Principle of Orality, Social and Legal Studies, 1-26, 2023.
35. *Goodpaster G.*, On the Theory of American Adversary Criminal Trial, Journal of Criminal Law and Criminology, Vol. 78, No. 1, 1987.
36. *Grande E.*, Legal Transplants and the Inoculation Effect: How American Criminal Procedure Has Affected Continental Europe, The American Journal of Comparative Law, Vol. 64, No. 3, 2016.
37. *Guntsadze S.*, in Commentary on the Criminal Procedure Code of Georgia, edited by G. Giorgadze, Tbilisi, 2015 (in Georgian).
38. *Jackson J. D. and Doran S.*, Addressing the Adversarial Deficit in Non-Jury Criminal Trials, Israel Law Review, Vol. 31, 1997.
39. *Jackson D. J.*, The Effect of Human Rights on Criminal Evidentiary Processes: Towards Convergence, Divergence or Realignment?, The Modern Law Review, Vol. 68, No. 5, 2005.

40. *Kremens K.*, Inquisitorial and Adversarial Influences on the Examination of a Witness in the International Criminal Procedure, Przeglad Prawa I Administracji C/2 Wroclaw, 2015.
41. *Liparteliani L.,* in Commentary on the Criminal Procedure Code of Georgia, edited by G. Giorgadze, Tbilisi, 2015 (in Georgian).
42. *Lively J. C., Fallon L., Snook B., Fahmy W.*, Objection, Your Honour: Examining the Questioning Practices of Canadian Judges, Psychology, Crime and Law, 2022.
43. *Papiashvili L.,* in Commentary on the Criminal Procedure Code of Georgia, edited by G. Giorgadze, Tbilisi, 2015 (in Georgian).
44. *Roberts P.*, Theorising Evidence Law, Oxford Journal of Legal Studies, Vol. 43, No. 3, 2023.
45. *Saltzburg A. S.*, The Unnecessarily Expanding Role of the American Trial Judge, Virginia Law Review, Vol. 64, No.1, 1978.
46. *Simon D.*, The Adversarial Bias, Annual Review of Law and Social Science, 2025.
47. Gäfgen v. Germany, [ECtHR], GC, App. No. 22978/05, 1 June 2010.
48. Allan v. the United Kingdom, [ECtHR], App. No. 48539/99, 5 November 2002.
49. Khan v. the United Kingdom, [ECtHR], App. No. 35394/97, 25 March 2000.
50. Schenk v. Switzerland, [ECtHR], Plenary, App. No. 10862/84, 12 July 1988.
51. Washington v. The Attorney Gen., United States Court of Appeals, Fourth Circuit, 2017.
52. United States v. Rivera-Rodriguez, United States Court of Appeals, First Circuit, 2014.
53. United States v. Ottaviano, United States Court of Appeals, Third Circuit, 2013.
54. United States v. Vosburgh, United States Court of Appeals, Third Circuit, 2010.
55. United States v. Dominguez Benitez, Supreme Court of United States, 2004.
56. United States v. Adedoyin, United States Court of Appeals, Third Circuit, 2004.
57. State v. Ross, Supreme Court of Tennessee, at Jackson, 2001.
58. United States v. Godwin, United States Court of Appeals, Fourth Circuit, 2001.
59. United States v. Wilensky, United States Court of Appeals, Third Circuit, 1985.
60. United States v. Beaty, United States Court of Appeals, Third Circuit, 1983.
61. United States v. Nobel, United States Court of Appeals, Third Circuit, 1982.
62. United States v. Green, District of Columbia Court of Appeals, 1976.
63. Lutwak v. United States, United States Supreme Court, 1953.
64. Quercia v. United States, United States Supreme Court, 1933.
65. Legal Information Institute, Cornell Law School. [https://www.law.cornell.edu/wex/leading_qu estion], [15.11.2025].

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The Grounds for the Use of Attachment and the Legal Assessment of its Appropriateness in Criminal Proceedings

On September 23, 2022, the Law of Georgia N1854-IXms-Xmp on Amendments to the Criminal Procedure Code of Georgia was adopted, at which time the seizure mechanism in the criminal procedure legislation was fundamentally changed, however, various issues still remain unclear and are not regulated at the legislative level, including the burden of proof in the justification part. For the purposes of criminal proceedings, a coercive measure of seizure may be used, which hypothetically may lead to a violation of fundamental human rights and freedoms. The right to property is one of the foundations of a democratic state. Since Georgia is a democratic country, the issue is relevant and it is advisable to discuss the issue at a scientific level in order to identify the shortcomings in Georgian legislation, the degree of its effectiveness in relation to contemporary challenges, on the example of foreign legislation and in relation to international standards, and finally to evaluate both exemplary and positive trends in legislation and practice, as well as to identify existing problematic issues, on which ways to solve the problems will be presented.

Keywords: *Seizure, Reasonable Time limit, Principle of Proportionality.*

1. Introduction

The right to property is guaranteed by Article 19 of the Constitution of Georgia; it is an inviolable right. The abolition of the universal right to alienate or acquire property is inadmissible.[1] Article 17 of the Universal Declaration of Human Rights (UDHR) protects a fundamental human right – the right to property. A person has the ability to own property both individually and collectively. The same Declaration stipulates that no one shall be arbitrarily deprived of their property.[2] The right under consideration is not absolute, and it may be restricted in cases provided by law. Accordingly, there is a risk that, during interference in a legally protected sphere, the right may be violated by a representative of the state.

A certain portion of society, in order to protect their property rights, changes the form of their material assets and stores them in a digital state – such as cryptocurrency, NFTs, and the purchase and ownership of shares in major developing companies. This, in certain legal contexts, may be associated with challenges, such as locating these assets and subsequently imposing a seizure on them, considering their inherent nature.

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1 Constitution of Georgia (1995) art. 21.

2 Universal Declaration of Human Rights (1948) art. 17.

The legal purpose of imposing a seizure is to ensure the subsequent confiscation of property. Accordingly, the imposition of a seizure is an important procedural coercive measure that may result in the deprivation of property rights over movable or immovable items, which is why the issue is relevant.

2. The Inviolability of the Right to Property under International Law

The Convention for the Protection of Human Rights and Fundamental Freedoms was adopted in 1950, and on 20 March 1952 Protocol No. 1 was adopted, the first article of which is devoted to the right to property due to its significance. By interpreting Article 1, three principles can be identified: first, the peaceful enjoyment and use of possessions; second, the possibility of deprivation of property on appropriate grounds; and third, the state's authority to control the 'use of property' in accordance with the public interest, including for ensuring the payment of taxes or fines.[3]

The concept of property, in the context of the Convention, should be interpreted autonomously; when defining property, attention is not limited to the physical possession of an item.[4] To determine whether there was a violation of the right to property in a specific case, the European Court of Human Rights examines whether the applicant had a property right for the purposes of Protocol No. 1. It then assesses any interference with that property right, the nature of the interference, and determines the applicable rules regarding such interference.[5] The European Court of Human Rights in Strasbourg justifies interference with a right only on the principle of proportionality, which requires the cumulative presence of three conditions: the interference must be provided for by law (the principle of legality); the interference must pursue a legitimate public interest; and the interference must be necessary in a democratic society.[6]

In relation to the use of seizure, Georgia's criminal legislation inherently satisfies the principle of proportionality. The use of seizure is provided for by law and is linked to preventing the commission of a new offense and protecting evidence from destruction, which constitutes a legitimate public purpose. However, whether the use of seizure is necessary for a democratic society must be assessed individually in each specific case.

Thus, we can conclude that Georgian legislation is equal to the standards of the European Court of Human Rights in terms of proportionality.

Article 12 of the United Nations Convention against Transnational Organized Crime requires participating states to confiscate or, where appropriate, seize proceeds or property derived from offenses covered by the Convention, as well as to impose a seizure for the purpose of confiscating property, in order to ensure the confiscation of instruments and other means used to commit the

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3 Sporrong and Lönnroth v. Sweden , [1982] ECHR, App. Nos. 7151/25, 7152/75, para. 61.

4 Denisova and Moiseyava v. Russia, [2010] ECHR, App. Nos. 16903/03, para. 47; Iatridis v. Greece [1999], ECHR, App. No. N31107/96, para. 54.

5 *Grgic A., Mataga Z., Longar M., Vilfan A*., The right to property Under the European Convention on Human Rights, A Guide to the Implementation of the European Convention on Human Rights and its Protocols, Human Rights Handbooks, No. 10, Council of Europe, 2007, 10-11.

6 *Tskhvedia T., Kvachantiradze D., Noselidze A.,* Guarantees of Protection of Property Rights in Criminal Proceedings, 2019, 8 (in Georgian).

crime.[7] The Palermo Convention also provides for the confiscation of money given as a bribe, benefits obtained through criminal means, and other such assets.[8] Other means may include computer equipment that offenders used to commit the crime.[9] The Palermo Convention has been ratified by Georgia and is fully complied with, which, of course, aligns with the standards of the United Nations.

3. Guarantees of Protection of Property Rights in Criminal Proceedings

Criminal procedure code of Georgia allows the prosecution to use seizure if there are grounds. There is an abstract threat of a violation of the right, there is an abstract threat of a violation of the right, as one of the postulates of ownership – the ability to dispose of property – will be restricted, which may result in the seizure of property. The state government has a positive obligation, the state is obliged to take all necessary measures, including at the legislative, administrative and judicial levels, and to establish a legal space in such a way as to prevent third parties from violating the right.[10] The right to appeal the seizure is a mechanism for protecting the right. The European Court points out that when the need arises to seize and confiscate property state authorities must determine the degree of culpability of the owners or the causal connection between the intended result and the person's actions.[11] In the case of property seizure and confiscation, a person must have the opportunity to protect their legitimate interest at the national level, this is linked to the existence of a mechanism that would allow the owner to justify their position at the internal national level and protect themselves from a violation of their rights,[12] at the investigation stage, it is necessary at the national level to appeal the imposed seizure if the owner claims that the seizure applied to them is unfounded, in such a case, the burden of proof will lie on them to demonstrate in the court their innocence and the lawfulness of the property registered in their ownership, they must also refute the causal link between the outcome and their actions, and they will have to prove in court that the property was not obtained as a result of criminal activity.

In the case of Agosi v. the United Kingdom, the court did not find a violation of the right to property, the applicant did not use the right to appeal at the national level and did not apply to the competent authority with a request for the protection of their property rights,[13] the court found that the system of British justice ensured that property confiscation procedures were examined in a fair manner,[14] which was not utilized at the national level, and therefore no violation of rights was found.

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7 The United Nations Convention against Transnational Organized Crime, 15/11/2000, art. 12.

8 *McClean D.,* Transnational Organized Crime: A Commentary on the UN Convention and its Protocols, Oxford University Press, 1 st 2007,144.

9 *Lagidze E.,* Seizure and Confiscation as an Effective Means of Combating Transnational Organized crime, law and world, 2023, 148.

10 *Golay Dr. C., Ms. Cismas I.,* Legal Opinion:The Right to Property from a Human Rights Perspective, 2010, 28.

11 Ünsped paket servisi San. Ve tic. A.Ş. v. Bulgaria [2015] ECHR, App. No. 3503/08, para. 38; Yildirim v. Italy [2003] ECHR, App. No. 38602/02, para. 49.

12 Agosi v. The United Kingdom [1986] ECHR, App. No. 9118/80, para. 54-55.

13 Ibid., para. 55.

14 Ibid., para. 56-61.

In the case of Silickienė v. Lithuania, the property of the defendant's spouse was confiscated, did not participate in the criminal proceedings, property obtained through criminal means by the accused was confiscated, the European Court deliberated and explained that the decision issued by the court regarding the confiscation of unlawfully obtained property was well-founded and was based on the body of evidence in the criminal case, which provided the standard for property confiscation.[15] The Court explained that the spouse of the accused had the opportunity to appeal both the property confiscation and the seizure at the national level. during which the burden of proof would lie on them to show that the property was not obtained through criminal means[16] which the applicant did not do, therefore, the court did not find a violation of the right to property in the mentioned case.[17]

From the mentioned examples, it is important to emphasize the significance of justification in relation to the future trust in judicial structures and law enforcement agencies. "State action that restricts a person's ability to own, use, or dispose of their property is, a priori, considered an interference with the constitutional right to property protected under Article 19 of the Constitution of Georgia and requires appropriate constitutional and legal justification".

The examples presented above illustrate that appealing a seizure order at the national level is important for the purposes of protecting property rights, which may be associated with certain challenges in the context of Georgia.

A problematic issue is the quality of justification in the court's decision. If the court's decision is vague and merely cites legislative provisions in a formulaic manner, the appellant will not be able to present their position properly. The court's decision must at a minimum indicate the factual circumstances on the basis of which the prosecutor justifies the necessity of applying the seizure.

The Criminal Procedure Code of Georgia is based on the principle of adversarial proceedings, where the burden of proof lies with the prosecution. This means that the prosecution is obliged to substantiate the person's guilt in court and support the state's accusation, it is obliged to justify the necessity of the seizure measure. When appealing a seizure order, if the appellant has not been charged, their access to the case materials is restricted. The appellant is obliged in the appeal or motion to address the factual circumstances on the basis of which the prosecution requested authorization for the seizure measure.

It is virtually impossible to convince the judge and refute the prosecution's arguments in any other way, I believe that the principle of adversarial proceedings is violated and the burden of proof is shifted to the appellant on the grounds that he must justify themselves without having the necessary information. From this perspective, it can be said that in such a case, the prosecution represents the stronger party, and the burden of proof shifts in favor of the prosecution, which contradicts the principles of the Criminal Procedure Code.

The owner of seized and/or confiscated property should be granted party status and should participate in the criminal proceedings within which the measures were carried out.[18]

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15 Silickiene v. Lithuania [2012] ECHR, App. No. 20496/02 para. 68-69.
16 Ibid., para. 48.
17 Ibid., para. 48-50.
18 Veits v. Estonia [2015] ECHR, App. No. 12951/11 para. 59.

The solution to the problematic issue can be formulated as follows, let's make an analogy with the law, for example, under the third part of Article 143[9] of the Criminal Procedure Code, a person is provided with a judge's ruling on the carrying out of covert investigative actions against him/her, as well as the materials based on which the judge rendered such a decision and shall be informed of the right to appeal the above ruling.

If a person is provided with a ruling analogously to Article 143[9], and the materials based on which the judge rendered ruling on the seizure, the principles of the Criminal Procedure Code will be upheld.

The problem could also be resolved by adding an article to the legislation on the minimum standards for drafting a ruling, which would be analogous to the sixth part of Article 206, while passing a court ruling on the seizure, the judge would be obliged to describe the reasoning part of the prosecutor's motion and subsequently justify the decision made by referencing the evidence, which will increase the appellant's ability to formulate the appeal comprehensively.

4. Seizure as a Coercive Measure

To secure the possible confiscation of property as a coercive measure in criminal proceedings, the court may, upon a motion by a party, impose a seizure (attachment) on the property of: the person against whom criminal prosecution is being conducted, a person responsible for his/her actions, or a person connected to him/her including bank accounts, if there are data indicating that the property may be concealed or spent, or that the property has been obtained by criminal means.[19] In the criminal procedure legislation, the term"coercive measur" is not defined at the legislative level, nor is a specific article devoted to it that would enable the establishment of its precise definitional interpretation. However, the Constitutional Court of Georgia provides an explanation regarding the term "procedural coercive measure." The court held that the definition of "coercive measure in criminal proceedings" is not vague/indeterminate, and that the content of the term is sufficiently specified/concretized within its scope,[20] procedural instruments that have a restrictive effect on human rights and freedoms and that meet the specific characteristics typical of procedural coercive measures. In legal doctrine, coercive measures are understood to mean preventive measures that create a guarantee of the proper fulfilment of obligations imposed on the participants in the proceedings. The application of procedural coercive measures serves to prevent obstruction of the administration of justice at the stages of investigation and substantive consideration.[21] The confiscation of assets serves not only as a punitive mechanism, but also performs the function of a preventive measure, which hinders the flow of illegal financial streams and facilitates the possibility of recovering unlawfully appropriated state resources.[22] Procedural coercive measures include such procedural institutions as: measures of restraint,

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19 Criminal Procedure Code of Georgia, 2009, Art. 151.

20 Decision of the Constitutional Court of Georgia, 18 April 2016, para. 16 (in Georgian).

21 Ibid., para. 20 (in Georgian).

22 *Khaliq M. N., Fatimah S.,* The Legal Politics of Establishing the Asset Seizure Law: A New Strategic Paradigm for Combating Corruption and Economic Crimes in Indonesia, Jurnal Ilmu Hukum Kyadiren, Vol. 6, No.2, 2025, 106.

detention/arrest, compulsory bringing of a person to court, imposition of seizure (attachment) on property, removal/suspension of a person from office, procedural confiscation, and others.[23] The coercive nature of the Criminal Procedure Code of Georgia is manifested, among other things, in the fact that a seizure (attachment) may be imposed in order to prevent/stop criminal activity. The effective use of seizure is essential to ensure that evidence is not destroyed or concealed and that an effective investigation can be conducted.[24]

5. "Sufficient Data" for the Use of Seizure

The word "data" as stated in the Code of Civil Procedure regarding the use of a seizure clearly implies, according to the practice established by the common courts, that it encompasses the standard of reasonable suspicion[25] It is important to note that in the case of the use of a seizure, the term "Sufficient data" appears; the definition of this term must unconditionally be understood as the standard of reasonable suspicion. It is important to note that, in order to secure the possible confiscation of property, a seizure (attachment) may be imposed on a person's bank accounts if there is data indicating that the property may be concealed or spent, or that the property has been obtained by criminal means. Sufficient data is linked to the requirement of reasonableness, which is the burden of the prosecution. Accordingly, the prosecution must gather evidence supported by the standard of reasonable suspicion, and this requirement is lawful. The term "sufficient data" may in practice denote the reasonable suspicion standard; therefore, it would be expedient to replace the phrase "sufficient data" in the legislation with the explicit term "reasonable suspicion".

Legal proceedings in Georgia are documentary in nature; accordingly, it is essential that procedural documentation be substantiated in such a way that all significant details of the criminal case are clearly reflected – details that would satisfy an objective person as to the necessity and lawfulness of imposing a seizure/attachment.

Introducing a new term into the legislation that lacks a precise statutory definition by the legislator is not welcome.

6. Duration of the Investigation and the Time Limit for the Application of Seizure

On 23 September 2022, the Law of Georgia No. 1854-IXMS-XMP was adopted, introducing amendments to the Criminal Procedure Code of Georgia. These amendments fundamentally reformed the existing mechanism of seizure in criminal procedure legislation. The basis for the amendments was the decision of the Constitutional Court of Georgia No. 2/1/1434,1466 of 25 February 2022 in the constitutional claims of Otar Marshava and Mikheil Nozadze v. the Parliament of Georgia. The aforementioned decision of the Constitutional Court served as the basis for amending the seizure/attachment mechanism. In its ruling, the Court declared unconstitutional the terms/provisions

[23] Decision of the Constitutional Court of Georgia, 18 April 2016, №2/1/631, para. 21.

[24] *Hryniewicz-Lach E.,* Improving Asset Confiscation: in the Quest for Effective and Just Solutions, ERA Forum, 2024, 238.

[25] Decision of the Constitutional Court of Georgia, 18 April 2016, №2/1/631, para.53 (in Georgian).

contained in the previous version of the Code. One of the key cornerstones of the Constitutional Court's decision was the duration of the investigation and the degree of connection of the person – whose property was subjected to seizure – to the crime. This approach fully corresponds to the standards of the European Court of Human Rights regarding the application of seizure measures.

Fundamental changes were introduced in response to the problems identified in the constitutional claims. However, despite these legislative amendments, certain issues remain that require additional regulation.

One factor that increases the intensity of interference with the right to property is the absence, at the statutory level, of any obligation on investigative authorities to conduct intensive investigative actions aimed at identifying the accused person after the seizure of property has been imposed.[26] Under the current version of the Criminal Procedure Code of Georgia, seizure of property may initially be imposed for a period of 12 months, after which the validity of the existing seizure may be extended in stages, up to a maximum of 4 extensions,[27] It is also possible for the seizure of property to remain in force until the termination of criminal prosecution and/or investigation, or until the enforcement of the sentence, in cases where the seized property belongs to: the accused, a member of the criminal underworld "thieves' world" or a member of an organized criminal group engaged in racketeering.

Under the legislative amendments that have entered into force, the public prosecutor is entitled – before the expiry of the initial 12-month period set for the seizure of property – to apply for its extension if "the relevant grounds for imposing the seizure on the property still exist",[28] The prosecutor is entitled to apply to the court with a motion for the extension of the seizure/attachment of property for a further period of 12 months.

In the given case, it is not specified what exactly is meant by the concept of "the relevant grounds for imposing the seizure on the property still exist. The investigation of a criminal case and the collection of evidence necessary to charge a person may be prolonged for an extended period, regardless of whether there is still a genuine need to maintain the seizure on the property. This leads to an intensive and disproportionate restriction of the right to property. The intensity of the restriction is further increased by the fact that there is no mechanism for the periodic review of the seizure of property, nor does the affected party have the right to apply to the court for the lifting of the seizure.[29] It would be expedient to add the following provisions to the law: a norm that clearly specifies within what time frame the prosecutor must file a motion for the extension of the existing seizure for a further 12-month period;

It would be expedient to supplement the norm with a requirement of substantive justification for the prosecutor's motion, obliging the prosecutor – in each specific case – to demonstrate to the court, on the basis of what new circumstances and evidence, it is reasonable and necessary to extend the existing seizure for a further 12-month period.

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[26] Decision of the Constitutional Court of Georgia, 25 February 2022, on cases No. 2/1/1434, 1466, regarding the claims of Otar Marshava and Mikheil Nozadze against the Parliament of Georgia, para.11. (in Georgian)

[27] Criminal Procedure Code of Georgia (2009), Art 158.

[28] Ibidem, art. 154 Part.1[1].

[29] Decision of the Constitutional Court of Georgia, 25 February 2022, on cases No. 2/1/1434, 1466, regarding the claims of Otar Marshava and Mikheil Nozadze against the Parliament of Georgia, para.18 (in Georgian).

In the event of such legislative amendments, it would be possible to: raise the evidentiary standard imposed on the prosecution, increase the intensity of investigative actions, and shorten the overall duration of the investigation.

Article 321 of the Italian Code of Criminal Procedure establishes preventive seizure (sequestro preventivo), the purpose of which is the use of seizure during the investigation in order to preserve evidence and to serve the objectives of the investigation,[30] It is noteworthy that, similarly to the Criminal Procedure Code of Georgia, the Italian Code of Criminal Procedure does not establish a precise time limit for such preventive seizure. Consequently, the seizure may remain in force for a prolonged period.

The criminal procedure legislation of the United Kingdom is similar in its approach to the use of seizure against an accused person. If a person is charged (or, in some cases, under investigation), a Restraint Order may be imposed, which can remain in force for a prolonged period for as long as it is necessary for the purposes of the investigation and potential future confiscation.[31] In cases where no charge has yet been brought and an investigation is ongoing, a Seizure/Detention Order may be applied, which can be extended for a maximum period of 2 years.[32]

7. Possibility of Reviewing the Used Seizure

The imposition of seizure/attachment on property constitutes a manifestly intensive interference with the right to property, because it prohibits the owner or possessor from disposing of the property and, where necessary, also from using it. As a result, the owner may be unable to properly use or benefit from his or her own property for months or even more than a year.[33] Prior to the adoption of the Law of Georgia of 23 September 2022 (i.e., before the legislative amendments), the issue of the duration of seizure/attachment of property was particularly problematic.

The intensity of the restriction on the right to property was aggravated by the fact that the previous norm formally referred to the statute of limitations for the criminal offense and did not provide any mechanism for reviewing the continuing necessity of maintaining the seizure on the property.[34] The Supreme Court of Georgia (Cassation Chamber) has pointed out that, according to the Criminal Procedure Code of Georgia, the Criminal Chamber of the Court of Appeals is competent – in the cases and according to the procedure provided for by the same Code – to review complaints concerning the reopening of a final judgment or other final judicial decision on the grounds of newly discovered circumstances.

In one of its decisions, the Supreme Court further states that the director of a company, I. K., requested the review and cancellation of a court order imposing seizure on the immovable property of

30 Codice di Procedura Penale 22/09/199 – art.321

31 Proceeds of Crime Act POCA 2002 POCA 2002 (UK), art. 40-44.

32 Proceeds of Crime Act POCA 2002 POCA 2002 (UK), art. 303L.

33 Decision of the Constitutional Court of Georgia, 18 April 2016, case No. 2/1/631, regarding the claims of Teimuraz Janashia and Giuli Alasania against the Parliament of Georgia, Part I- para.18 (in Georgian).

34 Decision of the Constitutional Court of Georgia, 25 February 2022, on cases No. 2/1/1434, 1466, regarding the claims of Otar Marshava and Mikheil Nozadze against the Parliament of Georgia, para. 8 (in Georgian).

a limited liability company and the lifting of the registered seizure on that property. However, the Criminal Procedure Code of Georgia does not provide for such a possibility. Consequently, the court lacks legal authority to examine or grant the said motion.[35]

The Constitutional Court's decision makes it clear that, despite the legislative amendments that have been implemented, the Code does not provide any mechanism for reviewing the application of a seizure on property.

It is noteworthy that the party is given the opportunity to seek review of the seizure of property only in the narrow sense through an appeal. Also of interest is the fact that a whole range of practical issues remain unregulated and are not addressed at the legislative level, including the requirement that the court order (ruling) be reasoned/motivated – this is not regulated at the legislative level, which makes it difficult for the complainant to present a properly reasoned and argued position in the complaint.

Section 304 of the German Code of Criminal Procedure[36] provides that persons may file a complaint against orders and dispositions that affect them. This provision objectively allows for the review of the existence/imposition of a seizure, because the affected person has the right to challenge the applied seizure through such a complaint.

The Supreme Court of Georgia states in its ruling that there is no possibility of reviewing a seizure because Georgian legislation does not provide for it in all cases. Specifically, a seizure order may be issued for a term of 12 months. Only after the expiration of that term, if a new court order is obtained extending the existing seizure for another 12 months, is it possible in that case to appeal/challenge the seizure.

It is expedient to add an article to the Criminal Procedure Code of Georgia, modelled on the German Code of Criminal Procedure, which would allow affected persons to lodge a complaint against any court order or disposition that concerns them Such a complaint should involve: a preliminary admissibility stage, and if the complaint is declared admissible, the issuance of a reasoned decision either after an oral hearing or, where appropriate, without an oral hearing.

8. "Relevant Basis" for Seizure of Property for a Period of Twelve Months at the Next Stage

According to the Criminal Procedure Code, "In the case provided for in Part 2 or 3 of Article 158 of this Code, before the expiration of the 12-month period established at the previous stage of seizure of property, if there are still relevant grounds for seizure of property, the prosecution is entitled to petition the court to seize property for a period of 12 months established at the next stage."[37] The decision to seize or confiscate property must be substantiated – it must exhaustively indicate the relevant legal grounds and evidence confirming the necessity of applying the measure.[38]

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35 Decision of the Supreme Court of Georgia, 23 December 2022, No. 38ag-22, in the case, para 4 (in Georgian).

36 Reichsstrafprozessordnung (1887) art. 304.

37 Criminal Procedure Code of Georgia (2009) art. 154, part. 1^1.

38 *Tskhvedia T., Kvachantiradze D., Noselidze A.,* Guarantees of Protection of Property Rights in Criminal Proceedings, 2019, 15 (in Georgian).

It is worth noting that the term "appropriate grounds" specified in the Criminal Procedure Code is relatively vague and allows for two-way interpretation of the issue, for example, the Code does not specify what "appropriate grounds" mean, and there is no explanation as to whether seizure can be imposed on the same grounds and subsequently extended for a period of 12 months. The norms should be structured in such a way that they cannot be interpreted two-way in order to avoid possible violations. The mentioned issue is important in terms of justification, because after 12 months, in the event of an appropriate petition, the person against whom the seizure has been applied must determine for himself whether the seizure is being applied on the same basis or if there is another basis. The term is inherently vague and it is important to determine that the seizure cannot be applied on the basis of the same evidence, which will prevent possible violations and protect public interests.

To solve the problem, it is important to specify in the legislative norm that each time the prosecution, in its motion for a request to extend the seizure for a period of 12 months, must substantiate the new charges on the basis of which the seizure is being applied; extending the seizure for a period of 12 months on the same grounds is not permissible. In such a case, possible risks will be avoided, thus the prosecution will be obliged to conduct investigative actions within a tight timeframe and create a high evidentiary standard.

The legislative level does not regulate the obligations of the prosecution in the event of an extension of the seizure for a period of 12 months. For example, the legislative level does not reflect the obligation to draw up a seizure protocol. On the one hand, drawing up a seizure protocol is pointless, since the existing seizure period is being extended, which is already known to the person against whom the seizure was issued, and on the other hand, there is a person's right to appeal. There is a general legislative provision that in the event of a seizure of property, the prosecution is obliged to draw up a seizure protocol. The issue needs to be further regulated so that the parties have expectations about the measures expected within the framework of the law. To resolve the issue, it is important to add articles to the legislation, which could be formulated as follows: at the next stage, when a decision is made to extend the seizure for a period of 12 months, the decision should be delivered to the person with the right to appeal within a reasonable time and the prosecution should be instructed to draw up a seizure protocol.

9. Appealing a Seizure Order or Reviewing it in the Narrow Sense

The Public Defender of Georgia published a report with relevant recommendations in 2018. It is important that the criminal case investigated by the Public Defender's Office revealed circumstances that led to the seizure of property for 13 and 11 years, in particular, by the order of the Tbilisi City Court of November 22, 2005, real estate owned by 240 citizens was seized, of which only 51 real estate properties were lifted during the investigation process, while the remaining real estate was still seized; In the second case, according to the explanation of the Georgian citizen, by the order of the Tbilisi City Court of May 1, 2007, the real estate owned by him was seized, pending the execution of the verdict in the criminal case, the termination of the criminal prosecution and/or investigation. The Public Defender indicates in the report that the seizure ruling is appealed once to the Court of Appeal within 48 hours of its issuance. Although, upon the petition of the party initiating the seizure petition,

it is possible to lift the seizure of property by a court ruling if, during the investigation, it is determined that the grounds and purposes provided for by the law for the use of seizure no longer exist, Georgian legislation does not provide for periodic control by the court of the legitimacy of the seizure petition during the investigation stage, and there is also no possibility for the validity of the seizure to be periodically reviewed upon the petition of the person whose property rights are being restricted. The Public Defender's Office considers it problematic to continue the use of seizure despite the expiration of the statute of limitations on the investigation, or to maintain it for a disproportionately long period before the statute of limitations expires.[39]

As part of the legislative amendments, the validity period of the law was limited, which is in line with the European Court of Justice and international standards, although the law still does not provide for the possibility of a person reviewing the seizure.

10. The Importance of the Duration of Detention According to the Case Law of the European Court of Human Rights

There are numerous decisions of the European Court of Human Rights regarding the implementation of speedy justice. The implementation of speedy justice is one of the important cornerstones of a democratic state. It is noteworthy that state 'inertia,' in the context of the legal measures to be taken, may lead to a violation of Article 6 of the European Convention on Human Rights.[40] The European Court of Human Rights also considers the confiscation of property to be legitimate; unlawful and unjustified deprivation of property for the accused does not constitute a violation.[41] The "reasonableness" of the length of proceedings is assessed according to: the complexity of the case, the conduct of the applicant, the conduct of the relevant State authorities and the importance/stakes of the dispute for the applicant[42] From a subjective standpoint, seizure should not be applied or maintained in cases where: no active investigative actions are being conducted on the criminal case with a view to completing the investigation or the criminal case has no realistic prospect of being concluded.

In such circumstances, the continued imposition of a seizure may constitute a violation of the aims and principles of the European Convention on Human Rights. This is because it results in an ongoing restriction of the right to property without any corresponding diligent measures being taken by the authorities to bring the proceedings to a conclusion within a reasonable time.

"In cases where the circumstances clearly indicate procrastination/delay on the part of the State in conducting the proceedings, the European Court of Human Rights considers the mere length of the proceedings sufficient to establish a violation of the Convention".[43]"The longer the seizure measure

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39 Report of the Public Defender of Georgia,, 2018, 281 (in Georgian).

40 Scollo v. Italy [1995] ECHR, App. No. 19133/91, para. 44.

41 *Parulava G.,* Duration of Seizure of Property in the Context of the Constitutionality of the Right to Property, "Georgian-German Journal of Comparative Law", 2021, №4, 25 (in Georgian).

42 Cocchiarella v. Italy [2006] ECHR, App. No. 64886/01, para. 68.

43 *Tskhvedia T., Kvachantiradze D., Noselidze A.,* Guarantees of Protection of Property Rights in Criminal Proceedings, 2019, 30 (in Georgian).

remains in force, the greater the interference with the individual's right to property".[44] The Strasbourg Court examines: whether the imposition of a seizure on property is proportionate and truly the only or least restrictive means of securing the objectives of the proceedings and whether the same legitimate aim could be achieved through the use of less intrusive/milder alternative measures.

Furthermore, the European Court of Human Rights attaches particular importance to the intensity with which investigative actions are conducted during the investigation. If the investigation is not carried out with sufficient diligence and intensity (i.e., no active or meaningful investigative steps are being taken), the Court will unconditionally find a violation of the right to the peaceful enjoyment of possessions guaranteed by Article 1 of Protocol No. 1 to the European Convention on Human Rights.[45]

The involvement of the subject of the seizure as a full party to the proceedings is of crucial importance. This is because it would give them the opportunity to access the criminal case file on which the seizure is based. Such access would, among other things, serve as an effective control mechanism to ensure that the investigation is conducted within reasonably short timeframes. Knowing that the affected person can monitor progress and challenge inaction, the investigative authorities would be incentivised to carry out the investigation promptly and to reach an appropriate decision in relation to the specific circumstances of the case without undue delay.

11. Cryptocurrency Seizure

Cryptocurrency is a modern challenge of the 21st century, and in some cases, the criminal world uses it for revenge. We have come across a banner on the Internet requesting funding on behalf of a terrorist organization, and providing the person who wishes with a cryptocurrency wallet address for funding the terrorist organization. High online activity allows criminals to commit crimes in a new way, known as cybercrime.[46] Investigators can contact banks and financial institutions to freeze suspicious accounts, however, in a cryptocurrency-related investigation, it is difficult to freeze a suspicious account because cryptocurrency is largely decentralized[47] And it is not tied to any financial institution. Moreover, unlike physical fiat currency and gold, cryptocurrency does not exist in a physical form that can be seized and transferred to storage.[48] Cryptocurrency depends on digital infrastructure, Through which decentralized transfers are carried out, which is associated with anonymity and provides a new opportunity to commit crimes,[49] "International Standards for Combating Money Laundering and the Financing of Terrorism and Proliferation", For the purposes of

44 Ibid., 30 (in Georgian).

45 Ibid., 30-31 (in Georgian).

46 *Sarkki P.A.H., Van 't Hoff-de Goede M.S., Van Leuken M.A.G., Van de Weijer S.G.A., Leukfeldt E.R.,* Fear of Cybercrime Victimisation: Examining the Relationship Between Fear and Victimisation, Journal of Criminal Justice, Article 102531, 2025, 1.

47 *Giudici G., Milne A., Vinogradov D.,* Cryptocurrencies: Market Analysis and Perspectives, Journal of Industrial and Business Economics. Springer International Publishing, 2019, 14.

48 *Taylor S., Ho-yong Kim S., Ariffin K. A. Z., Abdullah S. N. H. S.,* A comprehensive forensic preservation methodology for crypto wallets, Forensic Science International: Digital Investigation, 2022, 1.

49 *Allen D. W.E, Lane A. M.*, Crypto Crime as Technology Entrepreneurship, 2024, 3.

applying the Recommendations, countries should consider virtual assets as "property", "income", "funds", "funds or other assets" or other "appropriate" values. States should apply international standards for combating money laundering and terrorism financing to virtual asset providers, (VASP).[50] Countries should require VASPs to identify, assess and take effective measures to mitigate their money laundering, terrorist financing and proliferation financing risks.[51] States should control VASPs in terms of obtaining licenses and permits and oblige them to take appropriate measures to prevent money laundering and terrorist financing.[52] Georgian legislation has been implementing the relevant recommendations on combating money laundering and terrorism over time, and a number of regulations have been created regarding VASP, which are published on the website of the National Bank of Georgia and are subject to a permit/license. As of 2025, there are 24 VASPs that can seize cryptocurrency based on a relevant ruling. Several types of crimes can be committed against cryptocurrency, namely, cryptocurrency can be stolen in physical form, and crypto fraud can also be committed, such as investment fraud.[53] Physical theft of cryptocurrency means stealing a cold wallet, ledger, and its recovery codes and taking possession of the cryptocurrency contained therein, while investment fraud involves deceiving a person and taking possession of the cryptocurrency as a tangible asset.

The decentralized system of cryptocurrency is a problematic issue, due to the seizure of property. Georgian legislation does not specify how an investigative body should act if it finds a cold wallet with forgotten codes. It is possible to interpret that the basis for requesting information is to request information from the device whether there is cryptocurrency in it or not, and if a balance is found on it, then its seizure and withdrawal are carried out. In such a case, we are dealing with a novelty, which is a modern challenge in Georgian reality, investigative actions should not be carried out artificially, and for this it is important to develop legislation in this area.

As for the seizure of cryptocurrency on a trading platform, the measures to be taken in this regard are simple. Let's take the trading platform "Coinbase" as an example. On the official website of the mentioned trading platform, we find that on the basis of a court ruling, it is possible to seize a person's existing cryptocurrency – "freeze". In this regard, it is possible to obtain a court ruling within the framework of international cooperation, within the framework of which the accounts of a specific person will be seized.It is worth noting that the named trading platform does not operate in the Georgian market, and that is why the seizure is being used within the framework of international cooperation. In addition, the trading platform has a requirement that the justification must indicate why a specific investigative or procedural action is being taken from this country, more specifically, it must be indicated that a crime has been committed from the country sending the request, or the victim is a citizen of the state sending the request. The trading platform requires a high degree of justification. In addition, it is possible to impose a seizure on the Binance trading platform. We read on the Internet that if law enforcement officers submit a decision of the relevant court on the use of a seizure, the

[50] International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferations Updated 2023, 76.
[51] Ibid., 76.
[52] Ibid., 77.
[53] *Allen D. W E, Lane A. M.*, Crypto Crime as Technology Entrepreneurship, 2024, 6.

platform will be obliged to comply with the court decision and "freeze" the accounts.[54] In the end, we can agree as follows, namely, there are centralized trading platforms that cooperate with investigative bodies, which provide the investigation with information of importance to the case. Although the term cryptocurrency is not in the Criminal Procedure Code, however, given that cryptocurrency is a material good that has an equivalent in dollars, it is a material good and it is appropriate to seize it.

In the event that the cryptocurrency cannot be traced, for example, a cold wallet has been used, the matter is of course complicated. For this, it is important to take various measures to track the cryptocurrency. In addition, in this regard, importance is attached to the so-called currency booths, which exchange cryptocurrency for real money without permission and without a license, which complicates the current situation.

12. Conclusion

The institution of seizure represents one of the most significant coercive measures in the Criminal Procedure Code of Georgia. The current version of the Georgian Criminal Procedure Code is largely in line with the standards established by the European Court of Human Rights. However, it does not contain specific provisions regulating the seizure of cryptocurrency or other digital assets. It is therefore essential to create an appropriate legislative framework and, on that basis, to develop consistent judicial practice. This would give all parties to the proceedings reasonable and predictable expectations regarding the planning and successful execution of investigative and procedural actions, thereby strengthening the protection of fundamental human rights.

It is particularly important to emphasise the crucial role of the court when imposing a seizure: the court must provide substantive and individualised reasoning for its decision. A merely formal or boilerplate justification of a seizure order may itself constitute (or create the preconditions for) a violation of human rights – especially in circumstances where the affected person is subject to the strict 48-hour statutory deadline for filing an appeal and has no subsequent possibility to request review of the seizure on the basis of newly discovered circumstances.

It would therefore be appropriate to amend the Criminal Procedure Code of Georgia to grant the affected person the right, upon the emergence of such new circumstances or relevant grounds, to apply to the court at any time for the lifting or modification of the seizure.

Furthermore, it is expedient that the legislation clearly define the prosecution's burden of proof when seeking to extend an existing seizure for additional 12-month periods. This would eliminate ambiguity and prevent contradictory or dual interpretations of the norm.

Finally, it is advisable that the person entitled to challenge the seizure order be recognised as a full party to the proceedings concerning the imposition, extension, or lifting of the seizure. Such participation would contribute to the more effective conduct of the investigation, impose reasonable time limits on investigative measures, and ensure that the entire process is carried out efficiently and in full compliance with the principles of fairness and proportionality.

[54] <https://www.binance.com/en/square/post/18420338108202> [02.09.2025].

Bibliography:

1. Report of the Public Defender of Georgia, 2018, 281 (in Georgian).
2. Proceeds of Crime Act POCA 2002 (UK).
3. Codice di Procedura Penale 22/09/199.
4. Reichsstrafprozessordnung 01/02/1887.
5. Universal Declaration of Human Rights, 10/12/1948.
6. The United Nations Convention against Transnational Organized Crime, 15/11/2000.
7. Constitution of Georgia 24/08/1995.
8. Criminal Procedure Code of Georgia 03/11/2009.
9. *Allen D. W E, Lane A. M.*, Crypto Crime as Technology Entrepreneurship, 2024, 3, 6.
10. *Giudici G., Milne A., Vinogradov D.,* Cryptocurrencies: Market Analysis and Perspectives, Journal of Industrial and Business Economics. Springer International Publishing, 2019, 14.
11. *Golay Dr. C., Ms. Cismas I.,* Legal Opinion:The Right to Property from a Human Rights Perspective, 2010, 28.
12. *Grgic A., Mataga Z., Longar M. and Vilfan A.,* The Right to Property Under the European Convention on Human Rights, A Guide to the Implementation of the European Convention on Human Rights and its Protocols, Human Rights Handbooks, No. 10, Council of Europe, 2007, 10-11.
13. *Hryniewicz-Lach E.,* Improving Asset Confiscation: in the Quest for Effective and Just Solutions, ERA Forum, 2024, 238.
14. International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferations Updated 2023, 76.
15. *Khaliq M. N., Fatimah S.,* The Legal Politics of Establishing the Asset Seizure Law: A New Strategic Paradigm for Combating Corruption and Economic Crimes in Indonesia, Jurnal Ilmu Hukum Kyadiren, Vol. 6, No.2, 2025, 106.
16. *Lagidze E.,* Seizure and Confiscation as an Effective Means of Combating Transnational Organized Crime, law and world, 2023, 148.
17. *McClean D.,* Transnational Organized Crime: A Commentary on the UN Convention and its Protocols, Oxford University Press, 2007, 144.
18. *Parulava G.,* The Duration of Seizure of Property in the Context of the Constitutionality of the Right to Property, "Georgian-German Journal of Comparative Law", 2021, N4, 25 (in Georgian).
19. *Sarkki P.A.H., Van 't Hoff-de Goede M.S., Van Leuken M.A.G., Van de Weijer S.G.A., Leukfeldt E.R.,* Fear of Cybercrime Victimisation: Examining the Relationship Between Fear and Victimisation, Journal of Criminal Justice, Article 102531, 2025, 1.
20. *Taylor S., Ho-yong Kim S., Ariffin K. A. Z., Abdullah S. N. H. S.,* A comprehensive forensic preservation methodology for crypto wallets, Forensic Science International: Digital Investigation, 2022, 1.
21. *Tskhvedia T., Kvachantiradze D., Noselidze A.,* Guarantees of Protection of Property Rights in Criminal Proceedings, 2019, 8, 15, 30 (in Georgian).
22. Decision of the Supreme Court of Georgia of December 23, 2022 in case No. 38AG-22. (in Georgian).
23. Decision of the Constitutional Court of Georgia of February 25, 2022 on claims N2/1/1434,1466, in the case of Otar Marshava and Mikheil Nozadze against the Parliament of Georgia (in Georgian).

24. Decision No. 2/3/1279 of the Constitutional Court of Georgia of July 5, 2019 in the case of Levan Alafishvili and "KS Alafishvili and Kavlashvili – Georgian Lawyers Group" against the Government of Georgia (in Georgian).
25. Decision of the Constitutional Court of Georgia of April 18, 2016 on the lawsuit No. 2/1/631, in the case of Teimuraz Janashia and Giuli Alasania against the Parliament of Georgia (in Georgian).
26. Veits v. Estonia [2015] ECHR, App. No. 12951/11.
27. Ünsped Paket Servisi San. VE TİC. A.Ş. v. Bulgaria [2015] ECHR, App. No. 3503/08.
28. Silickiene v. Lithuania [2012] ECHR, App. No. 20496/02.
29. Denisova AND Moiseyeva v. RUSSIA, [2010] ECHR, App. No. 16903/03.
30. Cocchioarella v. Italy [2006] ECHR, App. No. 64886/01.
31. Yildirim v. Italy [2003] ECHR, App. No. 38602/02.
32. Iatridis v. Greece [1999], ECHR, App. No. 31107/96.
33. Sscollo v. Italy [1995] ECHR, App. No. 19133/91.
34. Agosi v. The United Kingdom [1986] ECHR, App. No. 9118/80.
35. Sporrong and Lönnroth v. Sweden, [1982] ECHR, App. Nos. 7151/25, 7152/75.
36. <https://help.coinbase.com/en/coinbase/other-topics/other/does-coinbase-freeze-accounts?contactusbanner=false#buying-and-selling-restrictions> [02.09.2025].
37. <https://www.binance.com/en/square/post/18420338108202> [02.09.2025].

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Money Laundering as an Obstacle to the Confiscation of Property Derived from Transnational Organized Crime

Criminal Activities. In the 21st century, the problem of money laundering has gained even greater relevance as it directly contributes to delays and, in many cases, the impossibility of confiscating property derived from criminal activities. Therefore, scholarly research on this issue is applicable and significant.

The article is based on the analysis of scientific literature, legislation, and judicial practice.

This paper aims to promote a proper understanding of the challenges posed by money laundering to the confiscation of related property, and to identify the key practical problems that persist today.

Keywords: *Money laundering, Transnational Organized Crime, Confiscation of Property, Challenges of Confiscation of Property.*

1. Introduction

"Organized crime is one of the most dangerous forms of crime of the 20th century, primarily encroaching on the economic, political, legal, and moral spheres of society."[1]

Since the second half of the 20th century, the criminal world has been actively looking for ways to legalize illegal income (money laundering), making it acquire a legal form. According to the International Monetary Fund, the income from drug trafficking and the legalization of illicit income is equal to six to eight percent of the world economy.[2]

Modern technologies, the digitalization of business activities, and the increasing use of virtual assets rapidly alter the form and the location of illicit income, a process further facilitated by new methods of money laundering.

"In the legal literature, money laundering is defined as the transformation of property acquired through illegal activities (such as drug and arms trafficking, or tax evasion) into lawful financial and economic circulation.

This study aims to examine money laundering as one of the impediments to the confiscation of property derived from transnational organized crime, to analyze the prevalence of such criminal activity, and to discuss recent case law of the general courts.

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1 *Glonti G., (Third Ed.),* Criminology and the Legal System in Georgia, Tbilisi, 2008, 176 (in Georgian).

2 *Shelley L.,* Transnational Organized Crime and Seized Assets: Moral Dilemmas Concerning the Disposition of the Fruits of Crime, 7 Maastricht J. Eur. & Comp., 2000, 35.

2. The Concept and Meaning of Money Laundering

"The legalization of illicit income constitutes a form of transnational crime that continues to raise numerous unanswered legal and policy questions."[3]

"Experts suggest that, in the modern sense, money laundering dates back to the 1920s, when organized crime significantly expanded in the United States following the enactment of the National Prohibition Act. Specifically, the so-called Volstead Act banned the sale and distribution of alcoholic beverages, leading to widespread bootlegging and smuggling. The proceeds from such illegal activities were often funneled into legitimate businesses whose income appeared ostensibly lawful."[4]

"Sources of illegal income may include drug trafficking, illegal gambling, bribery, unlicensed entrepreneurship, corruption, and other criminal enterprises. Criminals attempt to "launder" the proceeds from such activities to make them legal.[5] "The criminalization of money laundering is aimed at protecting the country's economic system and, above all, the monetary system from the inflow of large volumes of uncontrolled funds, which is also required by the interests of combating organized crime."[6]

"The problem of money laundering is broad and multifaceted. It is invariably connected to the possession or control of criminal property, assets derived from various unlawful activities, including drug trafficking, human trafficking, fraud, corruption, and other profit-driven crimes. The diverse origins of criminal income and the wide range of predicate offenses present significant conceptual and practical challenges in combating money laundering."[7]

"The fight against the legalization of illicit income is part of a strategy to combat any form of manifestation of organized crime."[8]

The European Union Strategy to Tackle Organized Crime 2021–2025 states: "Organized crime, due to the clandestine nature of its activities, remains largely invisible to society and poses a serious threat to European citizens, businesses, public institutions, and the European economy as a whole."[9]

Following Georgia's National Strategy for Combating Organized Crime, "Organized crime, by virtue of its transnational nature, represents one of the most significant challenges not only for Georgia but for the international community. It undermines the core values of society, impedes economic, social, cultural, and political development, violates the rule of law, and threatens both national and international security."[10]

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3 *Gogshelidze Z.,* Legalization of Illegal Income – Analysis of Georgian Judicial Practice, Journal. "Journal of Law", No. 1, 2020, 231 (in Georgian).

4 *Nachkebia G. (ed.),* Problems of Criminalization and Law Enforcement of Modern Manifestations of Organized Crime in Georgian Criminal Law, Tbilisi, 2012, 719-720 (in Georgian).

5 *Gvenetadze N., Mamulashvili G.,* Liability for Entrepreneurial or Other Economic Crimes under the Criminal Code of Georgia, Tbilisi, 2000, 24 (in Georgian)

6 *Tkesheliadze G. (ed.),* Private Part of Criminal Law (Book I), Tbilisi, 2006, 366 (in Georgian).

7 *Button M., Hock B., Shepherd D.,* Economic crime, London and New York, 2022, 163.

8 *Tumanishvili G., Jishkariani B., Shrami E., The* Influence of European and International Law on Georgian Criminal Procedure Law, Tbilisi, 2019, 805 (in Georgian).

9 *Button M., Hock B., Shepherd D.,* Economic crime, London and New York, 2022, 168.

10 The EU Strategy to tackle Organised Crime 2021-2025, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52021DC0170&qid=1632306192409>, [03.08.2025].

The National Strategy identifies the fight against organized crime as one of the country's main priorities, particularly due to its transnational characteristics. Following the collapse of the Soviet Union and during the subsequent civil and separatist conflicts, organized crime in Georgia assumed hazardous forms."[11] The geographical location of Georgia has made it particularly vulnerable to drug trafficking and human trafficking. Combating money laundering, recognized as a key element of transnational organized crime, has remained a long-standing priority for the Georgian state. This commitment is reflected in both national legislation and strategic documents. Since 2014, the Government of Georgia has adopted several critical policy frameworks, including the Strategy for Combating Money Laundering and the Financing of Terrorism (2014–2017)[12], The National Strategy for 2023–2026[13] on Preventing, Detecting, and Suppressing Money Laundering, Terrorism Financing, and the Financing of the Proliferation of Weapons of Mass Destruction. The Government Decree on the Approval of the National Risk Assessment Report on Money Laundering and Terrorism Financing in Georgia.[14]

3. Money Laundering in Georgian and Foreign Legislation

"Money laundering in Georgia was criminalized on October 29, 1996 (Article 165^1 of the previous Criminal Code, Legalization of Illegally Obtained Funds), [15] which prohibited "conducting financial transactions with illegally obtained funds or property, or using such funds or property for the implementation of legal entrepreneurial or other economic activities".[16]

On July 22, 1999, a new Criminal Code was adopted, which proposed a renewed disposition on money laundering, "Legalization of illegal income, i.e., giving money or other property to a lawful form, as well as concealing the source, location, movement, real owner or owner of property, or property rights."[17]

"Initially, the punishment for legalization of illegal income was determined by Article 194, and on March 19, 2008, Article 194^1 was added to the Criminal Code."[18]

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11 Combating Organized Crime 2021-2024 National Strategy, 2, <https://matsne.gov.ge/ka/document/view/5256554?publication=0> [03.08.2025].

12 *Ciklauri-Lammich Eliko*, Menschenraub, ein blühendes Gewerbe in der Kaukasusregion, Monatshefte für Osteuropäisches Recht, Hrsg. Dr. Günter Tontsch,. Hamburg 2000, 2-9.

13 Resolution No. 236 of the Government of Georgia of March 18, 2014, on the Approval of the Strategy and Action Plan for Combating Money Laundering and Terrorism Financing, <https://matsne.gov.ge/ka/document/view/2284180?publication=0>[04.06.2025].

14 Decree No. 813 of the Government of Georgia of June 4, 2024 "On Amendments to Decree No. 1757 of the Government of Georgia of October 3, 2023 on Approval of the Money Laundering and Terrorism Financing Risk Assessment Report in Georgia", <https://matsne.gov.ge/ka/document/view/6190824?publication=0>[04.06.2025].

15 *Tumanishvili G., Jishkariani B., Shrami E., The* Influence of European and International Law on Georgian Criminal Procedure Law, Tbilisi, 2019, 807 (in Georgian).

16 Law of Georgia of 29 October 1996 <https://matsne.gov.ge/ka/document/view/5748505?publication=167> [05.06.2025].

17 Article 194 of the Criminal Code of Georgia, <https://matsne.gov.ge/ka/document/view/16426?publication=0> [05.06.2025].

18 *Tumanishvili G., Jishkariani B., Shrami E., The* Influence of European and International Law on Georgian Criminal Procedure Law, Tbilisi, 2019, 807(in Georgian).

To date, Article 194 of the Criminal Code has undergone a number of changes, while Article 1941 was amended only once, in 2011.

In particular, it is important to focus on the changes of 2006, 2007, and 2011.

According to the 2006 amendment, a legal entity was defined as the subject of a crime. With the amendment of 2007, the article was fully expanded: illegal property became the subject of a crime. Concerning money laundering, unrecorded property, alongside criminal income, was taken into account as it can be obtained through other offenses. Hence, a definition of illegal and unsubstantiated property has been proposed. However, if interpreted in accordance with Article 194 of the Criminal Code, then the predicate offense must be criminal in nature. In particular, under Article 1, subparagraph "e" of the Convention of 8 November 1991 on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (Strasbourg Convention), the term "predicate offense" means a criminal activity that generates illicit proceeds, which can then be laundered through money laundering schemes under Article 6 of this Convention.

By the 2011 law, the article was supplemented with the purpose of assisting another person in evading liability.

The Law on Facilitating the Prevention of Money Laundering, adopted on June 6, 2003, should be considered as a step forward in the fight against money laundering, which, at the initial stage, regulated a number of issues.[19]

On October 30, 2019, a new law on promoting the prevention of money laundering and terrorist financing was adopted, which better responds to modern challenges against money laundering and terrorist financing.[20]

The new law considers money laundering to be a crime under Articles 186, 194, and 194^1 of the Criminal Code of Georgia.

We have already considered Articles 194 and 194^1 of the Criminal Code, and according to Article 186 of the Criminal Code, using, purchasing, possessing, or selling property obtained by a criminal is punished. As for foreign legislation, we will briefly refer to the experience of Germany and the United States.

"The German Bundestag, by law of June 23, 2017, made many amendments to the national legislation. Earlier, on 19 December 2016, the Bundestag adopted a law on consent, based on the 2005 Agreement of the Council of Europe on money laundering, freezing, confiscation, and financing of terrorism.[21]

Money laundering, under Section 261 of the German Penal Code, includes the following elements: (1) money or other property is the proceeds of a predicative crime, (2) the proceeds have been intentionally concealed, disguised or acquired (for oneself or a third party), used (for oneself or others) to make its origin, trace and confiscation impossible or complicated; (3) The offender is aware of the asset that constitutes the proceeds of a predicate offence and acts intentionally. It is also a

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19 Law of Georgia on Facilitating the Prevention of Illicit Income Legalization, <https://matsne.gov.ge/document/view/12580?publication=36#!> [05.06.2025].

20 Law of Georgia on Facilitating the Prevention of Money Laundering and Terrorist Financing <https://matsne.gov.ge/ka/document/view/4690334?publication=12> [05.06.2025].

21 *Gogshelidze Z.,* Criminal Liability for Legalization of Illegal Income, Tbilisi, 2023, 266 (in Georgian) <https://www.tsu.ge/assets/media/files/48/disertaciebi5/Zurab_Gogshelidze.pdf> [14.06.2025].

criminal offence if the offender acts with gross negligence and does not know of the illicit origin of the property. In the latter case, however, the maximum penalty shall be reduced."

Section 261 of the Criminal Code defines predicative offences: Serious crimes when the minimum sentence is imprisonment for at least one year (e.g., robbery); Active and passive bribery of civil servants, drug-related offenses, gross and organized violations of customs regulations, smuggling, and purchase of smuggled goods.

Subversive and violent activities that threaten the security of the state and international institutions, as well as the creation or membership of a criminal terrorist organization, if it is not already a predicate crime.

The following offences qualify as predicative offences if they are committed in an ongoing manner as part of a commercial activity or through an organized association: tax evasion, forgery of credit card cheques, pimping, human trafficking, labor exploitation (e.g., slavery), theft, concealment, extortion, receipt of stolen items, fraud and its specific forms, misappropriation, forgery of documents and related crimes, organization of unauthorized games, unauthorized trade in toxic, radioactive, or other toxic waste, commercial bribery, illegal transfer of migrants, asylum seekers Incitement to incorrect application filing, trading in insider information, intellectual property-related offenses, e.g. unlawful use of someone else's trademark.[22]

Money laundering has been a crime in the United States since 1986, making the United States one of the first countries to criminalize the act of money laundering. There are two money laundering articles in the U.S. Code, paragraphs 1956 and 1975 (18 U.S.C. §§ 1956 and 1957).

In general, it is a crime to participate in any virtual financial transaction if the person who carried out the transaction knew that the money was derived from criminal activities and if the state is able to prove the criminal property arose from a certain illegal activity. A criminal act can include a violation of any criminal law, federal, local, or foreign. Defined illegal activities include 200 types of U.S. crimes, ranging from drug trafficking, terrorism, fraud, continuing crimes related to organized crime, and specific international crimes.

The state does not need to prove whether the person who committed the money laundering knew that the criminal property was the result of a specific illegal activity.

Knowledge can be based on willful ignorance or careless indifference when you are not interested, and criminal activity crosses a red line. Knowledge may also be based on when state agents obtain information that the property was obtained from criminal activity.

Under Paragraph 1956, a transaction may be:

1. Intended to assist in the commission of a specific illegal act;
2. To avoid paying U.S. taxes and to fill out a false tax refund application;
3. Being aware that the transaction, whether in whole or in part, is aimed at disguising the nature, location, origin, or ownership of illicit property;"
4. To avoid the obligation of federal and state law to file a post-transaction report.

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[22] The International Comparative Legal Guide to: Anti-Money Laundering 2019 (A practical cross-border insight into anti-money laundering law), 84, <https://www.acc.com/sites/default/files/resources/upload/AML19E-Edition_0.pdf> [15.06.2025].

Section 1956 also punishes the transportation and transfer of money and other financial instruments (cash or cash shares in a transferable form) for 1) facilitating the commission of specific crimes, 2) with the knowledge that money and monetary instruments constitute the proceeds of a specific specific crime, and the transportation serves in whole or in part to disguise the nature, location, source of origin, owner of the criminal property.

Paragraph 1957 makes it an offence to engage in financial transactions with respect to property derived from criminal activity through U.S. banks or foreign banks if the volume of the transaction exceeds $10,000.

Tax evasion is not a predicate offense per se; however, the organization of transactions, using proceeds from other illegal activities, for the purpose of evading the payment of U.S. federal taxes and filing a false tax refund application, is a prerequisite for punishment under Section 1956.[23]

4. International and Georgian Experience in Combating Money Laundering

To intensify the fight against transnational organized crime and money laundering, a number of international (UN) and regional (European) documents have been adopted so far, which have been reflected in the legislation of our country at different times.

"The signs of legalization of illicit income are provided in the United Nations Convention for the Suppression of Illicit Trafficking in Narcotic Drugs and Psychotropic Substances of December 19, 1988 (Vienna Convention). This convention indicates the objective and subjective signs that characterize the legalization of proceeds from drug crime."[24]

"This convention represents the first international act in the fight against money laundering."[25]

According to the Convention (Article 5), "each party shall take such measures, which may be necessary to enable the confiscation of: (a) income derived from the commission of offences following Article 3(1), or property whose value corresponds to the value of such income; (b) Narcotic drugs and psychotropic substances, materials and devices or other means which are used in any way, or which are intended to be used in any way, in the commission of offences considered by section 3(1). 2. Each party shall also take such measures that may be necessary to enable its competent authorities to identify, trace, and freeze or seize any of the income, property, means, or any other items referred to in paragraph 1 of this article for further confiscation."[26]

"Effective anti-money laundering measures are one of the primary tasks of the EU member states. It represents an important tool in the fight against organized financial crime. Already within the framework of the European Community, on 10 July 1991, the aim of adopting a directive on the

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[23] The International Comparative Legal Guide to: Anti-Money Laundering 2019 (A practical cross-border insight into Anti-money laundering law), 243, <https://www.acc.com/sites/default/files/resources/upload/AML19_E-Edition_0.pdf>[15.06.2025].

[24] *Tumanishvili G., (Third Ed.), Jishkariani B., (Third Ed.), Shrami E., (Third Ed.), The* Influence of European and International Law on Georgian Criminal Procedure Law, Tbilisi, 2019, 805. (in Georgian)

[25] *Gogshelidze Z.,* Criminal Liability for Legalization of Illegal Income, Tbilisi, 2023, 25. (in Georgian) <https://www.tsu.ge/assets/media/files/48/disertaciebi5/Zurab_Gogshelidze.pdf>[14.06.2025].

[26] United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988, <https://matsne.gov.ge/document/view/2540250?publication=0> [06.06.2025].

prevention of money laundering was to combat it effectively within the financial and banking sectors."[27]

"The most important and indicative instruments for the countries with a transitional system are (in chronological order): the "Convention on Money, Search, Seizure and Confiscation of the Proceeds from Crime" (1990), the "Convention on Combating Bribery of Foreign Public Officials in International Business Transactions" (1997), the "Convention against Corruption" (1999), the "United Nations Convention against Transnational Organized Crime" (2000), the "Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (2005), and the EU Directive 2014/42 on the Freezing and Confiscation of Proceeds of Crime in the European Union (2014), which[28] was updated on 24 April 2024.[29]

"Among the legal acts against the legalization of illicit income, the most important is the Convention on Money Laundering, Recovery and Confiscation of Proceeds from Crime of November 8, 1990 (Strasbourg Convention).[30]

According to the Strasbourg Convention (Article 6, Money Laundering Offences), each Party shall adopt legislative or other measures as may be necessary to establish as criminal offences under its domestic law when committed intentionally:

a) The conversion or transfer of property, being aware that such property constitutes proceeds of crime, for the purpose of concealing or disguising its illicit origin, or of assisting any person involved in the commission of the predicate offence to evade the legal consequences of his or her actions

b) the concealment or disguising of the nature of the proceeds; the acquisition, possession, or use of property, knowing that these are derived from criminal acts; the participation in or assisting the movement of funds to make the proceeds appear legitimate.

c) Subject to the constitutional principles of the Party and the basic concepts of its legal system, the acquisition, possession, or use of property, knowing, at the time of receipt, that such property constitutes proceeds;

d) Participation in, association or conspiracy to commit, attempt to commit, or aiding, abetting, facilitating and counselling the commission of any of the offences established in accordance with this Article."[31]

Also, the UN Convention against Transnational Organized Crime of November 15, 2000, is one of the framework international instruments in the fight against organized crime.[32] "It was the first

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27 *Turava M.,* European Criminal Law, Tbilisi, 2010, 59 (in Georgian).

28 *Orlovska, N., & Stepanova J.,* confiscation of proceeds and property related to crimes: International standards and the ECHR practice, 10 Juridical Trib. 499-500, 2020, [24.01.2023].

29 Directive (EU) 2024/1260 of the European parliament and of the council on asset recovery and confiscation, <https://eur-lex.europa.eu/eli/dir/2024/1260/oj> [05.08.2025].

30 *Tumanishvili G., Jishkariani B., Shrami E., The* Influence of European and International Law on Georgian Criminal Procedure Law, Tbilisi, 2019, 805 (in Georgian).

31 Council of Europe Convention on Money Laundering, Collection, Recovery and Confiscation of Proceeds of Criminal Activity, 1990, <https://matsne.gov.ge/ka/document/view/1216554?publication=0> [06.06.2025].

32 United Nations Convention against Transnational Organized Crime, 2000, <https://matsne.gov.ge/document/view/1485286?publication=0> [27.11.2025].

international treaty of the century to be opened for signature to countries at the Millennium High-Level Conference, held in Palermo, Italy, from December 12 to December 15, 2000."[33]

"The Palermo Convention was created as a mechanism against cross-border criminal activity, which has become an international problem. Key aspects of the Convention include making participation in an organized criminal group, money laundering, corruption and obstruction of justice criminally punishable in national legislation (1), the establishment of an international cooperation mechanism that includes extradition, mutual legal assistance and cooperation of law enforcement agencies (2), professional development and technical support for public services at the national level (3)."[34]

The Council of Europe Convention on Laundering, Retrieval, Seizure and Confiscation of the Proceeds from Crime and the Financing of Terrorism (Warsaw, 2005)[35] includes a definition of terms related to money laundering. So, for example, "income" means any economic benefit directly or indirectly arising from or derived from a criminal offence. Concerning property, it includes any kind of property, property or non-property, movable or immovable, legal acts, or documents confirming the right or interest in such property."[36]

To study the Georgian experience and the damage caused by the legalization of illicit income, the practice of common courts for 2021-2023 (46 conviction judgments issued by common courts) was analyzed[37].

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33 *Ciopec F.,* compatibility of Romanian legislation with the UN convention against transnational organized crime, 39 Zbornik Radova (2005), 213.

34 *Borgstede G.,* Cultural property, the Palermo convention and transnational organized crime, 21 IJCP, 2014, 283.

35 Council of Europe Convention on Laundering, Search, Recovery and Confiscation of Proceeds of Crime and the Financing of Terrorism, 2005, <https://matsne.gov.ge/document/view/2345907?publication=0> [14.06.2025].

36 *Gogshelidze Z.,* Criminal Liability for Legalization of Illegal Income, Tbilisi, 2023, 30. <https://www.tsu.ge/assets/media/files/48/disertaciebi5/Zurab_Gogshelidze.pdf> [14.06.2025].

37 2021-2023 related to Article 194 (Legalization of Illegal Income) of the Criminal Code Judgments – Judgment No 1-1024/21 of September 08, 2021 of the Batumi City Court, Judgment No 1-181/21 of the Batumi City Court of November 01, 2021, Judgment No 1-453/22 of the Batumi City Court of April 19, 2022, Judgment No 1-711/23 of the Batumi City Court of May 30, 2023, Judgment No 1/328-23 of the Kutaisi City Court of April 04, 2023, Judgment No 1/659-23 of the Kutaisi City Court of July 06, 2023, Judgment No 1/632-22 of April 26, 2023 of Zugdidi District Court, Judgment No 1/3934-21 of October 29, 2021 of Tbilisi City Court, Judgment No 1/1044-21 of November 10, 2021 of Tbilisi City Court, Judgment No 1/3944-20 of March 11, 2021 of Tbilisi City Court, Judgment No 1/4152-20 of June 08, 2021 of Tbilisi City Court, Judgment No 1/996-21 of April 23, 2021 of Tbilisi City Court, Judgment No 1/4697-20 of May 11, 2021 of the Tbilisi City Court, Judgment No 1/4744-20 of the Tbilisi City Court of April 14, 2021, Judgment No 1/3611-21 of the Tbilisi City Court of August 23, 2021, Judgment No 1/4535-20 of the Tbilisi City Court of April 26, 2021, Judgment No 1/4280-21 of October 11, 2021, Judgment No 1/4171-21 of the Tbilisi City Court of October 1, 2021, Judgment No 1/3434-21 of July 27, 2021 of the Tbilisi City Court, Judgment No 1/4804-21 of May 2, 2022 of the Tbilisi City Court, Judgment No 1/1434-22 of May 31, 2022 of the Tbilisi City Court, Judgment No 1/1233-22 of the Tbilisi City Court of June 20, 2022, Judgment No 1/696-21 of the Tbilisi City Court of April 26, 2022, Judgment No 1/5434-21 of June 21, 2022 of the Tbilisi City Court, Judgment No 1/2181-21 of April 12, 2022 of the Tbilisi City Court, Judgment No 1/1708-22 of the Tbilisi City Court of April 13, 2022, Judgment No 1/1832-22 of the Tbilisi City Court of July 20, 2022,

In this regard, it should be said that the statistical indicators are higher compared to previous years[38], but they are still scarce.

In the concluding part of the analysis of judicial practice in relation to money laundering for 2018-2021, I. Grdzelidze writes that the shortage of cases "is likely due to the lack of cases sent to court by the investigation. This issue was mentioned in a report prepared by IDFI – Institute for the Development of Freedom of Information, referring to MONEYVAL's assessment of money laundering and terrorist financing in Georgia. On page 10 of the report, it is indicated: The MONEYVAL report reveals that potential cases of money laundering in Georgia have not been adequately identified. The total number of money laundering investigations is lower compared to related crimes."[39]

The analysis of judicial practice from 2021 to 2023 demonstrates that fraud constitutes, in most cases, a predicate offence to money laundering, with particular significance attached to fraud committed through transnational means and mass communication. "There has been an increase in offences in the financial-economic sector that involve a cyber component, including those perpetrated through the use of virtual assets. In response, the Investigative Service of the Ministry of Finance established, in 2023, a Directorate for Combating Offences with a Cyber Component in the Financial-Economic Sphere."[40]

In order to correctly and adequately determine the scale of damage caused by the legalization of illegal income and the volume of confiscated criminal property, it is necessary to create a centralized institutional unit, which does not exist at this stage.[41]

5. Specific International Organizations Combating Money Laundering

For decades, a number of international and regional organizations have been fighting transnational organized crime, including money laundering.

After the end of World War II, the International Police Organization (Interpol) was established.

"Modern crime is of a growing international nature. Thus, it is vital to have coordination among all the players tasked with maintaining the global security architecture. Interpol, as a global

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Judgment No 1/4855-19 of the Tbilisi City Court of March 16, 2022, Judgment No 1/3065-20 of September 08, 2022, Judgment No 1/3270-21 of the Tbilisi City Court of February 14, 2022, Judgment No 1/3631-22 of July 11, 2022 of the Tbilisi City Court, Judgment No 1/2638-22 of May 23, 2022 of the Tbilisi City Court, Judgment No 1/292-22 of May 4, 2022 of the Tbilisi City Court, Judgment No 1/3845-21 of March 25, 2022 of the Tbilisi City Court, Judgment No 1/2716-23 of December 04, 2023 of the Tbilisi City Court, Judgment No 1/2860-23 of September 27, 2023 of the Tbilisi City Court, Judgment No 1/2951-23 of July 07, 2023 of the Tbilisi City Court

38 *Grdzelidze I.,* Analysis of the Practice of the Common Courts of Georgia in Relation to the Legalization of Illicit Income (Money Laundering), 1, <https://www.supremecourt.ge/uploads/files/1/ANALITIKURI/fulis%20gatetreba.pdf> [04.06.2025].

39 Ibid., 16, <https://www.supremecourt.ge/uploads/files/1/ANALITIKURI/fulis%20gatetreba.pdf> [04.06.2025].

40 Order N19 of the Minister of Finance of Georgia dated January 26, 2023; <https://matsne.gov.ge/ka/document/view/87634?publication=17> [06.06.2025]

41 *Dzneladze L.,* Confiscation as a Necessary Criminal Mechanism to Combat Transnational Organized Crime, Zhurn. Journal of Law, No. 2, 2024, 246 (in Georgian).

organization, ensures cooperation even between countries that do not have diplomatic relations with each other."[42]

"Interpol has significantly improved international law enforcement cooperation in three areas: 1. Connecting national local police forces with a reliable and fast network, 2. Providing parties with information on new methods in the field of law enforcement through the International Professional Association, and 3. It increases the degree of harmonization among law enforcement agencies around the world."[43]

"In 1989, the Special Financial Action Group (FATF) was established by the Heads of State of the G7 at the Organisation for Economic Co-operation and Development (OECD) summit in Paris. It aims to develop a common policy against money laundering and terrorist financing, both nationally and internationally, and to maintain the integrity of the financial system."[44]

"This body establishes and monitors international standards for anti-money laundering regulations.[45] The FATF has defined money laundering as the processing of proceeds of crime to disguise their illicit origin to legitimize the illegally obtained profits."[46]

To increase the effectiveness of the fight against transnational organized crime, Europeans have been discussing the adoption of a unified police and prosecutorial system for years.[47]

Europol was established in 1992, followed by the creation of Eurojust in 1999.

"Europol assists Member States in a variety of ways; it facilitates the exchange of information in accordance with national legislation between Europol Liaison Officers (ELOs) representing the relevant national law enforcement agencies. Europol prepares operational analyses and strategic reports based on operational and intelligence information provided by Member States. In addition, Europol provides technical and expert assistance during the operational and investigative process carried out by individual states. Also, with its analyses, Europol contributes to raising awareness and coordinating investigative techniques concerning organised crime across the EU."[48]

"The Egmont Group (named after the first meeting held on June 09, 1995, at the Egmont Arenberg Palace in Brussels) is an international group that unites national financial intelligence services that specialize in the preparation of reports on money laundering and suspicious activities at the national level."[49]

"In October 1999, at the meeting in Tampere, Finland, the Council of Europe concluded that to combat serious, organized, and transnational crime, it needed to establish Eurojust. Eurojust is composed of prosecutors, magistrates, or police officers with the appropriate competencies, appointed

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42 Interpol <https://www.interpol.int/en/Who-we-are/What-is-INTERPOL> [08.12.2025].

43 *Guymon C.,* International legal mechanisms for combating transnational organized crime: The need for a multilateral convention, 18 Berkeley J. Int'I (2000), 73.

44 *Leong A.,* The disruption of international organized crime, London, 2007, 58-59.

45 The FATF has developed 40 recommendations and 9 special recommendations.

46 *Gogshelidze Z.,* Criminal Liability for Legalization of Illegal Income, Tbilisi, 2023, 8, <https://www.tsu.ge/assets/media/files/48/disertaciebi5/Zurab_Gogshelidze.pdf>[14.06.2025].

47 *Guymon C.,* International legal mechanisms for combating transnational organized crime: The need for a multilateral convention, 18 Berkeley J. Int'I (2000), 73.

48 *Brazier, M. L.,* The European Union's hot pursuit of organized crime groups, 7 New Eng. Int'I & Comp. L. Ann. (2001), 263 [24.01.2023].

49 *Leong A.,* The disruption of international organized crime, London, 2007, 62.

by the national governments of the Member States. Each national government determines the scope and nature of the mandate granted to its representative.

The objective of the Convention on Eurojust is to enhance cooperation among competent authorities through the implementation of additional legal mechanisms. Under the provisions of the Convention, Europol is required to initiate close cooperation with the relevant units of Eurojust and request their assistance and legal consultation. Europol must also provide Eurojust with information concerning all investigations and prosecutions involving more than one Member State. Acting in a coordinating role, Eurojust exercises control over investigations and prosecutions relating to certain types of crime, including trafficking in human beings, terrorist activities, counterfeiting of currency, as well as cases involving the economic and financial interests of the European Union, money laundering, and cybercrime. [50]

"Since 2019, the cooperation agreement between Georgia and EUROJUST has entered into force. Although Georgia has actively used the international facilitation opportunities of EUROJUST, it still has not provided cooperation within the framework of joint investigative teams and participation in expert forums."[51] MONEYVAL – The Committee of Experts on the Evaluation of Measures to Counter Money Laundering and the Financing of Terrorism of the Council of Europe serves as a permanent monitoring body of the Council of Europe. It is required to assess compliance with international standards on anti-money laundering and counter-terrorist financing (AML/CFT) at the national level and to issue recommendations aimed at strengthening domestic mechanisms in these areas.[52]

In 2020, Georgia's compatibility with international standards in the field of combating money laundering and the financing of terrorism was verified by the Council of Europe's Select Committee of Experts on Measures to Combat Money Laundering and the Financing of Terrorism (hereinafter referred to as "MONEYVAL").[53]

"The purpose of the updated 2024 report on the assessment of money laundering and terrorist financing risks in Georgia is to remedy the individual deficiencies identified by MONEYVAL."

6. The Issue of Money Laundering and the Confiscation of Criminal Assets

"In relation to the problem of money laundering, the institution of asset confiscation acquires particular significance"[54] to prevent the convicted person from benefiting from the proceeds of crime."[55]

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50 *Brazier, M. L.,* The European Unions' hot pursuit of organized crime groups, 7 New Eng. Int'I & Comp. L. Ann. (2001), 264-265.

51 2022-2027 of the Prosecutor's Office of Georgia Strategy, 38, <https://pog.gov.ge/uploads/7f5da215-saqarTvelos-prokuraturis-2022-2027-wlebis-strategia.pdf> [05.08.2025].

52 Moneyval, <https://www.coe.int/en/web/moneyval/moneyval-brief> [07.06.2025].

53 Decree No 813 of 04 June 2024 of the Government of Georgia on the Approval of the Risk Assessment Report on Money Laundering and Terrorist Financing in Georgia on the Amendment to Decree No 1757 of 3 October 2023 of the Government of Georgia <https://matsne.gov.ge/ka/document/view/6190824?publication=0> [04.6.2025].

54 *Turava M.,* European Criminal Law, Tbilisi, 2010, 62 (in Georgian).

Modern technology has given an amazing boost to the criminal business as well. It has become easier to obtain information about needs and opportunities (proposals) in different parts of the world. The use of cyber technologies has increased the framework of organized crime and its revenues astronomically. Also, drug and cybercrimes, money laundering, and huge construction projects were produced through the corruption of reputational systems at the expense of encroaching on the interests of society and the state.[56]

"Many national and international instruments, notably the United Nations Convention against Transnational Organized Crime (UNCTOC), manifest that transnational crime entered the legal supply chain."[57]

"Although more than two decades have passed since the adoption of the Transnational Organized Crime Convention, it is clear that organized crime remains a complex phenomenon that no single state can tackle in isolation."[58]

"The transnational threat of organised crime and the evolutionary nature of crime (covert and overt activities) committed by organised crime groups (Modi Operandi), require targeted and renewed action. It is imperative that the relevant national agencies, which have a leading role in the fight against organised crime, need to have effective cooperation and exchange of information both at the EU and global levels, through the Common Criminal Justice System, as well as appropriate material resources."[59]

"The main motivator for the most serious and organized crime is to obtain financial benefits."[60] In March 2012, the European Commission appealed to the European Parliament to harmonize legislation in the fight against serious transnational crimes, aiming to facilitate the seizure of property linked to organized crime, corruption, or economic crimes. This form of criminal liability is currently considered the most effective form of combating these crimes.[61] It also emphasizes that "the fight against crime, and in particular organized crime, is a continuous process, especially in the light of modern technological developments, where both law enforcement agencies and the criminal world are enhancing capabilities."[62]

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55 *Trexel Sh.,* Human Rights in Criminal Proceedings, Tbilisi, 2009, 282.

56 *Ciklauri-Lammich Eliko,* Kapitel 2 Abschnitt 2. Der Kampf gegen die Korruption in den europäischen Ländern in der Monographie: Die Korruption in Georgien: Kriminologische Analysen und Kommentare der gerichtlichen Praxis , Hrsg. TSU & Tsereteli Inst., Tiflis 2010, 50-76 (Georgisch).

57 *Hauck P. and Peterke S.,* Organaized crime and gang violence in national and international law, 92 INT'I REV. RED. Cross (2010), 408.

58 UNODC, – organized crime strategy toolkit for developing high-impact strategies, 1, <https://sherloc.unodc.org/cld/uploads/pdf/Strategies/OC_Strategy_Toolkit_Ebook.pdf> [07.12.2025].

59 The EU Strategy to tackle Organised Crime 2021-2025 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52021DC0170&qid=1632306192409> [03.08.2025].

60 2022-2027 of the Prosecutor's Office of Georgia Strategy, 37, <https://pog.gov.ge/uploads/7f5da215-saqarTvelos-prokuraturis-2022-2027-wlebisstrategia.pdf>[03.08.2025].

61 Vorschlag für eine RL des Europäischen Parlaments und des Rates über die Sicherstellung und Einziehung von Erträgen aus Straftaten in der Europäischen Union, COM(2012) 85 final v 12.3.2012, kurz: RL-Entwurf, abrufbar unter <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2012:0085:FIN:DE:PDF>.

62 Combating Organized Crime 2021-2024 National Strategy, 7, <https://matsne.gov.ge/ka/document/view/5256554?publication=0>, [03.08.2025].

Several states have adopted the confiscation of property as a form of liability, recognizing it as an effective measure in combating crime. Although the scope of its application and the extent of its use vary across countries, and approaches to its regulation under criminal, administrative, customs, or civil law differ, it is undeniable that this measure of liability is considered a legitimate institution under the constitutions of democratic states and aligns with the principles of democracy."[63]

The Criminal Code provides for the confiscation of any property, including equivalent assets, from an accused or convicted person for all intentional crimes, provided that it is established that such property was obtained through criminal activity. The investigation of organized and transnational crime should emphasize the identification and recovery of assets derived from criminal activity.

7. The Georgian Experience in the Confiscation of Assets Derived from Organized, Including Transnational Organized, Criminal Activity

"The Prosecutor's Office of Georgia, in its 2022–2027 Strategy, emphasizes that transnational and organized crime constitutes a particular threat to public order and security at national and global levels."[64]

It is impossible to provide all forms of profit-motivated transnational organized crime, as it manifests itself in almost every sphere, subsequently leading to the legalization of money laundering.[65]

The 2021-2023 Common Courts Practice demonstrates that, in addition to convicting persons who legalize illegal income, the court actively applies the mechanism of property confiscation as an additional punishment.

This section also examines court decisions in which the transnational nature of crimes has been more or less discernible.

By the verdict of the Tbilisi City Court on April 23, 2021, N.K. was convicted of fraud and legalization of illegal income of 17,900 euros. Confiscation of property was not applied as an additional punishment.[66]

Following the judgment of the Tbilisi City Court of May 11, 2021, F.O.K. And others were convicted of fraud and the legalization of $134,208 in illegal income. Confiscation of property was not used as an additional punishment; however, the court executed procedural confiscation of a 49.19 sq.m. residential apartment purchased by criminal means for $10,200. Procedural confiscation of a residential apartment.[67]

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63 Decision No. 1/2/384 of the Constitutional Court of Georgia of 2 July 2007, II-2, <https://constcourt.ge/ka/judicial-acts?legal=291> [03.08.2025].

64 2022-2027 of the Prosecutor's Office of Georgia Strategy, 38, <https://pog.gov.ge/uploads/7f5da215-saqarTvelos-prokuraturis-2022-2027-wlebis-strategia.pdf> [05.08.2025].

65 *Dzneladze L.,* Confiscation as a Necessary Criminal Mechanism to Combat Transnational Organized Crime, Zhurn, Journal of Law, No. 2, 2024, 236-237 (in Georgian).

66 Judgment No 1/996-21 of the Tbilisi City Court of April 23, 2021.

67 Judgment No 1/4697-20 of the Tbilisi City Court of May 11, 2021.

In accordance with the judgment of the Tbilisi City Court of July 27, 2021, F.O.K. and others were charged with legalizing $619,839 of unsubstantiated income. Seven luxury cars purchased for $168,000 to disguise illegal income were confiscated as additional punishment.[68]

Based on the judgment of the Tbilisi City Court of February 14, 2022, M.K. and others were convicted of fraud of 73,995 euros and $13,100 for the legalization of illegal income. Confiscation of property was not applied as an additional punishment.[69]

Following the judgment of the Tbilisi City Court of March 16, 2022, N. G. was convicted of theft and legalization of illegal income of 41,212 GEL. Confiscation of property was not used as an additional punishment; however, the court confiscated 2118.72 GEL and 277.90 USD in bank accounts.[70]

By the judgment of the Tbilisi City Court of May 23, 2022, J.A. was convicted for legalization of illegally obtained income for 5,201.2 GEL, EUR 63,065,825.49, and USD 88,132,376.82. As an additional punishment, he was deprived of the criminal assets of 37,685.52 GEL, EUR 153,467.48, and USD 7,831,116.04.[71]

By the verdict of the Tbilisi City Court on September 08, 2022, V.L. was convicted of fraud and legalization of illegal income of USD 206,782.2. Illegally acquired immovable property of various values was confiscated as an additional punishment.[72]

According to the judgment of the Tbilisi City Court dated December 04, 2023, Al. b. Was convicted of laundering $102,000 in illegal income. As an additional punishment, three immovable criminal properties of various values were confiscated.[73]

Judicial practice indicates that, taking into account the global scale of transnational organized crime, the volume of criminal assets to confiscation is comparatively small."

8. Foreign experience in confiscation of property derived from organized, including transnational organized criminal activities

According to the strategy of the Prosecutor's Office of Georgia, the development of international cooperation in the field of search and seizure of criminal property is one of the priorities (CARIN, EU ARO PLATFORM).[74]

The Camden Asset Recovery Inter-Agency Network was established on September 22-23, 2004, in The Hague at the initiative of Austria, Belgium, Germany, Ireland, the Netherlands, and the United Kingdom. It is a global network of professionals and experts with the aim of enhancing their

68 Judgment No 1/3434-21 of July 27, 2021, of the Tbilisi City Court.
69 Judgment No. 1/3270-21 of the Tbilisi City Court dated February 14, 2022.
70 Judgment No. 1/4855-19 of the Tbilisi City Court of March 16, 2022.
71 Judgment No 1/2638-22 of May 23, 2022, of the Tbilisi City Court.
72 Judgment No 1/3065-20 of the Tbilisi City Court dated September 08, 2022.
73 Judgment No 1/2716-23 of December 04, 2023 of the Tbilisi City Court.
74 2022-2027 of the Prosecutor's Office of Georgia Strategy, p. 10. 37, <https://pog.gov.ge/uploads/7f5da215-saqarTvelos-prokuraturis-2022-2027-wlebis-strategia.pdf>[03.08.2025].

knowledge of transnational identification, seizure, and confiscation methods and techniques in relation to criminal property and other assets linked to crime.[75]

Karin is an informal network that includes collaboration in all aspects of the fight against criminal property. Its goal is to increase the efficiency of member states through cooperation and to deprive the criminal world of criminal property.[76]

ARO (Informal Platform of Asset Recovery Offices of the EU) is an informal network operating across Europe. Since 2009, through periodic meetings, information has been collected regarding criminal assets in connection with the implementation of EU regulations, as well as on the activities of the respective national AROs of the Member States or, where applicable, of the authorities temporarily performing the functions of an ARO."[77]

Several countries, including the founding states of CARIN, have decades of experience in relation to the confiscation of criminal assets.

Ireland was one of the first countries where the Criminal Assets Bureau was established in 1996 to combat organized crime (prompted by the rise of organized crime and murders linked to drug-related offenses). Its key function was defined as the tracing, freezing, and confiscation of criminal assets. In Belgium, a Central Office for Seizure and Confiscation was created within the Public Prosecutor's Office in 2003. It was fully coordinated to fight against criminal assets, including the confiscation of property. To detect property acquired through criminal activity, an independent commission was set up in Bulgaria in 2005. In the United Kingdom, in 2002, the Proceeds of Crime Act was adopted, establishing an accredited system of financial investigation. In Germany, since the 1970s, the Federal Criminal Police Office's (BKA) department for combating serious and organized crime has been providing analytical support in the fight against economic crime. Since 1994, it has expanded further to include the area of money laundering.[78]

Despite some applicable international regulations,[79] on 24 April 2024, the European Commission embraced an updated Directive on the Return and Confiscation of Criminal Property.[80] According to Directive (2), the main motive for criminal organizations operating transnationally, including high-risk criminal networks, is financial benefits. In order to reduce the serious threat posed

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75 White paper on best practices in asset recovery, 11, <https://www.interior.gob.es/opencms/pdf/archivos-y-documentacion/documentacion-y-publicaciones/publicaciones-descargables/seguridad-ciudadana/White-paper-on-best-practices-in-asset-recovery-NIPO-126-12-071-X.pdf> [05.08.2025].

76 Camden Asset Recovery Inter-Agency Network (Carin Manual), 5, <https://www.interior.gob.es/opencms/pdf/archivos-y-documentacion/documentacion-y-publicaciones/publicaciones-descargables/seguridad-ciudadana/White-paper-on-best-practices-in-asset-recovery-NIPO-126-12-071-X.pdf> [05.08.2025].

77 White paper on best practices in asset recovery, 12-13, <https://www.interior.gob.es/opencms/pdf/archivos-y-documentacion/documentacion-y-publicaciones/publicaciones-descargables/seguridad-ciudadana/White-paper-on-best-practices-in-asset-recovery-NIPO-126-12-071-X.pdf> [05.08.2025].

78 White paper on best practices in asset recovery, 61-62, 85,87,91,95, <https://www.interior.gob.es/opencms/pdf/archivos-y-documentacion/documentacion-y-publicaciones/publicaciones-descargables/seguridad-ciudadana/White-paper-on-best-practices-in-asset-recovery-NIPO-126-12-071-X.pdf> [05.08.2025].

79 *Orlovska, N., & Stepanova J.,* confiscation of proceeds and property related to crimes: International standards and the ECHR practice, 10 Juridical Trib. 499-502 (2020).

80 Directive (EU) 2024/1260 of the European Parliament and of the Council on asset recovery and confiscation, <https://eur-lex.europa.eu/eli/dir/2024/1260/oj> [05.08.2025].

by organized crime, the competent authorities should devote more institutional efforts and attention to the effective search, identification, seizure, confiscation, and management of criminal assets.

An effective system for the return of criminal assets is a rapid search and identification of criminal resources if there is a suspicion about their criminal origin. Criminal income and property must be seized in order to prevent it from being concealed, as a result of which it must be confiscated within the framework of criminal procedure.

An effective system for the return of criminal assets includes efficient asset management of seized property, which means keeping its value while compensating the state or other private victims.[81]

At this stage, there is no centralized agency responsible for the return and management of criminal assets in Georgia. The function of Asset Recovery is accomplished by the Prosecutor's Office of Georgia.[82] The management of seized criminal property (Asset Management) is carried out by the relevant investigative units, where the court has applied the seizure measure in ongoing criminal cases. In 2023, the Investigation Service of the Ministry of Finance of Georgia, considering the current investigative goals of the service, initiated the establishment of the Asset Management Division in a pilot mode.[83]

The EU and Council Directive of 24 April 2024 obliges member states to harmonize the domestic legislative framework by 23 November 2026.

9. Conclusion

The study reveals that the search and confiscation of criminal property obtained through transnational organized crime is directly related to the effective fight against money laundering, which is one of the most common forms of transnational organized crime.

Money laundering becomes difficult to identify criminal financial resources, which, over time, makes it virtually impossible to trace and confiscate criminal assets using legal mechanisms.

New methods of money laundering are rapidly changing the shape and location of criminal proceeds, which is facilitated by the increasing use of digital programs and hardware.

Modern technologies facilitate quick and effective solutions to the challenges in the daily life and activities of each person, but in turn, they are a good opportunity for criminals to commit new and large-scale cybercrimes against business, banking, and the public and private sectors, and increase the demand for virtual money (asset).

Organized crime, with its transnational nature and the constant change of modern forms of money laundering, is becoming more and more harmful to society.

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81 Directive (EU) 2024/1260 of the European Parliament and of the Council on asset recovery and confiscation (5).

82 Organic Law of Georgia on the Prosecutor's Office, <https://matsne.gov.ge/ka/document/view/4382740?publication=10> [5.8.2025].

83 Order №19 of the Minister of Finance of Georgia dated January 26, 2023; <https://matsne.gov.ge/ka/document/view/87634?publication=17> [05.08.2025].

The incorporation of large amounts of criminal proceeds into the legal economy through money laundering can be devastating for any state, even for a successful economy.

The study also reveals that billions of criminal proceeds are invested in the legal economy every year, which cannot be distinguished from legal income.

The study also shows that there are sufficient normative tools at the international and national levels, which constantly require the study and understanding of the factors hindering their active use in practice.

On the one hand, transnational organized crime and money laundering, due to their nature and the severity of the sentence in the form of imprisonment, are subject to strict criminal law policies by law enforcement agencies.

On the other hand, along with traditionally convicting the perpetrator, law enforcement agencies should pay more attention to the application of property sanctions, including the search and confiscation of property derived from the crime.

At the end of the study, it can be unequivocally stated that money laundering is one of the key factors that prevent the confiscation of property accumulated from criminal activities.

The success of the fight against transnational organized crime lies in joint international and national efforts.

Bibliography:

1. Criminal Code of Georgia, 1999.
2. Criminal Code of Georgia, 1960.
3. Organic Law of Georgia “On the Prosecutor's Office”, 2018.
4. Law of Georgia on International Cooperation in the Field of Criminal Law, 2010.
5. Combating Organized Crime 2021-2024 National Strategy, 7, <https://matsne.gov.ge/ka/document/view/5256554?publication=0>, [03.08.2025].
6. Law of Georgia of October 29, 1996, “The Soviet Socialist Criminal Code of Georgia, Law on the Approval of the Criminal Code of the Georgian SSR, <https://matsne.gov.ge/ka/document/view/5748505?publication=167> [05.06.2025].
7. Law of Georgia on Facilitating the Prevention of Illicit Income Legalization <https://matsne.gov.ge/document/view/12580?publication=36#!> [05.06.2025].
8. Law of Georgia on Facilitating the Prevention of Money Laundering and the Financing of Terrorism, https://matsne.gov.ge/ka/document/view/4690334?publication=12 [05.06.2025].
9. Council of Europe Convention on Money Laundering, Recovery and Confiscation of Proceeds of Criminal Activity, 1990, <https://matsne.gov.ge/ka/document/view/1216554?publication=0> [06.06.2025].
10. Council of Europe Convention on Money Laundering and the Collection, Seizure and Confiscation of the Proceeds of Criminal Activity, 1990.
11. United Nations Convention for the Suppression of Illicit Trafficking in Narcotic Drugs and Psychotropic Substances, 1988, <https://matsne.gov.ge/document/view/2540250?publication=0> [06.06.2025].

12. United Nations Convention against Transnational Organized Crime, 2000, <https://matsne.gov.ge/document/view/1485286?publication=0> [27.11.2025].
13. United Nations Convention against Illicit Trafficking in Narcotic Drugs and Psychotropic Substances, 1988.
14. United Nations Convention against Transnational Organized Crime, 2000.
15. Directive (EU) 2024/1260 of the European Parliament and of the Council on asset recovery and confiscation, <https://eur-lex.europa.eu/eli/dir/2024/1260/oj> [05.08.2025].
16. Ordinance No 236 of 18 March 2014 of the Government of Georgia on the Approval of the Strategy and Action Plan for Combating Money Laundering and the Financing of Terrorism, <https://matsne.gov.ge/ka/document/view/2284180?publication=0> [04.06.2025].
17. Ordinance No 135 of 04 April 2023 of the Government of Georgia on "Facilitating the Prevention, Detection and Suppression of the Financing of Money Laundering and Terrorism, as well as the Financing of the Financing of Proliferation of Weapons of Mass Destruction 2023-2026" and the Implementation of the National Strategy for the Implementation of the National Strategy for the Prevention, Detection and Suppression of the Financing of Money Laundering and Terrorism, as well as the Financing of the Financing of Proliferation of Weapons of Mass Destruction 2023-2026 on the approval of the plan", <https://matsne.gov.ge/ka/document/view/5772532?publication=0> [04.06.2025].
18. About the Financial Monitoring Service of Georgia <https://www.fms.gov.ge/Uploads/files/GEO_28.05.2024_Annual_Report.pdf> [06.06.2025].
19. Order №19 of the Minister of Finance of Georgia dated January 26, 2023; <https://matsne.gov.ge/ka/document/view/87634?publication=17> [06.06.2025].
20. 2022-2027 of the Prosecutor's Office of Georgia Strategy, 37, 38, <https://pog.gov.ge/uploads/7f5da215-saqarTvelos-prokuraturis-2022-2027-wlebis-strategia.pdf> [05.08.2024].
21. Organic Law of Georgia on the Prosecutor's Office, <https://matsne.gov.ge/ka/document/view/4382740?publication=10> [05.8.2025].
22. The EU Strategy to tackle Organised Crime 2021-2025, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52021DC0170&qid=1632306192409> [03.08.2025].
23. Interpol <https://www.interpol.int/en/Who-we-are/What-is-INTERPOL> [08.12.2025].
24. Moneval <https://www.coe.int/en/web/moneyval/moneyval-brief> [07.06.2025].
25. UNODC,-organized crime strategy toolkit for developing high-impact strategies, 1, <https://sherloc.unodc.org/cld/uploads/pdf/Strategies/OC_Strategy_Toolkit_Ebook.pdf> [07.12.2025].
26. Vorschlag für eine RL des Europäischen Parlaments und des Rates über die Sicherstellung und Einziehung von Erträgen aus Straftaten in der Europäischen Union, COM(2012) 85 final v 12.3.2012, kurz: RL-Entwurf, abrufbar unter <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2012:0085:FIN:DE:PPD>
27. White paper on best practices in asset recovery, 11, <https://www.interior.gob.es/opencms/pdf/archivos-y-documentacion/documentacion-y-publicaciones/publicaciones-descargables/seguridad-ciudadana/White-paper-on-best-practices-in-asset-recovery-NIPO-126-12-071-X.pdf> [05.08.2025].
28. Camden Asset Recovery Inter-Agency Network (Carin Manual), 5, <https://www.interior.gob.es/opencms/pdf/archivos-y-documentacion/documentacion-y-publicaciones/publicaciones-descargables/

seguridad-ciudadana/White-paper-on-best-practices-in-asset-recovery-NIPO-126-12-071-X.pdf> [05.08.2025].

29. The International Comparative Legal Guide to: Anti-Money Laundering 2019 (A Practical Cross-Border Insight into Anti-Money Laundering Law), 84, 234, 243. <https://www.acc.com/sites/default/files/resources/upload/AML19_E-Edition_0.pdf> [15.06.2025].
30. *Borgstede G.,* Cultural property, the Palermo convention and transnational organized crime, 21 IJCP, 2014, 283.
31. *Brazier M. L.,* The European Union's hot pursuit of organized crime groups, 7 New Eng. Int'l and Comp. L. Ann., 2001, 263, 264-265.
32. *Button M., Hock B., Shepherd D.,* Economic crime, London and New York, 2022, 163, 168.
33. *Ciklauri-Lammich E.,* Kapitel 2 Abschnitt 2. Der Kampf gegen die Korruption in den europäischen Ländern in der Monographie: Die Korruption in Georgien: Kriminologische Analysen und Kommentare der gerichtlichen Praxis , Hrsg. TSU & Tsereteli Inst., Tbilisi, 2010, 50-76.
34. Ciklauri-Lammich E., Menschenraub, ein blühendes Gewerbe in der Kaukasusregion, Monatshefte für Osteuropäisches Recht, Hrsg. Dr. Günter Tontsch,. Hamburg, 2000, 2-9.
35. *Ciopec F.,* compatibility of Romanian legislation with the UN convention against transnational organized crime, 39 Zbornik Radova, 2005, 213.
36. *Dzneladze L.,* Confiscation as a Necessary Criminal Mechanism to Combat Transnational Organized Crime, Zhurn. "Journal of Law", No. 2, 2024, 236-237, 246.
37. *Glonti G.,* Criminology and the Legal System in Georgia, Tbilisi, 2008, 176.
38. *Gogshelidze Z.,* Criminal Liability for Legalization of Illegal Income, Tbilisi, 2023, <https://www.tsu.ge/assets/media/files/48/disertaciebi5/Zurab_Gogshelidze.pdf> [14.06.2025].
39. *Gogshelidze Z.,* Criminal Liability for Legalization of Illegal Income, Tbilisi, 2023, 8, 25, 30, 43, 266.
40. *Gogshelidze Z.,* Legalization of Illegal Income – Analysis of Georgian Judicial Practice, Journal. "Journal of Law", No. 1, 2020, 231.
41. *Grdzelidze I.,* Analysis of the Practice of the Common Courts of Georgia in Relation to the Legalization of Illicit Income (Money Laundering)", 1, 16, <https://www.supremecourt.ge/uploads/files/1/ANALITIKURI/fulis%20gatetreba.pdf>[04.06.2025].
42. *Guymon C.,* International legal mechanisms for combating transnational organized crime: The need for a multilateral convention, 18 Berkeley J. Int'l, 2000, 73.
43. *Gvenetadze N., Mamulashvili G.,* Liability for Entrepreneurial or Other Economic Crimes under the Criminal Code of Georgia, Tbilisi, 2000, 24.
44. *Hauck P., Peterke S.,* Organized Crime and Gang Violence in National and International Law, 92 Iint'l Rev. Red Cross, 2010, 408.
45. *Leong A.,* The disruption of international organized crime, London, 2007, 58-59, 62.
46. *Nachkebia G. (ed.),* Problems of Criminalization and Law Enforcement of Modern Manifestations of Organized Crime in Georgian Criminal Law, Tbilisi, 2012, 719-720.
47. *Orlovska N., Stepanova J.,* Confiscation of Proceeds and Property related to crimes: International standards and the ECHR practice, 10 Juridical Trib., 2020, 499-502.

48. *Shelley L.,* Transnational organized crime and seized assets: moral dilemmas concerning the disposition of the fruits of crime, 7 Maastricht J. Eur. & Comp., 2000, 35.
49. *Tkesheliadze G. (ed.),* Private Part of Criminal Law (Book I), Tbilisi, 2006, 366.
50. *Trexel Sh.,* Human Rights in Criminal Proceedings, Tbilisi, 2009, 282.
51. *Tumanishvili G., Jishkariani B., Shrami E.,* The Influence of European and International Law on Georgian Criminal Procedure Law, Tbilisi, 2019, 805, 807.
52. *Turava M.,* European Criminal Law, Tbilisi, 2010, 59.
53. Decision No 1/2/384 of the Constitutional Court of Georgia of July 2, 2007, II-2 <https://constcourt.ge/ka/judicial-acts?legal=291> [03.08.2025].
54. Judgment No. 1-1024/21 of the Batumi City Court dated September 08, 2021.
55. Judgment No. 1-181/21 of the Batumi City Court dated November 01, 2021.
56. Judgment No. 1-453/22 of the Batumi City Court of April 19, 2022.
57. Judgment No. 1-711/23 of the Batumi City Court of May 30, 2023.
58. Judgment No. 1/328-23 of Kutaisi City Court dated April 04, 2023.
59. Judgment of Kutaisi City Court No. 1/659-23 of July 06, 2023.
60. Judgment No. 1/632-22 of the Zugdidi District Court of April 26, 2023.
61. Judgment No 1/3934-21 of October 29, 2021 of the Tbilisi City Court.
62. Judgment No 1/1044-21 of the Tbilisi City Court of November 10, 2021.
63. Judgment No 1/3944-20 of the Tbilisi City Court of March 11, 2021.
64. Judgment No 1/4152-20 of the Tbilisi City Court of June 08, 2021.
65. Judgment No 1/996-21 of the Tbilisi City Court of April 23, 2021.
66. Judgment No 1/4697-20 of the Tbilisi City Court of May 11, 2021.
67. Judgment No 1/4744-20 of April 14, 2021, of the Tbilisi City Court.
68. Judgment No. 1/3611-21 of Tbilisi City Court dated August 23, 2021.
69. Judgment No 1/4535-20 of April 26, 2021, of the Tbilisi City Court.
70. Judgment No 1/4280-21 of October 11, 2021, of the Tbilisi City Court.
71. Judgment No 1/4171-21 of October 01, 2021, of the Tbilisi City Court.
72. Judgment No 1/3434-21 of July 27, 2021, of the Tbilisi City Court.
73. Judgment No 1/4804-21 of May 2, 2022, of the Tbilisi City Court.
74. Judgment No. 1/1434-22 of the Tbilisi City Court of May 31, 2022.
75. Judgment No. 1/1233-22 of the Tbilisi City Court of June 20, 2022.
76. Judgment No 1/696-21 of April 26, 2022, of the Tbilisi City Court.
77. Judgment No. 1/5434-21 of the Tbilisi City Court of June 21, 2022.
78. Judgment No 1/2181-21 of April 12, 2022 of the Tbilisi City Court.
79. Judgment No 1/1708-22 of the Tbilisi City Court of April 13, 2022.
80. Judgment No. 1/1832-22 of the Tbilisi City Court of July 20, 2022.
81. Judgment No. 1/4855-19 of the Tbilisi City Court of March 16, 2022.
82. Judgment No 1/3065-20 of the Tbilisi City Court dated September 08, 2022.
83. Judgment No. 1/3270-21 of the Tbilisi City Court dated February 14, 2022.

84. Judgment No 1/3631-22 of July 11, 2022, of the Tbilisi City Court.
85. Judgment No 1/2638-22 of May 23, 2022, of the Tbilisi City Court.
86. Judgment No 1/292-22 of May 04, 2022 of the Tbilisi City Court.
87. Judgment No. 1/3845-21 of the Tbilisi City Court of March 25, 2022.
88. Judgment No 1/2716-23 of December 04, 2023 of the Tbilisi City Court.
89. Judgment No. 1/2860-23 of the Tbilisi City Court of September 27, 2023.
90. Judgment No 1/2951-23 of July 07, 2023 of the Tbilisi City Court.

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Artificial Intelligence and Hate Speech

Across the world, the rate of hate speech is increasing day by day. The development of technology has amplified hate speech expressed through social networks and other forms of communication, which incite hostility among different social groups. Hate speech tends to escalate rapidly and can easily develop into a hate crime. Therefore, it is crucial to respond promptly and effectively without infringing upon freedom of expression.

With the ongoing development of the digital world, the application of artificial intelligence is becoming increasingly widespread. This circumstance has made it necessary to study the relationship between artificial intelligence and hate speech. Specifically, this study seeks to examine the impact of artificial intelligence on the dissemination and regulation of hate speech in digital environments. The paper analyzes the impact of artificial intelligence on the dynamics of hate speech and the limits of freedom of expression. The research has identified the legal measures necessary to adapt to emerging technological realities.

This article examines the essence and meaning of hate speech, the international and domestic legal frameworks governing its use, and the legal regulation of artificial intelligence, including the principle of non-discrimination in its application. It also analyzes the decisions of the European Court of Human Rights concerning hate speech and the use of artificial intelligence.

Keywords: *hate speech, artificial intelligence, freedom of expression, discrimination.*

1. Introduction

Hate speech is an increasing problem worldwide. Such actions reflect intolerance toward specific social groups. Hate speech spreads rapidly within society and can easily escalate into hate crimes, significantly affecting societal and national stability. Furthermore, a lack of awareness regarding hate speech contributes to its swift escalation.

Language has a fundamental role in society and can be used to express aggression against a group bearing a specific mark of discrimination. Hate speech has emerged as a significant mechanism for fostering divisions between social groups, posing a threat to global peace.

In 2023, António Guterres, Secretary-General of the United Nations, stated: "Hate speech is an alarm bell – the louder it rings, the greater the threat of genocide. It precedes and promotes violence".[1]

Advances in modern technology have positioned the development of artificial intelligence as a key factor influencing social, legal, and cultural processes. While the use of artificial intelligence

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1 United Nations, <https://www.un.org/en/hate-speech> [20.08.2025].

presents new opportunities, it also poses emerging threats, particularly in the context of hate speech. Detecting and regulating hate speech on social media and other digital platforms has long been a pressing challenge. Artificial intelligence can serve as an effective tool for identifying and mitigating such content, yet it may also inadvertently contribute to the creation or amplification of hate speech. This interdependence has prompted discussions on the development of ethical, legal, and technical standards to ensure that artificial intelligence does not exacerbate existing social tensions.

This article aims to examine the relationship between hate speech and artificial intelligence, the mechanisms for their legal regulation, and the extent to which these regulations comply with international human rights standards.

This article employs a doctrinal legal methodology, focusing on the study and analysis of international treaties and conventions regulating hate speech and artificial intelligence. It also draws on the case law of the European Court of Human Rights, which evaluates the practical application of international legal principles concerning online violence, freedom of expression, and state obligations. The paper also draws on secondary sources, including reports from international organizations and both international and local academic literature. These sources offer contextual and practical insights into the topic and contribute to the development of a theoretical framework for the legal regulation of artificial intelligence.

The research holds both scientific and practical significance. From a scientific perspective, it advances legal theory by examining the relationship between artificial intelligence and hate speech, thereby enriching doctrinal analysis concerning freedom of expression, digital ethics, and state obligations. The practical significance of this study lies in its potential to enhance Georgia's legislation and public policy on artificial intelligence, strengthen mechanisms for the protection of human rights, and align the legal framework more closely with international standards.

This paper examines the essence and meaning of hate speech, its legal regulation at the international level, and key issues in Georgian legislation. It further analyzes the impact of artificial intelligence on the formation and dissemination of hate speech, alongside the relevant standards established by the European Court of Human Rights (hereinafter “the Court”).

2. The Essence of Hate Speech and Its Legal Regulation

While numerous definitions of hate speech have been proposed, a legally binding definition remains absent in both European and international human rights law.[2] Hate speech is a "term of art" that refers to a specific expression of hatred towards specific people (groups) in a specific context.[3] It constitutes a deliberate and intentional public statement aimed at insulting a specific group of people.[4]

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2 *Nave E.,* Hate Speech, Historical Oppressions, and European Human Rights, Buffalo Human Rights Law Review 29, 2023, 89, Available at: <https://ssrn.com/abstract=4592218> [12.11.2025].

3 *Howard W. J.,* Free Speech and Hate Speech, Annual Review of Political Science, London, Volume 22, 2019, 95.

4 *Paz A. M., Montero-Díaz J., Moreno-Delgado A.,* Hate Speech: A Systematized Review, SAGE Journals, Volume 10, Issue 4, 2020, 1.

Hate speech undermines democratic principles, jeopardizes social stability, and threatens peace. Failure to respond can be perceived as tacit acceptance of bigotry and intolerance.[5] This underscores the importance of establishing appropriate legal mechanisms at the state level.

It is noteworthy that Georgian legislation does not define the essence of hate speech. The definition of "hate" remains a contentious issue, as perceptions may vary among individuals. Nonetheless, several international instruments provide definitions of hate speech.

For the purposes of Recommendation No. R(97) of the Committee of Ministers of the Council of Europe (1997), "hate speech" refers to any expression that spreads, incites, promotes, or justifies racial hatred, xenophobia, anti-Semitism, or other forms of intolerance-based hatred. This includes discrimination and hostility towards minorities, migrants, and immigrants, often expressed through aggressive nationalism and ethnocentrism.[6]

According to the United Nations, "hate speech" denotes offensive discourse directed at a group or individual based on an inherent characteristic (such as race, religion, or gender), which may threaten social peace.[7] In 2019, the United Nations developed a strategy and action plan on hate speech. The document defines hate speech as "any kind of communication in speech, writing or behavior, that attacks or uses pejorative or discriminatory language with reference to a person or a group on the basis of who they are, in other words, based on their religion, ethnicity, nationality, race, color, descent, gender or other identity factor."[8]

The European Commission against Racism and Intolerance defines hate speech as any expression of insult, hatred, promotion, or incitement directed at individuals or groups on discriminatory grounds, including harassment, negative stereotypes, stigmatization, or threats.[9]

Hate speech is directed exclusively at individuals or groups of individuals. It does not encompass states, governmental institutions, symbols, public figures, religious leaders, or religious beliefs.[10]

For the purposes of Recommendation CM/Rec(2022)16[1] of the Committee of Ministers of the Council of Europe, hate speech is defined as "all types of expression that incite, promote, spread or justify violence, hatred or discrimination against a person or group of persons, or that denigrates them, by reason of their real or attributed personal characteristics or status."[11]

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5 UN, United Nations Strategy and Plan of Action on Hate Speech, 2019, 1.

6 COE, Recommendation No. R (97)20 of The Committee of Ministers to Member States on "Hate Speech", 1997, 107.

7 United Nations, <https://www.un.org/en/hate-speech/understanding-hate-speech/what-is-hate-speech#:~:text=In%20common%20language%2C%20%E2%80%9Chate%20speech,that%20may%20threaten%20social%20peace.> [20.08.2025].

8 UN, United Nations Strategy and Plan of Action on Hate Speech, 2019, 2.

9 COE, ECRI General Policy Recommendation №15 on Combating Hate Speech, ECRI Publishing, Strasbourg, 2016, 3.

10 United Nations, <https://www.un.org/en/hate-speech/understanding-hate-speech/what-is-hate-speech#:~:text=In%20common%20language%2C%20%E2%80%9Chate%20speech,that%20may%20threaten%20social%20peace.> [20.08.2025].

11 Recommendation CM/Rec(2022)16[1] of the Committee of Ministers to Member States on Combating Hate Speech, Appendix to Recommendation, 2022, 2.

The Committee of Ministers recommends that, in order to combat and prevent hate speech, states should develop an effective legal framework that includes civil, administrative and criminal law. Criminal law should be used as a last resort for the most serious forms of hate speech.[12]

International law does not generally prohibit hate speech, but it does prohibit incitement to discrimination, hostility, or violence. Incitement represents a particularly dangerous form of hate speech, as it intentionally provokes discrimination, hostility, or violence, potentially including acts of terrorism or other serious crimes. States are not obligated under international law to prohibit hate speech that falls below this minimum threshold of incitement.[13]

Article 20 of the International Covenant on Civil and Political Rights prohibits the use of speech that incites national, racial, or religious hatred, even though the term "hate speech" is not explicitly used. Paragraph 2 of this article provides that any speech intended to provoke discrimination, hostility, or violence shall be prohibited by law.[14]

The European Convention on Human Rights does not define or mention the term "hate speech." Nevertheless, the term appears in the judgments of the European Court of Human Rights, which has, in some cases, defined hate speech as "all forms of expression which spread, incite, promote or justify hatred based on intolerance."[15]

The European Court of Human Rights first employed the term "hate speech" in 1999 in a judgment against Turkey.[16] The factual circumstances of the case[17] involved the imposition of criminal liability on the applicants for an interview published in a magazine. Specifically, the prosecutor charged the applicants with spreading propaganda against the indivisibility of the state.[18]

According to the Court, while the press must not cross certain boundaries that threaten national security or territorial integrity, it nevertheless has a duty to inform the public on political matters, including issues related to partition.[19] To prevent the media from becoming a tool for spreading hate speech or promoting violence, it must exercise particular caution when publishing the views of organizations that employ violence against the state.[20] In the present case, the Court concluded that the measures imposed on the applicants were disproportionate to the objectives pursued and, therefore, were not "necessary in a democratic society." Consequently, the Court found a violation of Article 10 of the Convention.[21]

Among the various forms of hate speech, that which occurs on the Internet is particularly noteworthy. Beginning in the early 1990s, the Internet revolution emerged with little preparation or

12 Ibid, 7.
13 UN, United Nations Strategy and Plan of Action on Hate Speech, 2019, 2.
14 International Covenant on Civil and Political Rights, 1966, 20, <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights> [20.08.2025].
15 *Weber A.,* Manual on Hate Speech, Council of Europe Publishing, 2009, 3.
16 *Tartarashvili T., Pirtskhalaishvili N.,* Hate Speech, Tbilisi, 2017, 4.
17 Erdoğdu and İnce v. Turkey, [1999] ECHR.
18 Ibid, 8-10.
19 Erdoğdu and İnce v. Turkey, [1999] ECHR, 48.
20 Ibid, 54.
21 Ibid, 55.

regulation, profoundly transforming people's lives and impacting nearly every aspect of society.[22] The first generation of Internet critics regarded it as a medium with the potential to transcend borders, overcome physical distance, and dismantle barriers in the real world.[23] The Internet offers unprecedented potential for diverse forms of communication, providing ease of access, efficiency, speed, and versatility without requiring significant financial resources or specialized expertise.[24] The online environment has emerged as a crucial platform for democracy, yet it has also become a space for hate speech and the propagation of hatred and violent extremism.[25] While the online space facilitates the dissemination of information and debate on political, social, economic, and other issues, it also provides a platform for expressing views that may be imbued with hatred and contribute to violence and human rights violations. This is largely due to the high degree of anonymity afforded by the Internet.[26] The Internet enables individuals to engage in hate speech with minimal hindrance. Many believe they will not be held accountable for the comments they post or the images and videos they share online. This contributes to the distinctiveness of online hate speech, as people feel far more comfortable expressing hatred than they would in real-life contexts, where they must confront the consequences of their words.[27]

To address the various threats in the digital sphere, the European Union has implemented a series of laws and initiatives. Notably, the Digital Services Act prioritizes consumer safety and establishes new obligations to combat hate speech.[28]

The growth of digital platforms and social media has created new avenues for exercising the right to freedom of expression. At the same time, these platforms have enabled the spread of hate speech in ways that would have been unimaginable only a few years ago.[29] The European Court of Human Rights first addressed hate speech expressed in online comments in 2015.[30]

In *Killin v. Russia*, the European Court of Human Rights examined the applicant's criminal conviction for using video and audio recordings that publicly incited violence and ethnic hatred. The

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22 *Cohen-Almagor R.,* Bullying, Cyberbullying and Hate Speech, International Journal of Technoethics (IJT), Volume 13, Issue 1, 2022, 6-7, Available at: <https://ssrn.com/abstract=4033031> or <http://dx.doi.org/10.2139/ssrn.4033031> [12.11.2025].

23 *Banks J.,* Regulating Hate Speech Online, International Review of Law, Computers and Technology, 24, 3, 2010, 233, Available at: <https://ssrn.com/abstract=2129412> [12.11.2025].

24 *Roels J.,* The Battle against Hate Speech and Freedom of Expression Online, Charles University in Prague Faculty of Law Research Paper No. 2017/I/4, 2017, 7, Available at: <https://ssrn.com/abstract=2954422> or <http://dx.doi.org/10.2139/ssrn.2954422> [12.11.2025].

25 European Commission, No Place for Hate: A Europe United Against Hatred, 2023, 6. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52023JC0051> [04.09.2025].

26 *Gagliardone I.,* Mapping and Analysing Hate Speech Online, University of Oxford, 2014, 12. Available at: <https://ssrn.com/abstract=2601792> or <http://dx.doi.org/10.2139/ssrn.2601792> [12.11.2025].

27 *Gagliardone I., Gal D., Alves T., Martínez G.,* Countering online hate speech, UNESCO Series on Internet Freedom, 2015, 14. <https://unesdoc.unesco.org/ark:/48223/pf0000233231> [04.09.2025].

28 European Commission, No Place for Hate: A Europe United Against Hatred, 2023, 6. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52023JC0051> [04.09.2025].

29 *Psychogiopoulou E.,* The Fight Against Digital Hate Speech: Disentangling the EU's Regulatory Approach and Hurdles, German Law Journal, 2024, 1182.

30 European Court of Human Rights, Factsheet – Hate speech, 2023, 24. <https://www.echr.coe.int/documents/d/echr/fs_hate_speech_eng> [03.09.2025].

materials were disseminated through a social networking site.[31] The Court examined the case within the framework of the right to freedom of expression.

In light of the case law of the European Court of Human Rights, freedom of expression on matters of public interest enjoys a high level of protection. However, when such expression promotes or justifies violence, hatred, xenophobia, or other forms of intolerance, it falls outside the scope of protection afforded by the right to freedom of expression.[32]

The dissemination of ideas and opinions via the Internet may pose a greater risk to the enjoyment of human rights and freedoms than traditional media, as "illegal speech," including hate speech and incitement to violence, can spread globally within seconds and may remain permanently accessible.[33] At the same time, statements posted on websites or social networks may differ in impact depending on the size of the audience and the number of followers of the user who published them. In order to assess the potential influence of an online publication, it is therefore important to determine the extent of its reach to the public.[34]

Taking into account the racist material disseminated by the applicant, the incitement to violence, and his intent, the Court considered the criminal prosecution undertaken by the State to be justified and found no violation of Article 10 of the Convention.[35]

In summary, understanding the nature of hate speech and the effectiveness of its legal regulation has become particularly important in the modern digital space, where online communication serves as the primary platform for information exchange. Although national and international legal frameworks seek to prevent hate speech, the characteristics of the Internet and social media make this task considerably more challenging. Hate speech on online platforms is diverse and spreads at an exceptionally rapid pace.[36] The rapid advancement of technology, particularly in the field of artificial intelligence, has a profound impact on the forms of hate speech and the strategies used to combat it. Accordingly, it is essential to examine the influence of artificial intelligence on this issue to evaluate its potential both as a threat and as a tool for positive use.

3. Artificial Intelligence and its Legal Regulation

Artificial intelligence, whose awareness and adoption are increasing rapidly, has become a major subject of study and research.[37] Although the term "artificial intelligence" was first coined in the 1950s,[38] its legal definition has only been developed in recent years.

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31 Kilin v. Russia, [2021] ECHR, 1.

32 Perinçek v. Switzerland, [2015] ECHR, 230.

33 Delfi As v. Estonia, [2015] ECHR, 110, 133.

34 Savva Terentyev v. Russia, [2018] ECHR, 79.

35 Kilin v. Russia, [2021] ECHR, 93-94.

36 *Battista D., Molano J. C.,* How AI Bots Have Reinforced Gender Bias In Hate Speech, ex æquo 48, 2023, 57.

37 *Battista D., Molano J. C.,* How AI Bots Have Reinforced Gender Bias In Hate Speech, ex æquo 48, 2023, 59.

38 *McCarthy, J., Minsky, M. L., Rochester, N., & Shannon, C. E.,* A Proposal for the Dartmouth Summer Research Project on Artificial Intelligence, 1955.

Since 2017, 69 countries have collectively adopted over 800 regulations concerning artificial intelligence. These regulations aim to address challenges such as bias, discrimination, privacy, and security.[39]

However, the legal framework governing artificial intelligence remains in its infancy, both in terms of existing regulations and case law. Only in 2024 did the Council of Europe and the European Union adopt the first legally binding instruments designed to establish a framework for regulating AI systems throughout their lifecycle and their impact on human rights.[40]

The Council of Europe Framework Convention on Artificial Intelligence and Human Rights, Democracy and the Rule of Law[41] (hereinafter referred to as the Convention for the purposes of this chapter) is the first international legally binding treaty in this field. It obliges each party to ensure that activities throughout the lifecycle of artificial intelligence systems fully comply with human rights, democracy, and the rule of law. Moreover, the Convention was created in part to address the risks of discrimination in the digital environment.[42]

Article 2 of the Convention provides a definition of artificial intelligence. Specifically, "artificial intelligence system" means a machine-based system that, for explicit or implicit objectives, infers, from the input it receives, how to generate outputs such as predictions, content, recommendations or decisions that may influence physical or virtual environments. Different artificial intelligence systems vary in their levels of autonomy and adaptiveness after deployment.[43]

Before the adoption of the Convention, various definitions of artificial intelligence existed. Based on these definitions, the following key characteristics of artificial intelligence can be identified: the ability to receive and transmit information using technical devices or systems; a predetermined level of autonomy, functioning without direct human intervention; the capacity to process and analyze information and make decisions based on the data; and the capability to self-learn and independently seek information.[44] Artificial intelligence systems are also characterized by abilities that resemble human capabilities, including information perception, reasoning, judgment, decision-making, and more.[45] The primary goal of artificial intelligence is to develop algorithms and mechanisms designed to imitate and model the cognitive functions of the human brain.[46]

Each State Party to the Convention on Artificial Intelligence and Human Rights, Democracy, and the Rule of Law is obligated to ensure that activities conducted through artificial intelligence

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39 *Romanishyn A., Malytska O., Goncharuk V.,* AI-driven disinformation: policy recommendations for democratic resilience, 2025, 5.

40 Background paper for the Judicial Seminar 2025: Protecting human rights in a world of Artificial Intelligence, algorithms and big data, 2024, 2.

41 Convention on Artificial Intelligence and Human Rights, Democracy and the Rule of Law, 17/05/2024, <https://rm.coe.int/1680afae3c> [21.08.2025].

42 Ibid, Preamble.

43 Ibid, Article 2.

44 *Gabisonia Z.,* National Artificial Intelligence Strategy for Georgia, Georgian-German Journal of Comparative Law, 8/2021, 24.

45 *Goderdzishvili N.,* Artificial Intelligence: Essence, International Standards, Ethical Norms and Recommendations, Institute for the Development of Freedom of Information, Tbilisi, 2021, 10.

46 *Areshidze M.,* Artificial Intelligence in Criminal Justice, Justice and Law №2(82), 2024, 154.

comply with human rights obligations,[47] including the principles of gender equality and non-discrimination.[48]

In addition to the Convention, the EU's 2024 Artificial Intelligence Act[49] seeks to establish a common legal framework to ensure the responsible development and deployment of AI systems, addressing potential risks to EU-protected values, including fundamental rights, democracy, and the rule of law.[50]

Additionally, the United States is actively developing a federal policy on artificial intelligence. The White House Office of Science and Technology Policy has released a concept for an Artificial Intelligence Act, emphasizing the importance of technological advancement while highlighting concerns regarding its potential impact on human rights and fundamental freedoms. According to the concept, several key principles have been identified, including the prevention of discrimination. In particular, AI systems should be designed and deployed to prevent any form of discrimination based on race, gender, religion, sexual orientation, or other personal characteristics.[51]

Although the legal regulation of artificial intelligence is still in its early stages, its impact on everyday life – including communication and interactions in the online space – is already evident. In particular, social media platforms and other online services employ algorithms and automated systems that determine the content users see, filter or remove potentially harmful information, and influence the spread of hate speech. This intervention by artificial intelligence creates a new dynamic in the detection and management of hate speech, necessitating independent analysis from both technological and legal perspectives.

4. The Impact of Artificial Intelligence on Hate Speech

In recent years, new forms of hate speech driven by artificial intelligence have attracted significant attention. Observations indicate that AI development enables individuals and groups to generate realistic images, videos, and texts containing hateful content, designed to exploit existing prejudices, reinforce harmful stereotypes, and/or sow division. The creation of such material no longer requires technical expertise, allowing virtually anyone to produce digital content with minimal effort.[52]

Multimedia formats are frequently used to reinforce negative stereotypes. The online environment enables the rapid dissemination of discriminatory and prejudiced messages to a broad

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47 Convention on Artificial Intelligence and Human Rights, Democracy and the Rule of Law, 17/05/2024, article 4, <https://rm.coe.int/1680afae3c> [21.08.2025].

48 Ibid, Article 10.

49 Artificial Intelligence Act, 13/06/2024, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L_202401689> [21.08.2025].

50 Background paper for the Judicial Seminar 2025: Protecting human rights in a world of Artificial Intelligence, algorithms and big data, 2024, 2.

51 *Shadska U. and others,* Human rights in the era of Artificial Intelligence: challenges and legal regulation, 2024, 16-17.

52 Regeni P., Wallner C., Online Hate Speech and Discrimination in the Age of AI, Conference Report, 2025, 3-4, <https://static.rusi.org/online-hate-speech-and-discrimination-in-the-age-of-ai-june-2025.pdf> [25.08.2025].

audience.[53] Hate speech on social media can take the form of texts, audio recordings, images, and videos.[54] Artificial intelligence plays a major role in this context. On the one hand, it has the potential to positively impact the detection and prevention of hate speech; on the other hand, the possibility and extent of its misuse for harmful purposes remain a concern.

Among the potential positive impacts of artificial intelligence on hate speech, its use in detecting hateful content online is particularly noteworthy. The rapid growth of social media platforms and blogs has resulted in over 3.8 billion active social media users worldwide, most of whom rely on text as their primary means of communication. A portion of these users employ language that expresses hatred toward specific groups.[55] Monitoring online posts and hate speech is a challenging task, as it requires substantial resources, including high-performance computing and a large number of experts.[56] Consequently, artificial intelligence–based algorithms for detecting hate speech have become increasingly prevalent.[57] Artificial intelligence enables the rapid and efficient detection of hate speech, allowing it to be classified according to various characteristics, its distribution patterns to be identified, and other relevant features to be collected and analyzed. In addition to detecting hate speech already present in the digital space, some researchers suggest that algorithms could potentially identify social media users who are likely to disseminate such content in the future.[58] Some researchers even suggest that artificial intelligence could be used to predict the risk of re-victimization.[59]

These efforts to use artificial intelligence positively also carry inherent risks. In particular, software errors or flaws could lead to unjustified restrictions on freedom of expression.[60] For example, by analyzing recognized patterns, artificial intelligence can predict whether a previously unseen text contains hate speech.[61] However, keywords typically associated with hate speech may be used in a context that does not constitute hate speech, or words employed as hate speech may carry hateful meaning only in specific contexts.[62] Furthermore, since artificial intelligence is developed by humans

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53 *Battista D., Molano J. C.,* How AI Bots Have Reinforced Gender Bias In Hate Speech, ex æquo 48, 2023, 55.

54 *Saleh H., Alhothali A., Moria K.,* Detecting White Supremacist Hate Speech using Domain Specific Word Embedding with Deep Learning and BERT, 2020, 2.

55 *Wullach T., Adler A., Minkov E.,* Towards Hate Speech Detection at Large via Deep Generative Modeling, 2020, 1.

56 Ibid.

57 *Khan W. Z., Kibriya H., Siddiqa A., Khurram khan M.,* Towards Safer Online Communities: Deep Learning and Explainable Ai for Hate Speech Detection and Classification, 2023, 11. Available at: <https://ssrn.com/abstract=4620796> or <http://dx.doi.org/10.2139/ssrn.4620796> [12.11.2025].

58 *Masud S., Dutta S., Makkar S., Jain C., Goyal V.,* Hate is the New Infodemic: A Topic-aware Modeling of Hate Speech Diffusion on Twitter, 2020, 11.

59 *Gonzalez-Prieto A., Bru A., Nuno J., Gonzalez-Alvarez J.,* Machine learning for risk assessment in gender-based crime, 2021, 8.

60 *Gvaramadze T.,* Human Rights and Artificial Intelligence, Burduli I. (ed.), Law Journal №2, Tbilisi, 2024, 147.

61 *Dietrich F.,* AI-based removal of hate speech from digital social networks: chances and risks for freedom of expression, Springer, 2024, 2946.

62 *Parker S., Ruths D.,* Is hate speech detection the solution the world wants?, Published by PNAS, 2023, 1.

through the design of algorithms, it may be programmed with discriminatory parameters from the outset.[63] However, in the event of such shortcomings, it is essential that internet users always have the opportunity to file a complaint regarding the removal of content they have published.[64]

As for the negative impact of artificial intelligence on hate speech, several cases are worth noting.

Today, artificial intelligence[65] is widely used as a communication platform, enabling people to interact with AI on a variety of topics, ask questions, receive advice, and search for necessary information. In particular, AI applications have made it possible for individuals to obtain legal advice online.[66] However, it is important to note that the primary database of artificial intelligence consists of information available on the Internet, which often contains unreliable statements, human biases, and offensive language. Although AI does not possess intent, it may generate offensive or discriminatory content during interactions.[67]

Artificial intelligence-powered text generation tools have emerged as a double-edged sword: they offer efficiency and creativity, but in the wrong hands, they can significantly amplify the dissemination and perceived credibility of false or misleading information.[68]

In addition to the potential for AI to generate information imbued with discriminatory content, it is also important to consider the various digital materials it produces, particularly "deep fakes"[69].

"Deepfake" refers to any digital media (such as text, audio recordings, images, or videos) that has been created or manipulated using artificial intelligence algorithms.[70] Deepfakes are generated using deep neural networks and depict events that never occurred. They can be created for entertainment, to defame individuals, to spread disinformation, or for other purposes. The ongoing development of artificial intelligence has made the creation of deepfakes accessible to a broader

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63 *Gvaramadze T.,* Human Rights and Artificial Intelligence, Burduli I. (ed.), Law Journal №2, Tbilisi, 2024, 149.

64 *Dias T.,* Tackling Online Hate Speech through Content Moderation: The Legal Framework Under the International Covenant on Civil and Political Rights, 2022, Bahador, Hammer and Livingston (eds), Countering online hate and its offline consequences in conflict-fragile settings, 2024, 9. Available at: <https://ssrn.com/abstract=4150909> [12.11.2025].

65 For example, OpenAI.

66 *Mgeladze M., Gorgoshadze M.,* Issues of legal regulation of the extension of some human rights to high artificial intelligence and robots, Constitutional Law Journal, Publication №1, 2019, 65.

67 *Chiu K., Collins A., Alexander R.,* Detecting Hate Speech with GPT-3, University of Toronto, 2022, 1-2.

68 *Romanishyn A., Malytska O., Goncharuk V.,* AI-driven disinformation: policy recommendations for democratic resilience, 2025, 14.

69 The so-called Deepfake is a term that refers to a subset of synthetic media. The term itself is a combination of the words "deep learning" and "fake" (*Firc A., Malinka K., Hanacek P.,* Deepfakes as a threat to a speaker and facial recognition: An overview of tools and attack vectors, Brno, Heliyon 9 (2023), 1). The term "deepfakes" was coined in 2017, and the technology behind it first became public knowledge when an anonymous Reddit user posted pornographic videos of someone else's face superimposed on someone else's body, and later posted the corresponding code on GitHub (*Pawelec M.,* Deepfakes and Democracy (Theory): How Synthetic Audio-Visual Media for Disinformation and Hate Speech Threaten Core Democratic Functions, 2022, 21-22).

70 *Lyu S.,* DeepFake the menace: mitigating the negative impacts of AI-generated content, Organizational Cybersecurity Journal: Practice, Process and People, 2023, 1-3.

audience. Even basic tools now feature graphical interfaces that enable inexperienced users to generate deepfakes.[71]

The popularity and easy accessibility of deepfakes make it necessary to examine the threats and impacts they may pose in cyberspace and in relation to hate speech.

One of the most common forms of deepfakes is pornographic videos created using the image of a woman. In 2019, 96% of all deepfake videos were pornographic content featuring manipulated images of women. Advances in artificial intelligence have made the creation of such videos easier and, moreover, have increased their realism. Pornographic deepfakes can cause serious psychological harm to victims, including anxiety and depression. They may also create hostile or damaging environments for victims, particularly in professional settings. In addition, such content threatens victims' equality and autonomy. In some cases, women are forced to change their names or withdraw from online activities altogether. This form of abuse can deter women from fully participating in both real and virtual environments.[72]

One of the most prominent and widely discussed examples is that of Northern Ireland Member of Parliament Kara Hunter, who was targeted in a deepfake pornography campaign. An unidentified individual used artificial intelligence to superimpose her likeness onto a sexual video and subsequently disseminated the fabricated content online. In addition to the personal harm – such as reputational damage and emotional trauma – there is a broader concern that the circulation of falsified and derogatory material may discourage women and young people from entering politics. This case has drawn significant attention in the United Kingdom to the need for stronger legal remedies against deepfake-related abuse. During one of the debates, the potential criminalization of such conduct has even been discussed.[73]

In addition to women, deepfakes also affect individuals who are subject to other forms of discrimination (for example, people with different skin colors, members of the LGBT+ community, and representatives of other marginalized groups). Deepfakes primarily harm democratic norms. Similar to other forms of hate speech, they intensify existing discrimination through intimidation and humiliation. They hinder members of marginalized groups from participating in public life and from fully exercising their rights.[74]

It is common for audiences to recognize that certain digital content may be generated by artificial intelligence, yet the underlying narrative often still resonates – particularly when it aligns with a person's pre-existing beliefs or biases. In many cases, "the message's alignment with existing biases matters more than its technical authenticity".[75]

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71 *Firc A., Malinka K., Hanacek P.,* Deepfakes as a threat to a speaker and facial recognition: An overview of tools and attack vectors, Brno, Heliyon 9 (2023), 1.

72 *Pawelec M.,* Deepfakes and Democracy (Theory): How Synthetic Audio-Visual Media for Disinformation and Hate Speech Threaten Core Democratic Functions, 2022, 22.

73 *Romanishyn A., Malytska O., Goncharuk V.,* AI-driven disinformation: policy recommendations for democratic resilience, 2025, 12.

74 *Pawelec M.,* Deepfakes and Democracy (Theory): How Synthetic Audio-Visual Media for Disinformation and Hate Speech Threaten Core Democratic Functions, 2022, 22-23.

75 *Regeni P., Wallner C.,* Online Hate Speech and Discrimination in the Age of AI, Conference Report, 2025, 5, <https://static.rusi.org/online-hate-speech-and-discrimination-in-the-age-of-ai-june-2025.pdf> [25.08.2025].

The article focuses on the potential negative impact of artificial intelligence on the spread of hate speech. However, halting technological development should not be viewed as a solution. Instead, it is essential to guide the development of artificial intelligence through proper regulation and ethical frameworks, thereby ensuring its responsible and socially beneficial use.

In discussions surrounding this issue, there is consistently a call for the creation of an inclusive and participatory digital environment grounded in democratic values. Combating hate speech and disinformation facilitated by artificial intelligence requires not only regulatory and technical measures, but also long-term investment in the development of digital spaces that empower users rather than undermine them.[76]

In summary, the impact of artificial intelligence on the spread and prevention of hate speech is twofold. On one hand, it creates new threats, including the risk of automated discrimination and the dissemination of hate speech in digital spaces. On the other hand, it offers significant opportunities for detecting and preventing such content. To minimize the creation and circulation of digital material containing hate speech through artificial intelligence, it is essential to develop an inclusive digital safety strategy that integrates both a robust legislative framework and complementary preventive measures.

5. Conclusion

Hate speech is one of the most pressing challenges in the modern world. It undermines social cohesion, erodes shared values, fuels violence, and threatens the rule of law. Beyond causing personal harm and inciting violence, it also violates principles of inclusiveness, diversity, and human rights.

Hate speech is closely connected to freedom of expression, which is both a fundamental human right and a cornerstone of democratic governance. It is essential to maintain a balance between combating hate speech and protecting freedom of expression.

The international and domestic legislative frameworks, along with the practice of the European Court of Human Rights and other specific cases reviewed in the article, demonstrate the harmful impact of hate speech on society and underscore the importance of combating it. Given its detrimental effects, it is essential to incorporate hate speech into the legal framework, respond appropriately to identified incidents, and implement state-led measures aimed at prevention.

Artificial intelligence could become one of the primary tools for either controlling hate speech online or, conversely, facilitating its spread in new forms. The effectiveness of artificial intelligence will largely depend on its ability to adapt dynamically to social and cultural changes.

At the same time, modern legal frameworks are increasingly confronted with new challenges arising from the rapid and often unpredictable development of digital technologies and artificial intelligence. A particularly pressing issue is the regulation of hate speech in contexts where automated systems are involved in the creation, transmission, and dissemination of content.

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[76] *Regeni P., Wallner C.,* Online Hate Speech and Discrimination in the Age of AI, Conference Report, 2025, 9, <https://static.rusi.org/online-hate-speech-and-discrimination-in-the-age-of-ai-june-2025.pdf> [25.08.2025].

It is necessary to reconsider the normative framework to ensure both the protection of human dignity and the proper legal governance of technological progress. The intersection of hate speech and artificial intelligence underscores the need to analyze regulations not only from a substantive perspective but also from systemic and ethical-legal standpoints.

Therefore, given the rapid development of artificial intelligence and the associated threats of hate speech, it is critically important for states to ensure a harmonious balance between technological advancement and public interest through the implementation of effective policies.

Bibliography:

1. *Areshidze M.,* Artificial Intelligence in Criminal Justice, Justice and Law №2(82), 2024, 154.
2. *Gabisonia Z.,* National Artificial Intelligence Strategy for Georgia, Georgian-German Journal of Comparative Law, 8/2021, 24.
3. *Gvaramadze T.,* Human Rights and Artificial Intelligence, Burduli I. (ed.), Journal of Law №2, Tbilisi, 2024, 147, 149.
4. *Goderdzishvili N.,* Artificial Intelligence: Essence, International Standards, Ethical Norms and Recommendations, Institute for the Development of Freedom of Information, Tbilisi, 2021, 10.
5. *Mgeladze M., Gorgoshadze M.,* Issues of legal regulation of the extension of some human rights to high artificial intelligence and robots, Constitutional Law Journal, Publication №1, 2019, 65.
6. *Tartarashvili T., Pirtskhalaishvili N.,* Hate Speech, Tbilisi, 2017, 4.
7. Artificial Intelligence Act, 13/06/2024, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L_202401689> [21.08.2025].
8. Convention on Artificial Intelligence and Human Rights, Democracy and the Rule of Law, 17/05/2024, <https://rm.coe.int/1680afae3c> [21.08.2025].
9. International Covenant on Civil and Political Rights, 1966, 20, <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights> [20.08.2025].
10. Background paper for the Judicial Seminar 2025: Protecting human rights in a world of Artificial Intelligence, algorithms and big data, 2024, 2.
11. *Banks J.,* Regulating Hate Speech Online, International Review of Law, Computers and Technology, 24, 3, 2010, 233, Available at: <https://ssrn.com/abstract=2129412> [12.11.2025].
12. *Battista D., Molano J. C.,* How AI Bots Have Reinforced Gender Bias In Hate Speech, ex æquo 48, 2023, 55, 57, 59.
13. *Chiu K., Collins A., Alexander R.,* Detecting Hate Speech with GPT-3, University of Toronto, 2022, 1-2.
14. COE, ECRI General Policy Recommendation №15 on Combating Hate Speech, ECRI Publishing, Strasbourg, 2016, 3.
15. COE, Recommendation No. R (97)20 of The Committee of Ministers to Member States on "Hate Speech", 1997, 107.
16. Cohen-Almagor R., Bullying, Cyberbullying and Hate Speech, International Journal of Technoethics (IJT), Volume 13, Issue 1, 2022, 6-7, Available at: <https://ssrn.com/abstract=4033031> or <http://dx.doi.org/10.2139/ssrn.4033031> [12.11.2025].
17. *Dias T.,* Tackling Online Hate Speech through Content Moderation: The Legal Framework Under the International Covenant on Civil and Political Rights, 2022, Bahador, Hammer and Livingston (eds),

Countering online hate and its offline consequences in conflict-fragile settings, 2024, 9. Available at: <https://ssrn.com/abstract=4150909> [12.11.2025].
18. *Dietrich F.,* AI-based removal of hate speech from digital social networks: chances and risks for freedom of expression, Springer, 2024, 2946.
19. European Commission, No Place for Hate: A Europe United Against Hatred, 2023, 6. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52023JC0051> [04.09.2025].
20. European Court of Human Rights, Factsheet – Hate speech, 2023, 24. <https://www.echr.coe.int/documents/d/echr/fs_hate_speech_eng> [03.09.2025].
21. *Firc A., Malinka K., Hanacek P.,* Deepfakes as a threat to a speaker and facial recognition: An overview of tools and attack vectors, Brno, Heliyon 9 (2023), 1.
22. *Gagliardone I., Gal D., Alves T., Martínez G.,* Countering online hate speech, UNESCO Series on Internet Freedom, 2015, 14. <https://unesdoc.unesco.org/ark:/48223/pf0000233231> [04.09.2025].
23. *Gagliardone I.,* Mapping and Analysing Hate Speech Online, University of Oxford, 2014, 12. Available at: <https://ssrn.com/abstract=2601792> or <http://dx.doi.org/10.2139/ssrn.2601792> [12.11.2025].
24. *Gonzalez-Prieto A., Bru A., Nuno J., Gonzalez-Alvarez J.,* Machine learning for risk assessment in gender-based crime, 2021, 8.
25. *Howard W. J.,* Free Speech and Hate Speech, Annual Review of Political Science, London, Volume 22, 2019, 95.
26. *Khan W. Z., Kibriya H., Siddiqa A., Khurram khan M.,* Towards Safer Online Communities: Deep Learning and Explainable Ai for Hate Speech Detection and Classification, 2023, 11. Available at: <https://ssrn.com/abstract=4620796> or <http://dx.doi.org/10.2139/ssrn.4620796> [12.11.2025].
27. *Lyu S.,* DeepFake the menace: mitigating the negative impacts of AI-generated content, Organizational Cybersecurity Journal: Practice, Process and People, 2023, 1-3.
28. *Masud S., Dutta S., Makkar S., Jain C., Goyal V.,* Hate is the New Infodemic: A Topic-aware Modeling of Hate Speech Diffusion on Twitter, 2020, 11.
29. *McCarthy, J., Minsky, M. L., Rochester, N., & Shannon, C. E.,* A Proposal for the Dartmouth Summer Research Project on Artificial Intelligence, 1955.
30. *Nave E.,* Hate Speech, Historical Oppressions, and European Human Rights, Buffalo Human Rights Law Review 29, 2023, 89, Available at: <https://ssrn.com/abstract=4592218> [12.11.2025].
31. *Parker S., Ruths D.,* Is hate speech detection the solution the world wants?, Published by PNAS, 2023, 1.
32. *Pawelec M.,* Deepfakes and Democracy (Theory): How Synthetic Audio-Visual Media for Disinformation and Hate Speech Threaten Core Democratic Functions, 2022, 21-23.
33. *Paz A. M., Montero-Díaz J., Moreno-Delgado A.,* Hate Speech: A Systematized Review, SAGE Journals, Volume 10, Issue 4, 2020, 1.
34. *Psychogiopoulou E.,* The Fight Against Digital Hate Speech: Disentangling the EU's Regulatory Approach and Hurdles, German Law Journal, 2024, 1182.
35. Recommendation CM/Rec(2022)16[1] of the Committee of Ministers to Member States on Combating Hate Speech, Appendix to Recommendation, 2022, 2, 7.
36. *Regeni P., Wallner C.,* Online Hate Speech and Discrimination in the Age of AI, Conference Report, 2025, 3-5, 9. <https://static.rusi.org/online-hate-speech-and-discrimination-in-the-age-of-ai-june-2025.pdf> [25.08.2025].

37. *Roels J.,* The Battle against Hate Speech and Freedom of Expression Online, Charles University in Prague Faculty of Law Research Paper No. 2017/I/4, 2017, 7, Available at: <https://ssrn.com/abstract=2954422> or <http://dx.doi.org/10.2139/ssrn.2954422> [12.11.2025].
38. *Romanishyn A., Malytska O., Goncharuk V.,* AI-driven disinformation: policy recommendations for democratic resilience, 2025, 5, 12, 14.
39. *Saleh H., Alhothali A., Moria K.,* Detecting White Supremacist Hate Speech using Domain Specific Word Embedding with Deep Learning and BERT, 2020, 2.
40. *Shadska U. and others,* Human rights in the era of Artificial Intelligence: challenges and legal regulation, 2024, 16-17.
41. UN, United Nations Strategy and Plan of Action on Hate Speech, 2019, 1, 2.
42. United Nations, <https://www.un.org/en/hate-speech/understanding-hate-speech/what-is-hate-speech#:~:text=In%20common%20language%2C%20%E2%80%9Chate%20speech,that%20may%20threaten%20social%20peace.> [20.08.2025].
43. United Nations, <https://www.un.org/en/hate-speech> [20.08.2025].
44. *Weber A.,* Manual on Hate Speech, Council of Europe Publishing, 2009, 3.
45. *Wullach T., Adler A., Minkov E.,* Towards Hate Speech Detection at Large via Deep Generative Modeling, 2020, 1.
46. Kilin v. Russia, [2021] ECHR, 1, 93-94.
47. Savva Terentyev v. Russia, [2018] ECHR, 79.
48. Delfi As v. Estonia, [2015] ECHR, 110, 133.
49. Perinçek v. Switzerland, [2015] ECHR, 230.
50. Erdoğdu and İnce v. Turkey, [1999] ECHR, 8-10, 48, 54-55.

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Levan Ghavtadze*

The Competence of the Constitutional Court of Georgia in Assessing the Constitutionality of a Decision on the Early Termination of the Powers of a Member of the Parliament**

The Constitution of Georgia, on the one hand, defines the special status of a member of Parliament, and on the other hand, establishes the grounds for early termination of the powers of a member of the Parliament by the principle of "Numerus clausus". Based on the Constitution the Parliament of Georgia acquires exclusive powers to decide on the issue of early termination of the powers of a member of Parliament. The Constitutional Court is a judicial body that exercises control over the decisions of the Parliament through the competence assigned by the Constitution of Georgia.

The purpose of the present article is to examine and analyze the topical issues associated with the institution of the early termination of the powers of a Member of the Parliament, as well as the viewpoints articulated in legal scholarship concerning the issues under consideration. This analysis aims to provide interested readers with an opportunity to draw well-founded conclusions. Furthermore, the article identifies the existing challenges within the legislative framework governing the early termination of the powers of a Member of the Parliament and proposes the author's recommendations for addressing and overcoming these challenges.

Keywords: *Constitutional Law, Early Termination of the Powers of a Member of Parliament, Principle of "Numerus clausus", Political and Legal Nature, Margin of Appreciation, Access to the Right to a Fair Trial, Constitutional Control.*

1. Introduction

> *"If angels were to govern men, neither external nor internal controls on government would be necessary."*[1]

The institution of early termination of the powers of a Member of Parliament includes some aspects that on the one hand, protect democracy (not to carry out parliamentary activities by the members of the Parliament who threaten the effective function/authority of the Parliament), and on the other hand, the will of the people should not be arbitrarily overcome by applying the mechanism of

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** Note: The author has published an article on a similar topic in the 2022 issue №1 of the Journal of Constitutional Law and Politics (a special anniversary edition). however, the issue discussed in the presented article contains different aspects and a new understanding of the issue will be proposed.

1 The Federalist Papers: №51, <https://guides.loc.gov/federalist-papers/text-51-60> [07.11.2025].

early termination of the powers. According to the the Constitutional Court of Georgia, "Protecting the powers of Members of the Parliament from early termination is an integral part of the constitutional guarantee of the smooth implementation of their activities".[2]

It is noteworthy that an essential part of the constitutional guarantee of the unhindered implementation of the activities of a member of the Parliament of Georgia is precisely the protection against early termination of the powers of a member of Parliament. In addition, Taking into account the political and legal nature of the decision of the Parliament, it is important to determine the role of the Constitutional Court of Georgia in assessing the constitutionality of the decision on the early termination of the powers of a member of Parliament. Examining the constitutionality of the issue of early termination of the powers of a Member of Parliament, the Constitutional Court of Georgia makes a decision by assessing how correctly the Parliament of Georgia applied the basis defined in the Constitution.

Within this article, the nature and legal framework of early termination of the powers of a Member of Parliament will be examined. It will identify the interpretative scope of the new ground for the early termination of the powers of a Member of Parliament, as introduced by the 2017–2018 constitutional reform. It also clarifies the function of the subjects entitled to appeal a decision on early termination and the corresponding timeframe for submitting such an appeal. In examining matters related to the early termination of the powers of a Member of Parliament, the powers of the Constitutional Court will be determined through the analysis of significant issues, including: The powers (scope of evaluation) of the Constitutional Court of Georgia considering the issue of early termination of the powers of a Member of the Parliament; Problematic period of review and decision-making on the issue of early termination of the powers of a Member of Parliament by the Constitutional Court; Legal Effects of the Constitutional Court's Decision Regarding the Consideration of a Early Termination of the powers of a Member of Parliament.

Thus, a scientific analysis of the above issues will be valuable for understanding the constitutional order established by the Constitution of Georgia regarding the early termination of the authority of a member of Parliament.

2. The Purpose of the Mechanism for Early Termination of the Powers of a Member of the Parliament

More than 40% of the Council of Europe member states have regulations for early termination of the powers of a Member of the Parliament at the constitutional level, while the rest of the countries regulate the issue at the legislative level.[3] The issue of early termination of a Member of Parliament at the legislative level is regulated by the Constitution of Georgia and the Rules of Procedure of the

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2 Judgment №1/7/1688 of 4 November 2022 of the Constitutional Court of Georgia on the case "Shalva Natelashvili v. the Parliament of Georgia", II-14, <https://www.constcourt.ge/ka/judicial-acts?legal=14358> [07.11.2025].

3 *Venice Commission,* Report on the exclusion of offenders from parliament, CDL-AD(2015)036, Opinion No. 807 / 2015, Strasbourg, 23 November 2018, §79.

Parliament of Georgia.[4] The Constitution of Georgia defines a decision-making entity and the issue where and by whom the resolution on the early termination of the powers of a Member of Parliament may be appealed. As the Constitutional Court notes, Rules of Procedure of the Parliament of Georgia shall establish both material and legal reasoning for the early termination of the powers of a Member of the powers of a Member of the Parliament. This is intended, on the one hand, to prevent the arbitrary early termination of a Member of Parliament's mandate on unfounded grounds, and, on the other hand, to ensure procedural transparency through detailed regulation of the process, thereby minimizing the risk of mistake.[5]

According to the Venice Commission, the issue of the smooth exercise of the rights and activities of a member of Parliament determines the "core" of democracy and its functionality.[6] Accordingly, the early termination of the powers of a Member of Parliament requires a balanced approach, as termination without a proper legal basis and due procedure undermines the will expressed by voters through their active electoral rights. Furthermore, consideration of this institution must take into account the role of Parliament and the status and functions of its members, which underpin the constitutional guarantees of the parliamentary mandate. Members of Parliament having the mandates of the people act on behalf of the whole nation.[7] "According to the jurisprudence of the Constitutional Court, "it is a fundamental requirement of democracy that the will of the people not be disregarded and that the mandate conferred by them not be overridden".[8] democracy can only function with or through the limitations that it has set for itself as being legitimate and reasonable.[9]

The MP enjoys a free mandate[10] and forcing him/her to carry out parliamentary duty is not allowed, however, in some cases, the MPs misuse the right through the destructive refusal of the mandate (Destruktiver Mandatsverzicht) when part of MPs (and their substitutes) collectively

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4 Paragraph 5 of Article 39 and sub-paragraph (g) of paragraph 5 of Article 39 of the Constitution of Georgia, Departments of the Parliament of Georgia, 31-33, 24/08/1995 <https://matsne.gov.ge/ka/document/view/30346?publication=36> [07.11.2025]; Article 9 of the Rules of Procedure of the Parliament of Georgia, 2025 <https://matsne.gov.ge/document/view/6494611?publication=3> [07.11.2025].

5 Judgment №1/7/1688 of 4 November 2022 of the Constitutional Court of Georgia on the case "Shalva Natelashvili v. the Parliament of Georgia", II-21, <https://www.constcourt.ge/ka/judicial-acts?legal=14358> [07.11.2025].

6 *Venice Commission*, Amicus Curiae Brief for the Constitutional Court of Ukraine on draft law 1027 on the early termination of a Deputy's mandate, CDL-AD(2019)029, Opinion No. 971/2019, Strasbourg, 9 December 2019, §17.

7 *Nemtoi G., Nesteriuc O.*, The Status of the Member of Parliament in Relationship with the Legal and Ethical Norms, European Journal of Law and Public Administration, Vol. 6, Issue 2, 2019, 248.

8 Judgment №3/2/574 of 23 May 2014 of the Constitutional Court of Georgia on the case , "Giorgi Ugulava v. the Parliament of Georgia", II-21, <https://www.constcourt.ge/ka/judicial-acts?legal=1032> [07.11.2025].

9 *Venice Commission,* Report on Democracy, Limitation of mandates and Incompatibility of political functions, CDL-AD(2012)027rev, Study No.646/2011, Strasbourg, 31 January 2013, §116.

10 *Sajó A., Uitz R.,* The Constitution of Freedom: an Introduction to Legal Constitutionalism, Oxford University Press, 2017, 221.

renounce mandates.[11] The Constitution does not force an MP to fully embrace the mandate for the entire 4 years, but he/she should not exercise the right to renounce the mandate, thereby endangering the functioning of Parliament.[12] The right to renounce the mandate should not be construed as the principal right of an MP. When an elected MP refuses to fulfill his obligation without any legitimate basis it is considered an act of betrayal of his people (voters).[13]

According to the interpretation of the Constitutional Court of Georgia, „the early termination of the powers of a Member of Parliament is a complex issue which, on the one hand, constitutes a direct requirement of democracy in order to prevent the will of the majority from being used against democracy itself and to safeguard the effective functioning of Parliament. On the other hand, the abuse or improper exercise of this power entails the risk of overriding the will of the people, as the direct source of authority. The effective functioning of democracy requires the existence of a mechanism for the early termination of a representative's mandate, which should be applied only where appropriate grounds exist, namely, where such termination is justified by the need to preserve the integrity of public authority and to ensure public trust therein, notwithstanding the fact that the possibility of early termination of the powers of a Member of Parliament inherently carries certain risks. It is for this reason that Article 39(5) of the Constitution of Georgia exclusively and exhaustively enumerates the grounds giving rise to the early termination of the powers of a Member of Parliament, thereby minimizing the scope of discretion afforded to the decision-making authority".[14] Moreover, the failure of Parliament to terminate a Member of Parliament's mandate may be aimed either at safeguarding the effective functioning of Parliament[15] or at avoiding the imposition of potential liability on the Member of Parliament.[16]

2.1. Numerus clausus principle related to the early termination of the powers of a Member of the Parliament

The Constitution has a special role in the legal system (it is a political and legal document) and it cannot be replaced by other documents.[17] The reasons for the early termination of powers of a Member of Parliament are regulated by the Constitution, in particular, according to paragraph 5 of

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11 *Dicke K., Stoll T.,* Freies Mandat, Mandatsverzicht Des Abgeordneten Und Das Rotationsprinzip Der GRÜNEN, Zeitschrift Für Parlamentsfragen, vol. 16, №4, 1985, 457.

12 *Ziekow J*., Rotation Von Mandatsträgern, Zeitschrift Für Parlamentsfragen, vol. 21, no. 4, 1990, 636.

13 *Winfried S.,* Edmund Burke: Zur Vereinbarkeit Von Freiem Mandat Und Fraktionsdisziplin, Zeitschrift Für Parlamentsfragen, vol. 12, №1, 1981, 119.

14 Judgment №3/2/1473 of 25 September 2020 of the Constitutional Court of Georgia on the case "Nikanor Melia v. the Parliament of Georgia", II-7 <https://constcourt.ge/ka/judicial-acts?legal=10128> [07.11.2025].

15 *Chafetz J.,* Leaving the House: The Constitutional Status of Resignation from the House of Representatives, Duke Law Journal, Vol. 58, №2, 2008, 226.

16 *Strøm K., Mueller W. C., Bergman T.,* Delegation and Accountability in Parliamentary Democracies, Oxford University Press, 2005, 354.

17 *Barak A.,* Purposive Interpretation in Law, Translated from Hebrew by Sari Bashi, Princeton, New Jersey, 2005, 371.

Article 39 of the Constitution of Georgia, the principle of "Numerus clausus"[18] defines the reasons for early termination of the powers of a member of Parliament, which are exhaustive and are not subject to expansion/reduction based on subordinate acts.[19]

The mentioned reasons can be conditionally divided into several categories: First – a Member of Parliament does not want to exercise his/her powers and submits a personal application to terminate his/her powers to the Parliament; Second – a Member of Parliament fails to exercise his/her powers (for example, he/she fails to attend without good reasons the regular settings during regular sessions, has been recognized as a beneficiary of support by a court decision or missing, etc.); Third – a Member of Parliament, based on his/her actions, shall no longer exercise his/her powers (for example, holds a position incompatible with the status or is engaged in incompatible activities, or has been convicted under a court judgment that has entered into legal force, etc.); Fourth – the 2017-2018 constitutional reform established an additional ground for the early termination of the powers of a member of Parliament, namely termination based on a decision of the Constitutional Court.

It is interesting to discuss the approach of the Constitution of Ukraine to the procedure on the early termination of the powers of a Member of Parliament, in particular, the Ukrainian Verkhovna Rada (Parliament) decides on the early termination of the powers of an MP based on a personal application, loss of citizenship/departure from Ukraine for permanent residence abroad. If a judgment of conviction against a member of the Parliament of Ukraine enters into legal force or is declared to be incapacitated/missing, the powers shall be terminated by the entry into force of the relevant court decision.[20] According to the Finnish Constitution, if a Member of the Parliament substantially and repeatedly ignores the performance of representative duties, the Parliament may terminate the powers of an MP for a permanent or limited period after getting the conclusion of the Constitutional Law Committee.[21]

2.2. The Political and Legal Nature of the Decision on Early Termination of the Powers of a Member of the Parliament

According to the Constitution of Georgia, Parliament shall have exclusive powers to make decisions on the early termination of the powers of a Member of Parliament. The decision of the Parliament is political-legal by its nature, in which the legislature has a certain scope of protection. After the reason provided by Article 39(5) of the Constitution of Georgia arises, the issue of early termination of the powers of a Member of Parliament shall be voted on and made a relevant

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18 "Numerus clausus" is a Latin word meaning closed number and refers to an exhaustive list provided for by law.

19 Judgment №1/7/1688 of 4 November 2022 of the Constitutional Court of Georgia on the case "Shalva Natelashvili v. the Parliament of Georgia", II-14, <https://www.constcourt.ge/ka/judicial-acts?legal=14358> [07.11.2025].

20 Constitution of Ukraine, 1991, Article 81 <https://zakon.rada.gov.ua/laws/show/en/254%D0%BA/96-%D0%B2%D1%80#Text> [07.11.2025].

21 Constitution of Finland, 1999, section 28 <https://oikeusministerio.fi/en/constitution-of-finland> [07.11.2025].

decision by the Parliament. The Parliament can theoretically make two types of decisions: a resolution on the termination of the powers of a member of Parliament or a resolution on the non-termination of the powers of a member of Parliament.[22]

It is noteworthy to follow the practice of the European Court of Human Rights in the case Kart v. Turkey (Application no. 8917/05), which disputed the inability of removal of a Member of Parliament to give up parliamentary immunity. The complainant raised the issue of removing parliamentary immunity before the Joint Committee of the Grand National Assembly but the complainant was not removed immunity and the criminal proceedings against him were postponed until the expiration of the powers of the MP. The decision was appealed by the complainant to the European Court of Human Rights because he believed that his case should be considered based on the right to a fair trial and that the process should not impede parliamentary immunity as a privilege. The European Court of Human Rights made an interesting explanation regarding the nature of a similar decision, in particular, the mechanism of parliamentary responsibility by deciding on the removal or refusal of removing parliamentary immunity is one of the means of parliamentary autonomy. In their nature, these decisions are political and do not meet the same criteria as required by court decisions.[23]

An interesting parallel may be drawn with the institution of the early termination of the powers of a judge of the Constitutional Court. According to the form of decision-making, the Organic Law of Georgia On the Constitutional Court of Georgia[24] differentiates among the grounds for the early termination of a judge's powers, namely: 1) In accordance with the first sentence of Article 16(2) of the Organic Law of Georgia On the Constitutional Court of Georgia, the early termination of a judge's powers of the Constitutional Court on the grounds of conduct incompatible with judicial office and the circumstances set out in subparagraphs (a)-(d) of paragraph 1 of Article 16 – requires the adoption of a resolution by the Plenum of the Constitutional Court, supported by a majority of its full membership. Consequently, even where a ground for early termination exists, the Plenum may nevertheless decline or be unable to terminate the judge's mandate prematurely. In this respect, the institutional design of the early termination of a Constitutional Court judge's powers mirrors that of the early termination of a Member of Parliament's mandate.

A second category of grounds for the early termination of a Constitutional Court judge's powers includes, inter alia, the loss of Georgian citizenship, resignation from office, and the circumstances provided for in subparagraphs (e)-(i) of paragraph 1 of Article 16. With regard to all these grounds, pursuant to the second sentence of paragraph 2 of Article 16 of the Organic Law of Georgia On the Constitutional Court of Georgia, the Plenum of the Constitutional Court examines the submitted documents, and, upon confirmation of the facts contained therein, the Chairperson of the Constitutional Court formalizes the early termination of the judge's powers. Accordingly, these grounds do not require a vote of the Plenum, and the Chairperson of the Constitutional Court is

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22 *Kakhiani G.*, (2011), "Constitutional Control in Georgia, Theory and Analysis of Legislation", 376 (in Georgian).

23 Kart v. Turkey, ECHR (Application no. 8917/05), 3 December 2009, §101 <https://hudoc.echr.coe.int/eng?i=001-96007> [07.11.2025].

24 Organic Law of Georgia on the Constitutional Court of Georgia, Departments of the Parliament of Georgia, 001, 27/02/1996 <https://matsne.gov.ge/ka/document/view/32944?publication=38> [07.11.2025].

obliged to issue an order on the early termination of the judge's mandate once the relevant facts are established. In this respect, the nature of the institution of the early termination of a Constitutional Court judge's powers differs qualitatively from that of the early termination of a Member of Parliament's mandate, as a Member of Parliament's personal request to Parliament for the termination of his or her mandate does not, in itself, constitute a sufficient legal basis for a decision, given that the matter must be put to a parliamentary vote.

3. The 2017-2018 Constitutional Reform and the Creationof a New Ground for the Early Termination of the Powers of a Member of the Parliament (Ambiguous Provision and Scope for Interpretation)

As part of the 2017-2018 constitutional reform, the Constitution of Georgia not only amended the editorial provisions concerning the early termination of a Member of Parliament's mandate but also introduced a new ground in Article 39(5), providing that a mandate may be terminated prematurely if it is subject to a decision of the Constitutional Court. Within the same reform, the Constitutional Court was also granted the authority, in addition to reviewing the constitutionality of a political party's activities, to examine the issue of the early termination of the mandate of a member of a representative body elected upon the nomination of that political party (subparagraph (f) of paragraph 4 of Article 60 of the Constitution of Georgia). It is important that the terms of the Constitution be interpreted in accordance with their true meaning.[25] According to Joni Khetsuriani, the Constitutional Court's decision to prohibit a political party should be accompanied by the early termination of mandates held by that party's representatives in legislative bodies. Importantly, this measure should fall within the competence of Parliament rather than that of the Constitutional Court.[26]

It should be noted that, under the legislation – neither the Organic Law of Georgia On the Constitutional Court of Georgia nor the Rules of Procedure of the Parliament of Georgia – there is no procedure regulating the early termination of a Member of Parliament's mandate on the aforementioned ground. Consequently, it remains unclear in which circumstances this ground is applicable, leaving a margin for interpretation. Specifically, it is uncertain whether the ground in question refers to the case envisaged under subparagraph (c) of paragraph 6 of Article 23 of the Organic Law On the Constitutional Court of Georgia, whereby the satisfaction of a claim by the Court does not automatically result in the early termination of a Member of Parliament's mandate, but rather the decision of the Constitutional Court serves as a basis for parliamentary deliberation on the matter. Under such an interpretation, the effectiveness of constitutional control would be undermined.

While the legislation does not explicitly define the scope of the aforementioned ground, a reading in light of the Constitution's[27] underlying purpose indicates that it should be applied in instances where the Constitutional Court upholds a constitutional claim under under subparagraph (f)

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25 *Redish M. H., Arnould M. B.,* Judicial Review, Constitutional Interpretation, and the Democratic Dilemma: Proposing a "Controlled Activism" Alternative, Florida Law Review, Vol. 64, Issue 6, 2012, 1486.

26 *Khetsuriani, J.*, Powers of the Constitutional Court of Georgia, 2020, 226-227 (in Georgian).

27 *Solum L. B.,* The Interpretation-Construction Distinction, Georgetown Law Faculty Publications and Other Works, 2010, 102.

of paragraph 4 of Article 60. This would result, on the one hand, in the prohibition of the political party (through annulment of its registration) and, on the other hand, in the termination of the mandates of its representatives elected to legislative bodies. The Parliament of Georgia serves as the final decision-making body, retaining the prerogative to decide against the early termination of a Member of Parliament's mandate. This situation is similar to impeachment procedures, where the Constitutional Court may issue a finding establishing that an official (specified in paragraph 1 of Article 48 of the Constitution of Georgia) has breached constitutional provisions or committed acts bearing elements of a criminal offense, but the Parliament of Georgia retains the discretion not to endorse the official's removal through impeachment.

Even under this interpretation, an exceptional situation may arise, whereby the Constitutional Court prohibits a political party and, concurrently, a member of a representative body elected upon that party's nomination is designated for early termination of their mandate. The Parliament, however, retains the discretion not to effectuate the termination, and such a decision may subsequently be contested before the Constitutional Court. As a result, circumstances may arise where the Constitutional Court has previously considered the early termination of a Member of Parliament's mandate, but the same matter could, in theory, require further constitutional review, giving rise to an exceptional situation. Accordingly, it is essential that legislation clearly and comprehensively regulate the procedure for the early termination of a Member's mandate on the grounds specified in this chapter.

4. The Purpose of the Term and the Circle of the Entities Appealing a Decision on Early Termination of the Powers of a Member of the Parliament

During the review of the powers of the Constitutional Court to assess the constitutionality of the early termination of the powers of a Member of Parliament, it shall be necessary to analyze the purpose of the circle and the term of appealing a decision on the early termination of the powers of a Member of Parliament.

4.1. The Purpose of the Circle of the Entities Appealing a Decision on Early Termination of the Powers of a Member of the Parliament

The object of constitutional review is a resolution of the Parliament of Georgia. Pursuant to paragraph 9 of Article 10 of the Organic Law of Georgia On Normative Acts,[28] a parliamentary resolution is deemed non-normative if it pertains to personal or personal matters. Therefore, a resolution adopted by Parliament concerning the early termination of a Member of Parliament's mandate addresses a personal matter and constitutes an individual legal act.

According to sub-paragraph g) of paragraph 4 of Article 60 of the Constitution of Georgia, the authorized subjects shall appeal to the Constitutional Court. Authorized subjects of a constitutional lawsuit are represented by one-fifth of the full composition of members of the Parliament or a relevant

[28] Organic Law of Georgia on Normative Acts, 33, 09/11/2009, <https://matsne.gov.ge/ka/document/view/90052?publication=41> [07.11.2025].

representative. The respondent party is the Parliament of Georgia. Without the mentioned prerequisites, the Constitutional Court is deprived of the opportunity to assess the constitutionality of the decision made by the Parliament.

The assigning of the authority to file a constitutional claim to at least one-fifth of the members of the Parliament of Georgia shall be related to the protection function of the parliamentary minority.[29] Specifically, the parliamentary minority has the ability, within the framework of constitutional review, to raise for consideration the question of the constitutionality of a Member of Parliament's mandate belonging to the parliamentary majority.

It is important to critically assess the meaning of the term 'the respective person' as used in the Constitution of Georgia, given that paragraph 1 of Article 40 of the Organic Law of Georgia On the Constitutional Court of Georgia ambiguously defines the circle of subjects entitled to file a constitutional claim. Specifically, the provision states that a constitutional claim regarding a parliamentary decision on the recognition or early termination of a Member of Parliament's mandate may be submitted by: 1) at least one-fifth of the Members of Parliament; or 2) the citizen whose mandate as a Member of Parliament was not recognized or was prematurely terminated by Parliament. A doctrinal analysis of this provision suggests that the right to challenge a parliamentary decision not to terminate a Member's mandate prematurely appears to be confined solely to at least one-fifth of the Members of Parliament. An analysis of this provision creates the impression that the right to file a constitutional claim concerning a parliamentary decision not to terminate a Member's mandate prematurely is limited solely to at least one-fifth of the Members of Parliament, which appears to be inconsistent with the Constitution of Georgia.

Whom the Georgian Constitution regards a "relevant representative" depends on the decision made by the Parliament of Georgia: 1) If the powers of a member of Parliament are terminated early, he/she shall be recognized as the person who has terminated the powers of a member of Parliament early; 2) If the powers of a member of Parliament are not terminated, he/she is recognized as a member of Parliament who has not been prematurely terminated his/her powers and/or the person who became a member of Parliament by rotation[30] (e.g., the member of parliament died and the Parliament did not terminate the powers because of rotating a "relevant representative" of the party list).

In view of the foregoing, it is advisable that legislative amendments be introduced to the Organic Law of Georgia On the Constitutional Court of Georgia, whereby, in accordance with the requirements of the Constitution, the definition of the term "relevant representative" would be clarified and the circle of subjects entitled to file a constitutional claim would be expressly determined. In this context, it is noteworthy to refer to the Recording Notice of the Constitutional Court of Georgia[31], which substantively admitted for consideration the constitutional claims filed by Zurab 'Girchi' Japaridze, Tamar Kordzaia, and Elene Khoshtaria. These constitutional claims contested resolutions

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29 *Vanberg G.*, Legislative-Judicial Relations: A Game-Theoretic Approach to Constitutional Review, Florida State University, American Journal of Political Science, Vol.45, No.2, 2001, 347.

30 *Kobakhidze, I.*, Constitutional Law, Tbilisi, 2023, 233 (in Georgian).

31 Recording Notice №3/1-1/1565,1568,1569 of 26 February 2021 of the Constitutional Court of Georgia on the case "Zurab Girchi Japaridze, Tamar Kordzaia and Elene Khoshtaria v. the Parliament of Georgia", <https://www.constcourt.ge/ka/judicial-acts?legal=10762> [07.11.2025].

adopted by the Parliament of Georgia, whereby the mandate of the claimants was not terminated prematurely. Accordingly, the Constitutional Court interpreted the term "relevant representative" in subparagraph (g) of paragraph 4 of Article 60 of the Constitution of Georgia as referring to the Member of Parliament whose mandate had not been terminated prematurely by Parliament.

4.2. Purpose of the Deadline for Appealing a Decision on Early Termination of the Powers of a Member of the Parliament

According to paragraph 3 of Article 40(3) of the Organic Law of Georgia on the Constitutional Court of Georgia, the time limit for filing a constitutional claim shall not exceed two weeks from the entry into force of a resolution of the Parliament of Georgia. Based on Article 1 of paragraph 48 of the Law of the Federal Constitutional Court of Germany, the issue of early termination of the powers of a Bundestag Member shall be appealed to the Federal Constitutional Court within two months after the Bundestag makes a decision.[32]

The period of two weeks for filing a constitutional claim prevents a person whose powers had to be terminated by the Parliament from being admitted to the legislative body, still, a person has the opportunity to restore the powers of a Member of Parliament as quickly as possible if the Parliament has terminated the powers of a member of Parliament in violation of the requirements of the Constitution. The constitutional claim of violation of the established term without good reasons shall not be accepted for consideration by the court. The legislation does not define the list of good reasons, and in each case, the Constitutional Court shall decide whether the violation of the time limit should be considered. The Constitutional Court did not accept the constitutional claim of Shalva Natelashvili, a member of the Parliament of Georgia for violating the established time limit for appealing. The Claimant disputed the resolution of the Parliament of Georgia on the failure to prematurely terminate the powers of a member of the Parliament, which was adopted on February 2, 2021, and came into force immediately. The Claimant appealed to the Constitutional Court on March 23, 2021, after the expiry of the time limit for appeals provided by law. In addition, the constitutional claim did not reveal a good reason for violation of the term of appeal.[33]

5. The Powers of the Constitutional Court of Georgia considering the Issue of Early Termination of the Powers of a Member of the Parliament

"Power should hold power."[34]

The Constitutional Court belongs to the powerful government institutions.[35] The strengthening of judicial power, especially the creation of a special body carrying out constitutional justice, is

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[32] The Act on the Federal Constitutional Court of Germany, 1993, Article Section 48 <https://www.gesetze-im-internet.de/bverfgg/index.html> [07.11.2025].

[33] Ruling No 3/1/1581 of 5 April 2021 of the Constitutional Court of Georgia on the case "Shalva Natelashvili v. the Parliament of Georgia", II-1, 2 <https://constcourt.ge/ka/judicial-acts?legal=11050> [07.11.2025].

[34] Montesquieu, The Spirit of Laws, 11:4.

assessed as one of the reasons for the separation of power.[36] In connection with the early termination of the powers of a Member of Parliament, Parliament may make two types of decisions: (1) a resolution on the termination of the powers of a Member of Parliament and 2) an ordinance on the non-termination of the powers of a Member of Parliament.[37] Accordingly, both cases in the Constitutional Court may become the subject of dispute. The task of the Constitutional Court as a body exercising constitutional control is to examine if the decision is made arbitrarily by Parliament.[38]

In evaluating the matter, the Constitutional Court must first take into account the legislative norms regulating the early termination of the powers of a Member of Parliament. However, such assessment must not overlook the principles of democracy and the rule of law enshrined in the Constitution of Georgia, as it is precisely these fundamental principles that define the integrity of the constitutional legal order.[39] In this context, the Constitutional Court of Georgia has emphasized that any analysis of the constitutionally permissible limits of the early termination of the powers of a Member of Parliament must be grounded in an understanding of the institutional essence and purpose of Parliament, as well as the constitutional status and functional role of a Member of Parliament".[40] Consequently, for the Constitutional Court to resolve the aforementioned issue correctly from a constitutional-law perspective, it is necessary to take into account the guarantees attached to both Parliament as an institution and the individual status of Members of Parliament.

Assessing the constitutionality of the issue of early termination of the powers of a Member of Parliament, the Constitutional Court shall take into account not only the formal requirements of the legislation but also the content and factual side of the issue. The Constitutional Court interpreted the main factors regarding the case of Valeri Gelashvili, particularly, "The actual exercise of the powers of the head of the enterprise shall not contradict the constitutional-legal assessment as it describes the constitutional, legal, and organizational framework governing the law-making process. It is unacceptable to carry out entrepreneurial activities not only in the usual form (a defense of formality) but also in actual implementation.[41] In this regard, the approach of the European Court of Human Rights applied in the case KOKËDHIMA v. ALBANIA (Application no. 55159/16) is very compelling. The court considered the early termination of the powers of a member of Parliament to be compatible with the Convention due to the conflict of interests. The subject of the court's assessment

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35 *Sergeev D. N.*, Constitutional Justice in Russia: A Political and Legal Study, Dissertation for the Degree of Candidate of Political Sciences (manuscript), 2005, 19.

36 *Loladze B.,* Das Rechtsstaatsprinzip in der Verfassung Georgiens und in der Rechtsprechung des Verfassungsgerichts Georgiens, Potsdam, 2015, 376.

37 *Kakhiani G.*, "Constitutional Control in Georgia, Theory and Analysis of Legislation", 2011, 277,278 (in Georgian).

38 *Loladze B., Matcharadze Z., Pirtshalashvili A.,* "Constitutional Justice", 2021, 269 (in Georgian).

39 *Roznai Y.,* The Straw that Broke the Constitution's Back? Qualitative Quantity in Judicial Review of Constitutional Amendments, Constitutionalism: Old Dilemmas, New Insights, edited by Alejandro Linares Cantillo, Oxford University Press, 2021, 149.

40 Judgment №3/2/1473 of 25 September 2020 of the Constitutional Court of Georgia on the case "Nikanor Melia v. the Parliament of Georgia", II-2. <https://constcourt.ge/ka/judicial-acts?legal=10128> [07.11.2025].

41 Judgment №3/2/378 of 13 July 2006 of Georgia on the case "Citizen of Georgia Valeri Gelashvili v. The Parliament of Georgia", V, <https://constcourt.ge/ka/judicial-acts?legal=272> [07.11.2025].

was whether the applicant could sufficiently consider taking legal steps to avoid conflicts of interest incompatible with the status of a Member of Parliament. The applicant argued that the company stopped participating in public tenders immediately after his election as a Member of the Parliament, however, the company continued to receive income from previously concluded agreements with state authorities. The national legislation of Albania was not engrossed in specifying the time to conclude contracts, but in the fact that the company carried on getting any payments derived from public resources after the complainant performed his duties as a Member of the Parliament. From this perspective, the European Court of Human Rights did not see the elements of arbitrariness in the decision to terminate the powers of a member of Parliament and considered it compatible with the requirements of Article 3 of the First Additional Protocol of the European Convention on Human Rights.[42]

According to the established practice of the Constitutional Court of Georgia, the constitutional assessment of the early termination of the powers of a member of Parliament is subject to a different scope of review than that applied to the evaluation of the constitutionality of restrictions imposed on other state officials. As the Constitution exhaustively enumerates the grounds for the early termination of the powers of a Member of Parliament, any termination effected on grounds other than those constitutionally prescribed would be incompatible with the Constitution of Georgia. The Constitutional Court of Georgia has established by its practice the scale of the examination of the constitutionality of the early termination of the powers of a Member of Parliament, in particular while examining the constitutionality of the issue of early termination of the powers of a Member of Parliament, the court makes a decision not through the proportionality of the restriction and/or justification of a release, but by assessing how correctly the Parliament of Georgia applied the basis defined in paragraph 5 of Article 39 of the Constitution.[43] This approach has been reaffirmed by the First Chamber of the Constitutional Court of Georgia, which emphasized that the constitutional review of the early termination of the powers of a Member of Parliament substantially differs from cases involving the assessment of the constitutionality of restrictions on the exercise of other public offices, which are evaluated using classical constitutional tests.[44]

Another important aspect relates to the question of which constitutional provisions should be considered when assessing the constitutionality of the early termination of the powers of a Member of Parliament. In the cases reviewed by the Constitutional Court of Georgia, the disputes centered on the conformity of the decision to terminate a Member of Parliament's mandate with the specific constitutional provisions that formed the normative basis for the contested parliamentary resolution. According to Justice Teimuraz Tugushi, the limited two-week period for filing a constitutional

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42 Kokëdhima v. Albania, ECHR (Third Section), 11 June 2024, §66-70 <https://hudoc.echr.coe.int/eng?i=001-234125> [07.11.2025].

43 Judgment №3/2/1473 of 25 September 2020 of the Constitutional Court of Georgia on the case "Nikanor Melia v. the Parliament of Georgia", II-4 <https://constcourt.ge/ka/judicial-acts?legal=10128> [07.11.2025].

44 Judgment №1/7/1688 of 4 November 2022 of the Constitutional Court of Georgia on the case "Shalva Natelashvili v. the Parliament of Georgia", II-14, <https://www.constcourt.ge/ka/judicial-acts?legal=14358> [07.11.2025].

complaint on the termination of the powers of a Member of Parliament implies that specifying particular constitutional provisions in the complaint could unduly restrict the complainant's access to judicial remedy. Therefore, in such cases, the dispute should address the constitutionality of the termination decision as a whole, allowing the Constitutional Court to assess it in light of the distinctive nature of parliamentary mandates.[45]

5.1. Problematic Period of Review and Decision-Making on the Issue of Early Termination of the Powers of a Member of Parliament by the Constitutional Court

According to paragraph 2 of Article 21 of the Organic Law of Georgia on the Constitutional Court of Georgia, the constitutionality of the issue of early termination of the powers of a member of the Parliament of Georgia shall be judged by the Board of the Constitutional Court. At the same time, Articles 21^1 and 21^2 of the same law provide for the transfer of a matter adjudicated by a chamber of the Constitutional Court to the Plenum of the Constitutional Court. The initiative to transfer a case to the Plenum may be taken by: 1) a chamber of the Constitutional Court or a member of that chamber, if it concludes that the legal position emerging from the case at hand differs from the jurisprudence previously established by the Court, or if the case raises, by its nature, an uncommon and/or exceptionally important legal issue relating to the interpretation and/or application of the Constitution of Georgia; 2) the Chairperson of the Constitutional Court of Georgia, if, in the process of distributing a constitutional complaint among the chambers pursuant to the rules of constitutional procedure, he or she forms a reasoned view that the substance of the case may raise a rare and/or particularly significant legal issue relating to the interpretation and/or application of the Constitution of Georgia.

The practice has seen the precedents when the constitutional claims for early termination of the term of the powers of an MP were reviewed by the Plenum of the Constitutional Court with the argument that the case under consideration may arise a rare and/or particularly significant legal problem in the definition and/or application of the Constitution of Georgia. This proposal was shared by the Plenum of the Constitutional Court.[46]

According to paragraph 1 of Article 22 of the Organic Law of Georgia on the Constitutional Court of Georgia, the time limit for consideration of a constitutional claim/constitutional submission must not exceed nine months after its registration. In special cases, the Chairman of the Constitutional Court shall extend the time limit for consideration of a claim by a maximum of two months.

The deadline for the decision by the Constitutional Court is quite long, in many cases, it lasts even several years. A good example of this is the constitutional claims of №3/5/1565,1568,1569. The Constitutional Court held the substantive hearing on June 10-11, 2021 but for more than 4 years the

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[45] Concurring Opinion of Justice Teimuraz Tugushi on Recording Notice №3/1/1473 of 26 January 2021 of the Constitutional Court of Georgia on the case "Nikanor Melia v. the Parliament of Georgia", II-7,8. <https://www.constcourt.ge/ka/judicial-acts?legal=3932> [07.11.2025].

[46] Recording Notice No3/1-1/1473 of 13 January 2020 of the Constitutional Court of Georgia on the case "Nikanor Melia v. the Parliament of Georgia", <https://www.constcourt.ge/ka/judicial-acts?legal=3730?> [07.11.2025]; Recording Notice No3 3/1-1/1565,1568,1569 of 26 February 2021 of the Constitutional Court of Georgia on the case "Zurab Girchi Japaridze, Tamar Kordzaia and Elene Khoshtaria v. the Parliament of Georgia", <https://www.constcourt.ge/ka/judicial-acts?legal=10762> [07.11.2025].

Court has not made a decision yet. Before evaluating the decision by the Constitutional Court, the Parliament terminated the term of both claimants Zurab Girchi Japaridze and Elene Khoshtaria.[47] As a result, the plaintiffs have lost interest in constitutional claims because even if theoretically constitutional claims are satisfied, the purpose of the plaintiffs (early termination of power) has already been achieved.

The constitutionality of the issue of terminating the powers of a Member of Parliament is of great importance from both perspectives of the individual right of a Member of Parliament (effective application of the right to a fair trial) and determining the Parliament as the supreme representative body in compliance with the requirements of the Constitution.

To eliminate the mentioned problem, two alternative approaches may be considered: 1) It is prudent to amend the legislation and determine the deadlines for reviewing/making a constitutional claim on the early termination of the powers of a Member of Parliament. The time limit for making a decision by the Constitutional Court is determined by the legislation of several countries, for example, according to the legislation of the Constitutional Court of the Republic of Latvia, the term for each stage of legal proceedings is defined separately.[48] According to paragraph 9 of Article 79 of the Constitutional Law of the Republic of Armenia on the Constitutional Court, the decision of the Constitutional Court on the termination of the powers of the MP shall be made not later than 30 days after the claim is filed.[49] 2) The Constitutional Court may invoke its internal procedural mechanism to prioritize the consideration of the case, as envisaged by paragraph 4 of Article 34 of the Rules of the Constitutional Court of Georgia. Pursuant to this provision, the Plenum or a chamber of the Court is empowered to issue a reasoned Recording Notice to ensure that a particular case is examined or adjudicated ahead of other pending matters, thereby enabling the Court to address issues of exceptional significance with procedural expediency.

5.2. Legal Effects of the Constitutional Court's Decision Regarding the Consideration of a Early Termination of the powers of a Member of Parliament

According to paragraph 5 of Article 60 of the Constitution of Georgia, "an act or part thereof recognized as unconstitutional shall lose its legal force from the moment of publication of the corresponding decision of the Constitutional Court, unless the decision provides for a different, deferred date for the loss of legal force of the act or its part". Accordingly, this provision applies to decisions of the Constitutional Court of Georgia declaring parliamentary acts unconstitutional in the context of the early termination of the powers of a Member of Parliament.

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47 Decree No1008-VIms-Xmp of 16 November 2021 of the Parliament of Georgia, <https://info.parliament.ge/file/1/BillReviewContent/285316?> [07.11.2025]; Decree No1363-VIIIms-Xmp of 15 February 2022 of the Parliament of Georgia, <https://info.parliament.ge/file/1/BillReviewContent/295030?> [07.11.2025].

48 Constitutional Court Law of the Republic of Latvia, 1993 <https://www.satv.tiesa.gov.lv/en/2016/02/04/constitutional-court-law/> [07.11.2025].

49 Constitutional Law of the Republic of Armenia on the Constitutional Court, 1995, Paragraph 9 of Article 79 <https://www.concourt.am/en/normative-legal-bases/constitutional-law#49> [07.11.2025].

The legal effects of the Constitutional Court's decision regarding the early termination of the powers of a Member of Parliament are regulated by the Organic Law of Georgia on the Constitutional Court. Moreover, the legal effect depends on the content of the contested parliamentary act, specifically: 1) If a parliamentary act terminating a Member of Parliament's mandate prematurely is challenged before the Constitutional Court, then, pursuant to subparagraph (a) of paragraph 6 of Article 23 of the Organic Law on the Constitutional Court of Georgia, the Court's satisfaction of the claim will result in the annulment of the contested act as of the moment it entered into force and the restoration of the Member's mandate. The inconsistency of the aforementioned provision with the Constitution has been emphasized by academician Joni Khetsuriani, who notes that the Constitutional Court's decision is granted retroactive effect. While such retroactivity may be justified in certain circumstances, it contradicts the provision of paragraph 5 of Article 60 of the Constitution of Georgia, which imperatively establishes that an act recognized as unconstitutional shall lose its legal force from the moment of publication of the corresponding decision of the Constitutional Court, unless the decision provides for a different, deferred date for the loss of legal force. Accordingly, in order to ensure conformity with the Constitution, the Organic Law requires amendment;[50] 2) If a parliamentary act by which a Member of Parliament's mandate was not prematurely terminated is challenged before the Constitutional Court, he satisfaction of the claim by the Court, in accordance with subparagraph (c) of paragraph 6 of Article 23 of the Organic Law on the Constitutional Court of Georgia, results in the annulment of the contested act from the moment of publication of the Constitutional Court's decision and the consequent early termination of the Member's mandate.

In light of the binding effect of the Constitutional Court's decisions, the first case analyzed above raises notable procedural and legal challenges. As previously observed, the Court's satisfaction of a constitutional claim results in the restoration of a Member of Parliament's mandate. Nevertheless, the existing legislative framework, including the Rules of Procedure of the Parliament of Georgia, does not regulate circumstances in which the Parliament is required to recognize the mandate of an alternative individual under the procedure for substitutes. Article 13 of the Rules of Procedure of the Parliament of Georgia (Principles governing the initiation of criminal proceedings against a Member of Parliament) regulates the sole case concerning the termination of a parliamentary mandate on the basis of a final criminal conviction. Specifically, pursuant to paragraph 6 of Article 13, a person's mandate is restored by a parliamentary decision if the mandate had been previously terminated due to a final criminal conviction that was subsequently overturned by an acquittal. Furthermore, the mandate of the substitute member of Parliament shall not be recognized. In cases where the mandate of the Member of Parliament cannot be restored, the duration of the mandate for the corresponding convocation of Parliament shall be counted towards the total term of the Member's mandate, and the Member shall be entitled to compensation corresponding to that period. Accordingly, if Parliament recognizes the mandate of a substitute Member, it becomes impossible to restore the mandate of the Member of Parliament. Compensation is provided only in the aforementioned case, while other cases are not regulated under the applicable legislation.

[50] *Khetsuriani, J.*, Powers of the Constitutional Court of Georgia, 2020, 208 (in Georgian).

From 2024 onwards, parliamentary elections will be conducted under a fully proportional system, characterized by party lists and, where necessary, the replacement of Members of Parliament through a substitute mechanism (in contrast to Members elected under a majoritarian system, for whom by-elections are held in the event of early termination of mandate). The Constitutional Court has also highlighted the problematic aspects concerning the restoration of a mandate, specifically noting that, "in the case of Nikanor Melia, a guilty verdict was passed by the court of first instance and was appealed to the court of higher instance. Even if the court of higher instance finds Nikanor Melia innocent, according to the Rules of Procedure of the Parliament of Georgia, it will be impossible for him to be reinstated, since Badri Basishvili's powers have already been recognized by the Resolution of the Parliament of Georgia №5699 of January 17, 2020 "On the Recognition of the Powers of the Expelled Member of the Parliament of Georgia, Badri Basishvili". Based on all the above, it is impossible to restore the authority of Nikanor Melia even if it is justified by the Court of Appeal or the Supreme Court".[51]

In order to remedy the aforementioned issue, it is advisable that legislation provide for the suspension of a Member of Parliament's mandate until the Constitutional Court has rendered a decision on the matter, and/or until the expiry of the legally established period for challenging a parliamentary decision concerning the early termination of the Member's mandate. It should be noted that the institution of suspending a Member of Parliament's mandate is envisaged by the Rules of Procedure of the Parliament of Georgia. Specifically, According to paragraph 4 of Article 13 of the Rules of Procedure of the Parliament of Georgia, if the Parliament consents to the arrest or detention of a Member of Parliament, the powers of the arrested or detained Member of Parliament shall be suspended by a decree for the period of arrest or detention. In addition, to avoid delaying the process of reviewing/making a constitutional claim on the issue of early termination of the powers of a member of Parliament at the Constitutional Court, it is necessary to determine the expedited timeframes.

6. Conclusion

The institution of the early termination of the powers of a Member of Parliament is grounded in the fundamental principles of a democratic state and is intended to preserve the authority of Parliament and ensure the effective and uninterrupted performance of its constitutional functions. At the same time, the improper, disproportionate, or arbitrary application of this mechanism may undermine the will of the people, who constitute the supreme source of state authority. The Constitution of Georgia defines, in accordance with the principle of „Numerus clausus", the grounds incompatible with the nature of a Member of Parliament's mandate and, at the same time, reinforces the guarantees protecting Member of Parliament from the arbitrary early termination of of the powers of a Member of Parliament.

[51] Judgment №3/2/1473 of 25 September 2020 of the Constitutional Court of Georgia on the case "Nikanor Melia v. the Parliament of Georgia", II-18,19 <https://constcourt.ge/ka/judicial-acts?legal=10128> [07.11.2025].

The Venice Commission considers it appropriate to regulate the essential aspects of the institution of premature termination of the powers of a Member of Parliament.[52] Procedural guarantees should be extended on this issue. Appealing the decision of the Parliament to the Constitutional Court seems to be an additional guarantee, but ought not to be appraised as a requirement.[53] Since the early termination of the powers leads to interference with the right, it is necessary to observe the proportionality considering the nature of the crime, its severity, and/or the duration of the sentence.[54] In such a case, the deprivation of the authority to hold public office serves the legitimate purpose of maintaining the proper functioning of the democratic order and supporting trust in it.[55]

The inclusion of any grounds for the early termination of the powers of a Member of Parliament on the agenda does not lead to the early termination of that mandate, as the matter is subject to a vote and requires the consent of Parliament. A decision adopted by Parliament in relation to the early termination of the powers of a Member of Parliament constitutes an individual legal act which may give rise to a violation of the norms established by the Constitution. Taking into account the specifics of the subject of the dispute, the Constitution attributed the resolution of the issue to the jurisdiction of the Constitutional Court.[56] Based on the fact that the political neutrality and impartiality of the Constitutional Court is an essential part of the principle of the rule of law[57] taking into account the importance of the issue of early termination of the powers of a Member of Parliament, the Constitutional Court of Georgia should not only evaluate the formal side but also analyze the Constitutionality of the resolution made by the Parliament.[58]

In order to remedy the problematic issues identified in the article, it is advisable to implement the following legislative amendments to the Organic Law of Georgia "On the Constitutional Court of Georgia": 1) It should be clarified whom the Constitution of Georgia refers to by the term "relevant representative", and the subjects entitled to challenge a parliamentary decision on the early termination of the powers of a Member of Parliament should be determined. This would resolve the legislative conflict between the Constitution of Georgia and the Organic Law of Georgia "On the Constitutional Court of Georgia"; 2) To avoid delaying the process of reviewing/making a constitutional claim on the issue of early termination of the powers of a Member of Parliament at the Constitutional Court (which is confirmed by practice), it is necessary to determine the expedited timeframes; 3) To eliminate ambiguity, the scope of application of the new ground for the early termination of the powers of a

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52 *Venice Commission,* Report on the exclusion of offenders from parliament, CDL-AD(2015)036, Opinion No. 807 / 2015, Strasbourg, 23 November 2018, §179.

53 *Venice Commission,* Amicus curiae brief for the European Court of Human Rights in the case of Berlusconi v. Italy, CDL-AD(2017)025, Opinion No. 898/2017, Strasbourg, 9 October 2017,§34.

54 *Venice Commission,* Report on the exclusion of offenders from parliament, CDL-AD(2015)036, Opinion No. 807 / 2015, Strasbourg, 23 November 2018, §168-171.

55 M.D.U. v. Italy, ECHR (FOURTH SECTION). 28 January 2003, <https://hudoc.echr.coe.int/eng?i=001-44046> [07.11.2025].

56 *Khetsuriani, J.,* Powers of the Constitutional Court of Georgia, 2020, 196 (in Georgian).

57 *Khubua G.,* Constitutional Court Between Law and Politics, Review of Constitutional Law №9, *2016,* 3.

58 *Khetsuriani J.,* Authority of the Constitutional Court of Georgia on the Issues of Constitutionality of Recognising or Preterm Termination of the Authority of a Member of the Parliament, Justice and Law №3(42), 2014, 19 (in Georgian).

Member of Parliament (introduced in Article 39(5) of the Constitution of Georgia) should be clarified. Moreover, the procedure for examining matters arising from this ground should be comprehensively and precisely regulated.

The legislative establishment of the institution for the suspension of a Member of Parliament's mandate, as proposed in the article, serves, on the one hand, to ensure that the Constitutional Court can examine and resolve matters concerning the early termination of a parliamentary mandate within a expedited timeframe, and, on the other hand, provides an individual with the opportunity to restore their mandate should the Constitutional Court uphold their constitutional claim and annul the decision by which their mandate was early terminated.

Finally, and most importantly, the use of the mechanism for the early termination of the powers of a Member of Parliament must not prejudice the interests of the electorate, which may be affected either by the early termination of a mandate or by the failure to implement such termination. Terminating a parliamentary mandate in violation of constitutional requirements arbitrarily overrides the will of the electorate. Similarly, when a mandate is not early terminated for a Member of Parliament who is unwilling to perform their duties, and the agenda provides for the mandate to be filled through a replacement mechanism, the electorate's interest (to exercise its authority through its representative(s)) is also violated. Accordingly, extending constitutional review to parliamentary decisions on the early termination of the powers of a Member of Parliament ensures that the matter is resolved in accordance with the requirements of the Constitution.

Bibliography:

1. Constitution of Georgia, 1995 <https://matsne.gov.ge/ka/document/view/30346?publication=36> [07.11.2025].
2. Organic Law of Georgia on the Constitutional Court of Georgia, Departments of the Parliament of Georgia, 001, 27/02/1996 <https://matsne.gov.ge/ka/document/view/32944?publication=38> [07.11.2025].
3. Organic Law of Georgia on Normative Acts, 33, 09/11/2009 <https://matsne.gov.ge/ka/document/view/90052?publication=41> [07.11.2025].
4. The Act on the Federal Constitutional Court of Germany, 1993 <https://www.gesetze-im-internet.de/bverfgg/index.html> [07.11.2025].
5. The Basic Law for the Federal Republic of Germany, 1949 <https://www.gesetze-im-internet.de/gg/index.html> [07.11.2025].
6. The Federalist Papers: No.51, <https://guides.loc.gov/federalist-papers/text-51-60> [07.11.2025].
7. Recording Notice No3/1-1/1473 of 13 January 2020 of the Constitutional Court of Georgia on the case "Nikanor Melia v. the Parliament of Georgia", <https://www.constcourt.ge/ka/judicial-acts?legal=3730> [07.11.2025].
8. Recording Notice No3 3/1-1/1565,1568,1569 of 26 February 2021 of the Constitutional Court of Georgia on the case "Zurab Girchi Japaridze, Tamar Kordzaia and Elene Khoshtaria v. the Parliament of Georgia", <https://www.constcourt.ge/ka/judicial-acts?legal=10762> [07.11.2025].
9. Constitutional Court Law of the Republic of Latvia, 1993 <https://www.satv.tiesa.gov.lv/en/2016/02/04/constitutional-court-law/> [07.11.2025].

10. Constitution of Ukraine, 1991 <https://zakon.rada.gov.ua/laws/show/en/254%D0%BA/96-%D0%B2%D1%80#Text> [07.11.2025].
11. Constitutional Law of the Republic of Armenia on the Constitutional Court, 1995 <https://www.concourt.am/en/normative-legal-bases/constitutional-law#49> [07.11.2025].
12. Constitution of Finland, 1999, section 28 <https://oikeusministerio.fi/en/constitution-of-finland> [07.11.2025].
13. Concurring Opinion of Justice Teimuraz Tugushi on Recording Notice №3/1/1473 of 26 January 2021 of the Constitutional Court of Georgia on the case "Nikanor Melia v. the Parliament of Georgia", II-7,8. <https://www.constcourt.ge/ka/judicial-acts?legal=3932> [07.11.2025].
14. Decree No1008-VIms-Xmp of 16 November 2021 of the Parliament of Georgia, < [07.11.2025].
15. Decree No1363-VIIIms-Xmp of 15 February 2022 of the Parliament of Georgia, <https://info.parliament.ge/file/1/BillReviewContent/295030?> [07.11.2025].
16. The Rules of Procedure of the Parliament of Georgia, 2025 <https://matsne.gov.ge/document/view/6494611?publication=3> [07.11.2025].
17. *Barak A.*, Purposive Interpretation in Law, Translated from Hebrew by Sari Bashi, Princeton, New Jersey, 2005.
18. *Chafetz J.*, Leaving the House: The Constitutional Status of Resignation from the House of Representatives, Duke Law Journal, Vol. 58, No2, 2008.
19. *Dicke K., Stoll T.*, Freies Mandat, Mandatsverzicht Des Abgeordneten Und Das Rotationsprinzip Der GRÜNEN. Zeitschrift Für Parlamentsfragen, vol.16, no.4,1985.
20. *Kakhiani G.*, Constitutional Control in Georgia, Theory and Analysis of Legislation, 2011 (in Georgian).
21. *Khetsuriani J.*, Authority of the Constitutional Court of Georgia on the Issues of Constitutionality of Recognising or Preterm Termination of the Authority of a Member of the Parliament, Justice and Law №3(42), 2014 (in Georgian).
22. *Khetsuriani J.*, Powers of the Constitutional Court of Georgia, 2020 (in Georgian).
23. *Khubua G.*, Constitutional Court Between Law and Politics, Review of Constitutional Law №9, 2016 (in Georgian).
24. *Kobakhidze I.*, Constitutional Law, Tbilisi, 2023 (in Georgian).
25. *Loladze B.*, Das Rechtsstaatsprinzip in der Verfassung Georgiens und in der Rechtsprechung des Verfassungsgerichts Georgiens, Potsdam, 2015 (in Georgian).
26. *Loladze B., Matcharadze Z., Pirtshalashvili A.*, Constitutional Justice, 2021 (in Georgian)
27. *Montesquieu*, The Spirit of Laws, 11:4.
28. *Nemtoi G., Nesteriuc O.*, The Status of the Member of Parliament in Relationship with the Legal and Ethical Norms, European Journal of Law and Public Administration, Vol.6, Issue 2, 2019.
29. *Redish M. H., Arnould M. B.*, Judicial Review, Constitutional Interpretation, and the Democratic Dilemma: Proposing a "Controlled Activism" Alternative, Florida Law Review, Vol. 64, Issue 6, 2012.
30. *Roznai Y.*, The Straw that Broke the Constitution's Back? Qualitative Quantity in Judicial Review of Constitutional Amendments, Constitutionalism: Old Dilemmas, New Insights, edited by Alejandro Linares Cantillo, Oxford University Press, 2021.
31. *Sajó A., Uitz R.*, The Constitution of Freedom: an Introduction to Legal Constitutionalism, Oxford University Press, 2017.

32. *Sergeev D. N.*, Constitutional Justice in Russia: A Political and Legal Study, Dissertation for the Degree of Candidate of Political Sciences (manuscript), 2005 (in Russian).
33. *Solum L. B.*, The Interpretation-Construction Distinction, Georgetown Law Faculty Publications and Other Works, 2010.
34. *Strøm K., Mueller W. C., Bergman T.*, Delegation and Accountability in Parliamentary Democracies, Oxford University Press, 2005.
35. *Vanberg G.*, Legislative-Judicial Relations: A Game-Theoretic Approach to Constitutional Review, Florida State University, American Journal of Political Science, Vol.45, №2, 2001.
36. *Venice Commission*, Report on Democracy, Limitation of mandates and Incompatibility of political functions, CDL-AD(2012)027, Study No. 646 / 2011, Strasbourg, 17 December 2012.
37. *Venice Commission*, Amicus curiae brief for the European Court of Human Rights in the case of Berlusconi v. Italy, CDL-AD(2017)025, Opinion No. 898/2017, Strasbourg, 9 October 2017.
38. *Venice Commission*, Report on the exclusion of offenders from parliament, CDL-AD(2015)036, Opinion No. 807 / 2015, Strasbourg, 23 November 2018.
39. *Venice Commission*, Amicus Curiae Brief for the Constitutional Court of Ukraine on draft law 1027 on the early termination of a Deputy's mandate, CDL-AD(2019)029, Opinion No. 971/2019, Strasbourg, 9 December 2019.
40. *Winfried S.*, Edmund Burke: Zur Vereinbarkeit Von Freiem Mandat Und Fraktionsdisziplin. Zeitschrift Für Parlamentsfragen, vol.12, no.1., 1981. <www.jstor.org/stable/24214828> [07.11.2025].
41. *Ziekow J.*, Rotation Von Mandatsträgern, Zeitschrift Für Parlamentsfragen, vol. 21, no. 4, 1990.
42. *M.D.U. v. Italy*, ECHR (FOURTH SECTION). 28 January 2003, https://hudoc.echr.coe.int/eng?i=001-44046 [07.11.2025].
43. Judgment №3/2/378 of 13 July 2006 of Georgia on the case "Citizen of Georgia Valeri Gelashvili v. The Parliament of Georgia", <https://constcourt.ge/ka/judicial-acts?legal=272> [07.11.2025] (in Georgian).
44. Judgment №3/2/574 of 23 May 2014 of the Constitutional Court of Georgia on the case "Giorgi Ugulava v. the Parliament of Georgia", II-21, <https://www.constcourt.ge/ka/judicial-acts?legal=1032> [07.11.2025] (in Georgian).
45. Judgment №3/2/1473 of 25 September 2020 of the Constitutional Court of Georgia on the case "Nikanor Melia v. the Parliament of Georgia", II-30, <https://constcourt.ge/ka/judicial-acts?legal=10128> [07.11.2025] (in Georgian).
46. Judgment №1/7/1688 of 4 November 2022 of the Constitutional Court of Georgia on the case "Shalva Natelashvili v. the Parliament of Georgia", <https://www.constcourt.ge/ka/judicial-acts?legal=14358> [07.11.2025] (in Georgian).
47. Kart v. Turkey, ECHR (Application no. 8917/05), 3 December 2009, §101 <https://hudoc.echr.coe.int/eng?i=001-96007> [07.11.2025].
48. Ruling No 3/1/1581 of 5 April 2021 of the Constitutional Court of Georgia, on the case Shalva Natelashvili v. the Parliament of Georgia, https://constcourt.ge/ka/judicial-acts?legal=11050 [07.11.2025] (in Georgian).
49. Kokëdhima v. Albania, ECHR (THIRD SECTION), 11 June 2024, §66-70 <https://hudoc.echr.coe.int/eng?i=001-234125> [07.11.2025].

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Extradition Through the Lens of Articles 3 and 6 of the European Convention on Human Rights: Challenges Facing Georgia

In the context of Georgia's international cooperation in criminal matters, compliance with Council of Europe standards is of fundamental importance in extradition proceedings. Accordingly, the analysis of specific provisions of the European Convention on Human Rights[1] (hereinafter – the European Convention) holds both academic and practical relevance. The present study aims to analyse the protective standards enshrined in Articles 3 and 6 of the European Convention in the context of extradition proceedings and evaluates the degree to which these standards are implemented within Georgian legal practice. The article examines how effectively Georgian courts and executive authorities assess real risks in extradition cases and whether the fundamental rights of individuals are adequately safeguarded.

The protection of human rights in the context of extradition is particularly significant in Georgia, where existing practice demonstrates formal adherence to legal standards but not always their effective enforcement. The study identifies this issue as a weakness within Georgia's domestic legal framework and as a potential ground of the state's international responsibility. The article discusses the ongoing challenges related to ensuring human rights protection during extradition and proposes possible avenues for addressing these deficiencies.

Keywords: *extradition, extradition and human rights, prohibition of torture, right to a fair trial.*

1. Introduction

Extradition, as a formal legal mechanism governing interstate cooperation, plays a vital role in ensuring accountability for criminal conduct and combating impunity.[2] It also plays a pivotal role in enabling states to confront transnational crime and to address counter-terrorism objectives.[3] An analysis of Georgian judicial practice reveals that extradition constitutes a consistently developed and relatively active legal instrument, while the range of requesting states remains notably diverse.[4]

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1 Convention for the Protection of Human Rights and Fundamental Freedoms, CETS, 1950.

2 *Moodrick-Even Khen H.,* Mutual Legal Assistance and Double Criminality: Bolstering the Struggle against Impunity Outside the ICC Framework, Journal of International Criminal Justice, Vol. 23, №1, 2025, 87, 93-94.

3 *Clarke A.,* Terrorism, extradition, and the Death Penalty, William Mitchell Law Review, Vol. 29, №3, 2003, 783, 785-87.

4 See the analysis of the Supreme Court of Georgia's Jurisprudence on Extradition: <https://www.supremecourt.ge/uploads/files/1/ANALITIKURI/eqstraditsia.pdf> [29.08.2025] (in Georgian).

The protection of individuals from torture, which encompasses the prohibition of inhuman or degrading treatment or punishment,[5] is an absolute right from which no derogation is permitted, even in times of emergency or armed conflict.[6] According to the standards established in the case law of the European Court of Human Rights (hereinafter – the European Court or the Court), assessing compliance with this right during extradition proceedings requires a meticulous and rigorous examination.[7] States parties to the European Convention also bear a comparably robust obligation to safeguard the right to a fair trial.[8] This article examines the factors that states must consider when conducting such assessments and critically evaluates the legal and practical application of these standards in Georgian extradition practice.

Georgian legislation does not explicitly define the standard for protecting human rights in extradition cases; rather, it relies on the framework of international law and domestic judicial practice. Accordingly, the central question of this study is whether the Georgian judiciary and executive authorities properly assess and prevent the real risk of violations of Articles 3 and 6 of the European Convention during extradition proceedings. This issue is especially significant, as an improper assessment may reveal both theoretical and practical deficiencies in Georgia's legal system and expose the state to potential international legal responsibility before the European Court or other international tribunals.[9] According to established international standards, states not only share a collective interest in, but also bear an obligation to, prevent torture, and this obligation applies in every individual case.[10]

Alongside the need to protect human rights, the issue of diplomatic assurances remains highly significant and, within the European Court's jurisprudence, problematic; such assurances may at times play a decisive role in extradition proceedings.[11] However, the format and scope of the present article do not permit a detailed exploration of this topic.

This study uses a doctrinal methodology, summarising and analysing relevant legislation and judicial decisions to test the accuracy of theoretical conclusions against practical outcomes.[12] To illustrate Georgia's challenges in the field of extradition, the article also examines recent high-profile cases involving Azerbaijani journalists,[13] highlighting the gaps evident in the practices of both the judiciary and executive authorities. The article assesses the extent to which Georgia's institutional and legal framework ensures effective compliance with international standards, particularly in cases involving risks of political persecution, forcible transfer, or inhuman treatment.

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5 Convention for the Protection of Human Rights and Fundamental Freedoms, Article 3, CETS, 1950.

6 Ibid, Article 15.

7 *Dugard J., Van den Wyngaert C.,* Reconciling Extradition with Human Rights, The American Journal of International Law, Vol.92, №2, 1998, 187, 197-99.

8 Convention for the Protection of Human Rights and Fundamental Freedoms, Article 6, CETS, 1950.

9 Soering v. United Kingdom [1989] ECHR (Ser. A.), 161, § 91; Othman (Abu Qatada) v. the United Kingdom [2012] ECHR, § 183-187; Mamatkulov and Askarov v. Turkey [2005] ECHR, § 69.

10 Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment, [2012] ICJ Reports, 422, § 69.

11 Othman (Abu Qatada) v. the United Kingdom [2012] ECHR, § 73, § § 188-189.

12 *Brownsword R*., An Introduction to Legal Research, essay King's College London, 2006, 3.

13 A.S. v. Georgia [2025] ECHR.

By examining the interaction between extradition and human rights protection, the article contributes to the advancement of Georgian legal scholarship. It addresses existing gaps in understanding the practical implementation of international standards. The findings may serve as a valuable resource in legislative and policy development, the elaboration of risk-assessment criteria, and the harmonisation of judicial practice.

2. Legal Mechanisms Governing Extradition

To achieve the objectives of the study, this section analyses the legal framework for extradition under the European Convention, its aims and significance in inter-state cooperation, as well as the implementation of these mechanisms in Georgian legislation and the challenges that persist in practice.

The 1957 European Convention on Extradition[14] (hereinafter – the Extradition Convention or the Convention) constitutes the first multilateral extradition treaty at the regional level.[15] All member states of the Council of Europe become parties to the Convention upon ratification or accession.[16] The Convention also enables non-member states to accede upon agreement of the ratifying states.[17] The Russian Federation also remains a party to the Convention despite its expulsion from the Council of Europe following its aggression against Ukraine.[18] The Convention provides the formal framework for regulating extraditions and remains one of the most significant instruments in this field.[19]

In addition to the Extradition Convention, Georgia is also a party to the Convention on Legal Assistance and Legal Relations in Civil, Family, and Criminal Matters[20] (the Minsk Convention), a multilateral treaty among the Commonwealth of Independent States (CIS) member states, which Georgia continues to apply despite its withdrawal from the CIS.[21]

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14 European Convention on Extradition, European Treaty Series, 1957. Georgia is also a State Party to the First and Second Additional Protocols to the European Convention on Extradition and has signed the Third and Fourth Additional Protocols. See: <https://www.coe.int/en/web/conventions/full-list> [29.08.2025].

15 *Bassiouni M. C.*, International Extradition United States Law and Practice, 6th ed., Oxford, 2014, 23-24.

16 See: <https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=024> [20.09.2025].

17 European Convention on Extradition, Article 30, European Treaty Series, 1957. The non-member States of the Council of Europe that are Parties to the Extradition Convention are: Israel, the Republic of Korea, the Republic of South Africa, Chile, and the Russian Federation. See: <https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=024> [29.08.2025].

18 On the expulsion of the Russian Federation from the Council of Europe, see: Resolution CM/Res(2022)1 on legal and financial consequences of the suspension of the Russian Federation from its rights of representation in the Council of Europe adopted by the Committee of Ministers on 2 March 2022 at the 1427th meeting of the Ministers' Deputies, § 6.

19 *Zanotti I.*, Extradition in Multilateral Treaties and Conventions, Netherlands, 2006, 1.

20 Convention on Legal Aid and Legal Relations in Civil, Family and Criminal Cases, CIS-2-93-01, Adopted in Minsk on 22 January 1993 (in Georgian).

21 Resolution of the Parliament of Georgia on the Termination of the Application of the "Charter of the Commonwealth of Independent States, Approved by the Decision of the Council of Heads of States of the Commonwealth of Independent States of January 22, 1993" with respect to Georgia, Georgian Legislative Herald, 117, 14.08.2008 (in Georgian).

The Extradition Convention outlines the formal rules of cooperation among states and does not address the determination of guilt or innocence by the requesting state. During the drafting of the Convention, two principal approaches emerged: whether priority should be given to the fight against crime, or whether humanitarian limitations and the conclusion of bilateral or multilateral agreements should be afforded greater weight.[22] In this context, the proposal suggested by the Scandinavian States, emphasising the protection of individual rights and mutual trust, did not receive broad support. As a result, States ultimately agreed upon a traditional extradition treaty model that incorporates humanitarian exceptions and provides the possibility of requesting supplementary evidence.[23] While the rising number of extradition agreements among Council of Europe member States may weaken the uniform application of the Convention, given that States with closer ties often require more detailed regulation, it nevertheless remains a widely used, successful, and effective instrument across the continent.[24]

Consistent with the Convention and with centuries of inter-State cooperation, the final decision on extradition remains within the competence of political authorities, notwithstanding the involvement of the judiciary or the prosecution service at various procedural stages.[25] The role of the judiciary is limited to a one-time review of the admissibility of extradition, whereas the final decision rests with the executive branch.[26] This international standard is likewise reflected in Georgian domestic law. Matters relating to extradition are regulated by the Law of Georgia on International Cooperation in Criminal Matters[27] (hereinafter – the Law). While the judiciary is responsible for determining the admissibility of extradition, the ultimate political decision rests with the Minister of Justice.[28]

The Law also sets out grounds upon which extradition is prohibited, for instance, where transfer would involve risks of persecution, torture, inhuman treatment, concerns regarding minority status or health, prosecution by special tribunals, or conflicts with Georgia's sovereignty, security, or international obligations.[29] However, the relevant Georgian legal framework does not provide a direct or comprehensive definition of the standards governing the evaluation of human-rights risks.

To bridge the theoretical framework outlined above with its practical application, it is appropriate to consider recent jurisprudence emerging from the Georgian courts. Particularly noteworthy is the case of Azerbaijani journalist Afgan Sadigov.[30] The case demonstrates that, in

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22 Explanatory Report to the European Convention on Extradition, §§ 9-10, <https://rm.coe.int/16800c92bc > [29.08.2025].

23 Ibid, § 13.

24 *Gilbert G.,* Responding to International Crime, Netherlands, 2006, 38.

25 *Caraballo A.L., Conti-Cook C., Pierre Y., McGrath M., Aarons H.*, Extradition in Post-Roes America, City University of New York Law Review, Vol. 26, №1, 2023, 1, 40-41.

26 Ibid, 39.

27 Law of Georgia on International Cooperation in Criminal Matters, Georgian Legislative Herald 48, 09/08/2010 (in Georgian).

28 Ibid, Article 34.

29 Ibid, Article 29

30 Decision of December 9, 2024, №2K-211-I-24 of the Criminal Case Chamber of the Supreme Court of Georgia.

extradition proceedings, mere formal compliance with legislative requirements or, in some instances, established practice, is insufficient to ensure genuine protection of human rights.[31]

The case further highlights the serious challenge of balancing a State's international legal obligations in the field of extradition with the imperative to protect human rights standards. Sadigov, widely recognised in Baku as a politically oppressed journalist and a political prisoner, faced a real and substantial risk of persecution and ill-treatment upon return.[32] Despite numerous submissions and the arguments by the defence, Georgia eventually granted the extradition request.[33] At a glance, the decision formally complied with the domestic legal requirements. However, on the other hand, the European Court's subsequent interim measure suspending the extradition[34] highlighted serious deficiencies in Georgia's practical handling of the case. It is also well-known that the Court applies interim measures only in exceptionally limited circumstances, namely where an imminent risk of irreparable harm exists.[35] Thus, the protection of Sadigov's rights against possible authoritarian persecution was achieved only through the intervention of the European Court.

Although not directly involving extradition, the case of another Azerbaijani journalist, Afgan Mukhtarli, is equally relevant, as it concerns allegations of kidnapping and forcible transfer.[36] The case, which involved claims of abduction, ill-treatment, and forced transfer to Azerbaijan, was brought before the European Court. The application concerned alleged kidnapping, inhuman treatment, and unlawful transportation to Azerbaijan, as well as the ineffectiveness of the subsequent investigation, acts that were apparently carried out to suppress his journalistic activities.[37] The Court held that Georgia had failed to conduct an effective investigation into the applicant's abduction and transfer.[38] Key deficiencies in the investigation included unwarranted delays, substandard handling of critical video-surveillance evidence and insufficient efforts to verify the statements of Azerbaijani officials.[39] Transfers of individuals from one State's jurisdiction to another must serve only a single legitimate purpose: the enforcement of a sentence or the conduct of judicial proceedings.[40] The Court further emphasised that Georgian investigative bodies had not ensured an effective investigation, and more than seven years later, the central question, on whose instructions and for what reason the journalist was abducted, remains unanswered.[41]

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31 Ibid.

32 Amnesty International's International Secretariat Letter to the Georgian Ministry of Justice <https://socialjustice.org.ge/uploads/products/pdf/TG-EUR-56.2024.6250_1731662698.pdf?ref=oc-media.org> [20.09.2025].

33 Decision of December 9, 2024, №2K-211-I-24 of the Criminal Case Chamber of the Supreme Court of Georgia.

34 A.S. v. Georgia [2025] ECHR.

35 Mamatkulov and Askarov v. Turkey [2005] ECHR, § 104.

36 Mukhtarli v. Azerbaijan and Georgia [2024] ECHR.

37 Ibid, § 1.

38 Ibid, §§ 157-69.

39 Ibid.

40 *Arnell P., Walker C*., The Ressurection of the Political Offence Exception to Extradition in UK Law, New Journal of European Criminal Law, Vol. 15, №4, 2024, 412, 413.

41 Mukhtarli v. Azerbaijan and Georgia [2024] ECHR, §§ 158-60.

The analysis presented in this section demonstrates that, despite the existence of a formal legal framework established by the Extradition Convention and Georgian domestic legislation, the practical challenge of balancing international obligations with the protection of human rights standards remains a pressing concern. For Georgia, strict adherence to the standards articulated by the European Court, the development of transparent criteria for risk assessment, and decision-making free from political influence are essential to preventing future violations of a similar nature. It must also be recognised that these issues extend beyond the infringement of individual rights: they involve questions of State responsibility under the relevant legal mechanisms, encompassing both legal and political dimensions.

3. The European Court's Standard in Extradition Cases

This section examines the intersection of international human rights law and extradition mechanisms, highlighting the importance of balancing fundamental rights with good-faith cooperation among states in criminal matters.[42]

Human rights treaties do not explicitly regulate extradition nor prohibit it;[43] yet, extensive case law and state practice clearly demonstrate the close connection between extradition and the protection of fundamental rights.[44] International human rights law establishes limits on the permissible conditions of extradition to safeguard individuals from irreversible harm.[45]

3.1. Standards Under Article 3 of the European Convention

The first substantive intersection between extradition and human rights in the Court's case law emerged in the *Soering* case,[46] where the Court addressed the potential human rights violations in the extradition process and established fundamental standards that are still applied today.[47] These standards have been used for decades and have come to play a decisive role not only in the assessment of extradition cases but also in the evaluation of deportation and expulsion proceedings.[48]

The Court reaffirmed that states generally bear obligations under the Convention only toward persons within their jurisdiction and are not responsible for imposing Convention standards on non-

42 *Arnell P.,* The Universality of Human Rights in UK Extradition Law, Transnational Criminal Law Review, Vol.1, №1, 2022, 52, 60-61.

43 Convention for the Protection of Human Rights and Fundamental Freedoms, CETS, 1950; American Convention on Human Rights, UNTS, 1969, 144; African Charter on Human and Peoples' Rights, UNTS, 1981, 217.

44 *Magnuson W.,* The Domestic Politics of International Extradition, Virginia Journal of International Law Vol. 52, №4, 2012, 839, 852-54.

45 *Gilbert G*., Aspects of Extradition Law, Netherlands, 2022, 80-81.

46 Soering v. United Kingdom [1989] ECHR (Ser. A.), 161.

47 *Arnell P.,* The Universality of Human Rights in UK Extradition Law, Transnational Criminal Law Review, Vol.1, №1, 2022, 52, 57.

48 *Khutsishvili K*., Extradition and Deportation under the European Convention on Human Rights, in European Human Rights Standards and Their Impact on Georgian Legislation and Practice, ed. *Korkelia K.* (*ed.*), Tbilisi, 2006, 313, 317-20 (in Georgian).

member states.[49] The Court also acknowledged the relevance of other instruments, such as the 1951 Refugee Convention,[50] the Extradition Convention,[51] and the UN Convention against Torture,[52] which specifically addresses the risks arising from the transfer of an individual to another jurisdiction.[53] Nonetheless, the Court held that these considerations do not mitigate the state's responsibility under Article 3 for foreseeable consequences of extradition.[54] The Court thus established that a state bears liability where extradition exposes an individual to a "real risk" of torture or inhuman or degrading treatment.[55] Consequently, even without territorial jurisdiction, the state must refrain from transferring individuals to such risks, requiring a thorough and independent assessment of the requesting state's legal system and conditions.[56]

In the same case, the Court emphasised that the Convention, as a treaty establishing a collective enforcement mechanism for human rights, must be interpreted in a manner that ensures its safeguards are applied practically and effectively, consistent with the ideals of a democratic society.[57] The extradition of an individual to a state where there are substantial grounds for believing that he or she would be subjected to torture, or to inhuman or degrading treatment or punishment, is fundamentally incompatible with the very essence of the Convention.[58] Although Article 3 does not explicitly refer to extradition, the Court has established an implied obligation on States not to surrender individuals to circumstances in which they would face a real risk of such prohibited ill-treatment.[59] In this way, the Convention's protective regime has been extended extraterritorially.

Subsequently, the "real risk" test was expanded to encompass an assessment of the "substantial grounds" for a potential violation of Article 3 not only in extradition but also in deportation and expulsion cases.[60] One of the notable examples of the Court's application of the real risk test outside the extradition context is the *Chahal* case, in which, while assessing the real risk, the Court relied on assessments by UN experts, reports by Amnesty International, the U.S. Department of State, and other credible sources.[61] Importantly, responsibility does not arise from establishing the requesting State's

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49 Soering v. United Kingdom [1989] ECHR (Ser. A.), 161, § 86.

50 Convention Relating to the Status of Refugees, Article 33, UNTC, 1951, 137.

51 European Convention on Extradition, Article 11, European Treaty Series, 1957

52 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 3, UNTC, 1984, 113.

53 Soering v. United Kingdom [1989] ECHR (Ser. A.), 161, § 86.

54 *Arnell P.,* The Imposition of European Convention on Human Rights Standards in Extradition, Scots Law Times, 2024, 221, 222.

55 Soering v. United Kingdom [1989] ECHR (Ser. A.), 161, § 86.

56 *Shea M.P.*, Expanding Judicial Scrutiny of Human Rights in Extradition Cases After Soering, Yale Journal of International Law, Vol. 17, 1992, 85, 86.

57 Soering v. United Kingdom [1989] ECHR (Ser. A.), 161, § 87.

58 Ibid. § 88.

59 Ibid.

60 See: Ahmed v. Austria [1996] ECHR; H.L.R. v. France [1997] ECHR; D v. United Kingdom [1997] ECHR; Mamatkulov and Askarov v. Turkey [1999] ECHR. See: Cruz Varas and Others v. Sweden [1991] ECHR, § 75-76, Vilvarajah and Others v. UK [1991] ECHR, § 107.

61 Chahal v. the United Kingdom [1996] ECHR § 95-107.

liability; rather, it derives from the act of the transferring State in exposing an individual to a foreseeable risk of ill-treatment.[62] To fall within the scope of Article 3, the ill-treatment must reach a minimum level of severity, assessed with reference to factors such as its nature, duration, method, and consequences, and any allegations must be supported by credible and relevant evidence.[63]

More recent jurisprudence emphasises that an individual must not be exposed to an "unsubstantiated risk" of transfer to a State where systemic deficiencies affect the asylum or protection system, an approach that applies across all forms of forced removal.[64] A State is therefore obliged not only to refrain from extradition, deportation, or expulsion where such risks exist, but also to take proactive measures to assess and mitigate them.[65] This requires a rigorous pre-transfer examination of all relevant circumstances and, where necessary, the adoption of interim measures, including a substantive, not merely formal, evaluation of diplomatic assurances.[66] A well-founded risk assessment must rely on a sufficiently broad and qualitative range of sources, including reports from UN special rapporteurs, documentation from non-governmental organisations, and information from diplomatic missions. Accordingly, States must rely not on formal guarantees alone, but on the actual human rights practices of the requesting State.[67]

The Court has also become increasingly strict in evaluating transfers to States where the use of torture is widespread and/or increasing.[68] Its scrutiny is especially rigorous concerning authoritarian regimes,[69] in which systemic failings in justice and detention systems make individualised assurances essentially ineffective in guaranteeing protection against unlawful ill-treatment.[70] Evaluation of real risk additionally requires careful consideration of both the burden and the standard of proof. It is essential to underline that this evidentiary inquiry does *not* concern the criminal law standards of proof, such as proof beyond a reasonable doubt or probable cause, related to establishing guilt.[71]

Extradition is a mechanism through which one State cooperates with another State's criminal justice system, and the required evidence relates not to guilt or innocence, but to circumstances that may preclude or impede the extradition procedure. Thus, unless there exist statutory, treaty-based, or other legal barriers to surrender, the individual is presumed extraditable. Additional evidence may be requested to clarify or verify relevant circumstances. Consequently, at the initial stage, the burden of proof lies with the person alleging a risk. The applicant must present evidence substantiating the

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62 Mamatkulov and Askarov v. Turkey [2005] ECHR, § 67-70.

63 Ibid.

64 M.S.S. v. Belgium and Greece [2011] ECHR, § 341-343.

65 *Gilbert G.,* Responding to International Crime, Netherlands, 2006, 371-73.

66 J.K. and Others v. Sweden [2016] (GC) ECHR, § 87-88, § 91.

67 Ibid, § 89-90.

68 Saadi v. Italy [2008] (GC) ECHR, § 127-33**;** Hirsi Jamaa and Others v. Italy [2012] (GC) ECHR, § 122-25.

69 Shamayev and Others v. Georgia and Russia [2005] ECHR, § 344-53; Garabayev v. Russia [2007] ECHR, § 72-80; Ismoilov and Others v. Russia [2008] ECHR, § 121-27; Mammadov (Jalaloglu) v. Azerbaijan, [2007] ECHR, § 66-75; M.A. v. France, [2018] ECHR, § 54.

70 Ismoilov and Others v. Russia [2008] ECHR*,* § 121; Garayev v. Azerbaijan [2010] ECHR*,* § 74.

71 Law of Georgia Criminal Procedure Code of Georgia, Article 3, subparagraphs 11 and 13, Georgian Legislative Herald, 31, 03/11/2009 (in Georgian).

alleged danger.[72] Once such a prima facie case is established, the burden shifts to the State, which must prove that no such risk exists.[73]

In conclusion, despite the sovereign authority of States over extradition, expulsion, and deportation decisions, this authority is constrained by the obligations arising under Article 3 of the Convention: no Contracting State may transfer an individual to another jurisdiction where a real risk of prohibited ill-treatment exists. As the requested State bears international responsibility, the assessment of potential risk must be precise, evidence-based, and consistent with the Convention's fundamental values.

3.2 Standards Under Article 6 of the European Convention

A distinction must be drawn between, on the one hand, the submission or request of evidence for the determination of the admissibility of extradition, and, on the other hand, the protection of the right to a fair trial under Article 6 of the European Convention during extradition proceedings.[74] It took the European Court twenty-two years to establish a violation of Article 6 in an expulsion case.[75] In its earlier jurisprudence,[76] the Court consistently held that disputes concerning a foreign national's "entry, stay, and deportation" did not involve the determination of civil rights or obligations, or a criminal charge, within the meaning of Article 6(1) of the Convention.[77]

According to the Court, the notions of "civil rights and obligations" and "criminal charge" in Article 6(1) are autonomous concepts under the Convention and cannot be defined exclusively by reference to domestic law.[78] In reviewing extradition decisions, domestic courts determine only whether the legal prerequisites for extradition are met.[79] The substantive examination of the charges and the assessment of criminal liability take place only after extradition, in the requesting State. Consequently, the full spectrum of fair-trial guarantees associated with judicial proceedings is not required at the extradition stage.[80]

For the purposes of the present study, it is also necessary to examine Article 6(2) of the Convention. Under this provision, an individual "shall be presumed innocent until proved guilty according to law." From the moment the requesting State seeks extradition based on alleged criminal conduct, the individual is considered "accused" for Article 6. The presumption of innocence

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72 Saadi v. Italy [2008] ECHR, § 129; NA. v. the United Kingdom [2008] ECHR, § 111.

73 Ibid.

74 In the Soering case, the applicant also sought a declaration of a violation of Article 6(3)(c) of the European Convention; however, the Court did not find a violation of the right to a fair trial in the case. see.: Soering v United Kingdom [1989] ECHR, § 113.

75 *Langford P.,* Extradition and Fundamental Rights: The Perspective of the European Court of Human Rights, The International Journal of Human Rights, Vol. 13, №4, 2009, 512, 515-18.

76 Mamatkulov and Askarov v. Turkey [2005] ECHR, § 82.

77 Maaouia v. France [2000] ECHR, § 40.

78 Ibid*,* § 34.

79 *Gilbert G.,* Aspects of Extradition Law, Netherlands, 2022, 89.

80 *Arnell P*., The Contrasting Evolution of the Right to a Fair Trial in UK Extradition Law, The International Journal of Human Rights, Vol. 22, №7, 2018, 869, 874.

constitutes a fundamental status that attaches from the moment a charge arises.[81] "The determination of a criminal charge," in turn, pertains to the main proceedings in which guilt or innocence is determined. Since such a determination does not occur during the extradition hearings, the procedural guarantees under Article 6(1) and the related rights under Article 6(3) are not triggered at that stage. Nevertheless, in relation to the accused status,[82] the individual is already treated as an "accused," even though the trial has not yet commenced in the requesting State. It is precisely this status that activates the fundamental protection of the presumption of innocence under Article 6(2).

The case of *Abu Qatada* constitutes one of the most significant precedents developed by the Court, establishing that removal of a person may violate Article 6 of the European Convention if there is a real risk that evidence obtained through torture will be used at trial.[83] In that case, the Court concluded that Article 6 had been violated in its entirety, rather than identifying a breach of any specific paragraph of the article.[84]

Prior to the case reaching the European Court, the UK House of Lords had concluded that Abu Qatada's deportation to Jordan, despite the real risk of reliance on evidence obtained by torture, did not meet the threshold of a "flagrant denial of justice" as defined in the Court's case law.[85] This lower standard, applied domestically, clearly indicated that the case would require review by the European Court.[86]

According to the European Court, where there are substantial grounds for believing that the requesting State's judicial system will not secure the right to a fair trial in accordance with Article 6,[87] extradition is impermissible.[88] In such circumstances, the State is required to evaluate the level of judicial independence in the requesting state, the manner in which evidence has been obtained, and the existence of other essential guarantees of a fair trial.[89]

Although Georgian legislation regulates extradition consistently with the European Convention and other international instruments, an examination of Georgia's recent cases[90] suggests that it remains unclear to what extent domestic courts assess whether the requesting State will ensure fair-trial standards during subsequent proceedings.[91] Strengthening the extradition framework, therefore,

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81 *Caraballo A.L., Conti-Cook C., Pierre Y., McGrath M., Aarons H.*, Extradition in Post-Roes America, City University of New York Law Review, Vol. 26, №1, 2023, 1, 30.

82 In the context of subparagraphs 2 and 3 of Article 6 of the European Convention.

83 Othman (Abu Qatada) v. UK [2012] ECHR, § 265-85.

84 Ibid, § 287.

85 RB (Algeria) (FC) and another (Appellants) v Secretary of State for the Home Department OO (Jordan) (Original Respondent and Cross-appellant) v Secretary of State for the Home Department (Original Appellant and Cross-respondent), [2009] UKHL 10.

86 *Garrod M.*, Deportation of Suspected Terrorists with 'Real Risk' of Torture: The House of Lords Decision in Abu Qatada, Modern Law Review, Vol. 73, №4, 2010, 631, 634-36.

87 *Arnell P., Walker C.*, The Resurrection of the Political Offence Exception to Extradition in UK Law, New Journal of European Criminal Law, Vol. 15, №4, 2024, 412, 429.

88 Parlanti v. Germany [2005] ECHR, § 5; Othman v. UK [2012] ECHR, § 258.

89 Othman v. the United Kingdom [2012] ECHR, § *266-67.*

90 <https://www.supremecourt.ge/ka/cases> [20.09.2025].

91 There is likewise no clear indication in practice as to whether, and to what extent, Georgian courts examine diplomatic assurances in a manner consistent with the standards established by the European Court. On this

requires the adoption of practices aligned with the European Court's standards and an enhanced role for the judiciary in this process.[92] Georgian courts, however, frequently fail to meet these obligations, particularly in cases involving the transfer of individuals to authoritarian regimes.

4. Conclusion

The analysis of Georgia's extradition framework through the lens of Articles 3 and 6 of the European Convention reveals that, despite formal alignment with international standards, the existing mechanisms, particularly in politically sensitive cases, do not fully guarantee effective individual protection in practice.

The examination of the journalist's case discussed in this article demonstrates that, had Sadigov been extradited to the Republic of Azerbaijan, Georgia would, with a high degree of likelihood, have breached the rights safeguarded by both Articles 3 and 6 of the Convention. This case, therefore, illustrates not only specific deficiencies in the conduct of extradition proceedings but also a broader systemic problem concerning the protection of these rights in Georgia.

The research further indicates that, notwithstanding the presence of international and domestic normative frameworks, Georgian judicial and executive authorities often underassess substantive risks and treat human rights protections as formal requirements rather than effective safeguards.

For Georgia, strict adherence to the standards developed by the European Court, the establishment of transparent criteria for risk assessment, and the adoption of decision-making processes separated from political influence are essential to preventing future breaches of international responsibility and ensuring the genuine protection of individuals' fundamental rights.

Bibliography:

1. Law of Georgia on International Cooperation in Criminal Matters, Georgian Legislative Herald 48, 09/08/2010 (in Georgian).
2. Law of Georgia Criminal Procedure Code of Georgia, Georgian Legislative Herald, 31, 03/11/2009 (in Georgian).
3. Convention on Legal Aid and Legal Relations in Civil, Family and Criminal Cases, CIS-2-93-01, Adopted in Minsk on 22 January 1993 (in Georgian).
4. Resolution of the Parliament of Georgia on the Termination of the Application of the "Charter of the Commonwealth of Independent States, Approved by the Decision of the Council of Heads of States of the Commonwealth of Independent States of January 22, 1993" with respect to Georgia, Georgian Legislative Herald, 117, 14.08.2008 (in Georgian).
5. *Ghvaladze N.,* The Extradition Treaty Between Georgia and the United States – A Legal Analysis and Perspectives for Implementation, Journal of Law, №1, 2025, 499, 506-09 (in Georgian).

issue generally, see: *Hawkins K. R*., The Promises of Torturers: Diplomatic Assurances and the Legality of Rendition, Georgetown Immigration Law Journal, Vol. 20, 2006, 213.

92 *Ghvaladze N.,* The Extradition Treaty Between Georgia and the United States – A Legal Analysis and Perspectives for Implementation, Journal of Law, №1, 2025, 499, 506-09 (in Georgian).

6. *Khutsishvili K*., Extradition and Deportation under the European Convention on Human Rights, in European Human Rights Standards and Their Impact on Georgian Legislation and Practice, ed. *Korkelia K.* (*ed.*), Tbilisi, 2006, 313, 317-20 (in Georgian).
7. Decision of December 9, 2024, №2K-211-I-24 of the Criminal Case Chamber of the Supreme Court of Georgia.
8. Convention for the Protection of Human Rights and Fundamental Freedoms, CETS, 1950.
9. American Convention on Human Rights, UNTS, 1969, 144.
10. African Charter on Human and Peoples' Rights, UNTS, 1981, 217.
11. European Convention on Extradition, European Treaty Series, 1957.
12. Resolution CM/Res (2022)1 on legal and financial consequences of the suspension of the Russian Federation from its rights of representation in the Council of Europe, adopted by the Committee of Ministers on 2 March 2022 at the 1427th meeting of the Ministers' Deputies.
13. *Arnell P*., The Contrasting Evolution of the Right to a Fair Trial in UK Extradition Law, The International Journal of Human Rights, Vol. 22, №7, 2018, 869, 874.
14. *Arnell P., Walker C*., The Resurrection of the Political Offence Exception to Extradition in UK Law, New Journal of European Criminal Law, Vol. 15, №4, 2024, 412, 413, 429.
15. *Arnell P.,* The Universality of Human Rights in UK Extradition Law, Transnational Criminal Law Review, Vol. 1, №1, 2022, 52, 57, 60-61.
16. *Arnell P.,* The Imposition of European Convention on Human Rights Standards in Extradition, Scots Law Times, 2024, 221, 222.
17. *Bassiouni M. C*., International Extradition United States Law and Practice, 6th ed., Oxford, 2014, 23-24.
18. *Brownsword R*., An Introduction to Legal Research, essay King's College London, 2006, 3.
19. *Clarke A.,* Terrorism, extradition, and the Death Penalty, William Mitchell Law Review, Vol. 29, №3, 2003, 783, 785-87.
20. *Caraballo A.L., Conti-Cook C., Pierre Y., McGrath M., Aarons H.*, Extradition in Post-Roes America, City University of New York Law Review, Vol. 26, №1, 2023, 1, 30, 39, 40-41.
21. *Dugard J., Van den Wyngaert C.,* Reconciling Extradition with Human Rights, The American Journal of International Law, Vol. 92, №2, 1998, 187, 197-99.
22. *Garrod M*., Deportation of Suspected Terrorists with 'Real Risk' of Torture: The House of Lords Decision in Abu Qatada, Modern Law Review, Vol. 73, №4, 2010, 631, 634-36.
23. *Gilbert G*., Aspects of Extradition Law, Netherlands, 2022, 80-81, 89.
24. *Gilbert G.,* Responding to International Crime, Netherlands, 2006, 38, 371-73.
25. *Hawkins K. R*., The Promises of Torturers: Diplomatic Assurances and the Legality of Rendition, Georgetown Immigration Law Journal, Vol. 20, 2006, 213.
26. *Langford P.,* Extradition and Fundamental Rights: The Perspective of the European Court of Human Rights, The International Journal of Human Rights, Vol. 13, №4, 2009, 512, 515-18.
27. *Magnuson W.,* The Domestic Politics of International Extradition, Virginia Journal of International Law Vol. 52, №4, 2012, 839, 852-54.
28. *Moodrick-Even Khen H.,* Mutual Legal Assistance and Double Criminality: Bolstering the Struggle against Impunity Outside the ICC Framework, Journal of International Criminal Justice, Vol. 23, №1, 2025, 87, 93-94.
29. *Shea M.P.*, Expanding Judicial Scrutiny of Human Rights in Extradition Cases After Soering, Yale Journal of International Law, Vol. 17, 1992, 85, 86.

30. *Zanotti I*., Extradition in Multilateral Treaties and Conventions, Netherlands, 2006, 1.
31. A.S. v. Georgia [2025] ECHR
32. Mukhtarli v. Azerbaijan and Georgia [2024] ECHR.
33. M.A. v. France, [2018] ECHR.
34. *J.K. and Others v. Sweden,* [2016] (GC) ECHR.
35. Hirsi Jamaa and Others v. Italy [2012] (GC) ECHR.
36. Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment, [2012] ICJ Reports, 422.
37. Othman (Abu Qatada) v. the United Kingdom [2012] ECHR.
38. *M.S.S. v. Belgium and Greece,* [2011] ECHR.
39. *Garayev v. Azerbaijan [2010]* ECHR.
40. *RB (Algeria) (FC) and another (Appellants) v Secretary of State for the Home Department OO (Jordan) (Original Respondent and Cross-appellant) v Secretary of State for the Home Department (Original Appellant and Cross-respondent)*, [2009] UKHL 10.
41. *Ismoilov and Others v. Russia [2008]* ECHR.
42. N.A. v. the United Kingdom [2008] ECHR.
43. Saadi v. Italy [2008] (GC) ECHR.
44. Garabayev v. Russia, [2007] ECHR.
45. Mammadov (Jalaloglu) v. Azerbaijan, [2007] ECHR.
46. Mamatkulov and Askarov v. Turkey [2005] ECHR.
47. Parlanti v. Germany [2005] ECHR.
48. Shamayev and Others v. Georgia and Russia, [2005] ECHR.
49. Maaouia v. France [2000] ECHR.
50. D v. United Kingdom [1997] ECHR.
51. H.L.R. v. France [1997] ECHR.
52. Ahmed v. Austria [1996] ECHR.
53. Chahal v. the United Kingdom [1996] ECHR.
54. Cruz Varas and Others v. Sweden [1991] ECHR.
55. Vilvarajah and Others v. the United Kingdom, [1991] (Ser. A), 215.
56. Soering v. United Kingdom [1989] ECHR (Ser. A.), 161.
57. Analysis of the Supreme Court of Georgia's Jurisprudence on Extradition: <https://www.supremecourt.ge/uploads/files/1/ANALITIKURI/eqstraditsia.pdf> [04.11.2025] (in Georgian).
58. Explanatory Report to the European Convention on Extradition <https://rm.coe.int/16800c92bc> [04.11.2025].
59. Amnesty International's International Secretariat Letter to the Georgian Ministry of Justice <https://socialjustice.org.ge/uploads/products/pdf/TG-EUR-56.2024.6250_1731662698.pdf?ref=oc-media.org> [04.11.2025].
60. <https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=024> [04.11.2025].
61. <https://www.supremecourt.ge/ka/cases> [04.11.2025].

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French Laïcité and Freedom of Conscience

The proper regulation of the political and legal relationship between church and state constitutes one of the most important challenges for states. In accordance with the historical development of civil society, states at different times have sought to devise forms of governance in which the institution of the church would also be represented in its own way. In this regard, one distinctive secular form of such relations is French Laïcité. Accordingly, the present paper examines the history of the origin of this model and the dynamics of its development. Particular attention is paid to its role in the formation of a modern democratic and legal system of governance and, ultimately, to the peaceful coexistence of church and state.

Keywords: *French Laïcité, freedom of conscience, constitution, secularism.*

1. Introduction

> Jesus answered them and said: "Render to Caesar
> the things that are Caesar's, and to God
> the things that are God's."
>
> **Gospel of Mark, 12:17.**

The state, as the organized coexistence of human beings, is an ancient order.[1] The church and the state each possess their own mechanisms for carrying out their respective activities; however, it is difficult to say to what extent any form of connection exists between them.[2]

Historical upheavals demonstrate that religion has played a special role in the formation of society and in the preservation of collective identity.[3] It is noteworthy that faith, in addition to its metaphysical and transcendental nature, also carried a political and, among other things, a legal character. The best examples of this are, on the one hand, the historical development of ecclesiastical dogmatics and, on the other, the formation of canon law. Taking all this into account, it is not surprising that at certain stages of human development religion experienced oppression and persecution, while, against the backdrop of the strengthening of imperialism, states began to employ the ideological mechanisms of religious institutions.[4] Although the church cannot be perceived as a

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1 *Boumis, P. I.*, Canonical Law, translated by I. Garakanidze, Tbilisi, 2007, 187 (in Georgian).

2 *Khutsurauli, I.,* The Interrelation between Christian Religion and Law in the State, journal "Law", No. 9–10, 2001, 21 (in Georgian).

3 *Ferrari S.,* Introduction to European Church and State Discourses, in: Law & Religion in the 21st Century – Nordic Perspectives, Edited by *L. Christoffersen, K. Å. Modeér, S. Andersen,* Copenhagen, 2010, 26.

4 *Locklin, R. B.,* Many Windows in the Wall, journal "Constitutional Law Review", No. 5, 2012, 91 (in Georgian).

supporter of any political system or grouping, it should, as far as possible, maintain a neutral position.[5] Nevertheless, Christianity, for its part, accepted the state system of governance as the best mechanism[6] for combating anarchy and even reinforced its cooperative relationship with it through ecclesiastical canon law: "The state and authority are regarded as a form of governance established by God, and every Christian is obliged to obey it."[7]

It is precisely from this period that the political and legal regulation of relations between church and state begins.[8] Throughout this time, secularism assumed various forms; however, it should be noted that, by virtue of its political and legal nature, French Laïcité occupies a special place.

From this very perspective, it is important to emphasize the interrelations connected with freedom of conscience, the emergence of secularism, and the creation of Laïcité.

2. Freedom of Conscience as a Fundamental Right

"…Thus, we demand complete freedom of belief…"[9]

One of the principal challenges in the formation of a secular state lies in translating this process into purely legal terms. For states to make a political decision regarding the complete secularization of state institutions, there must exist a constitutional and legal argument whose purpose is the protection of a specific individual right. Such a protected sphere is freedom of conscience, which in its essence constitutes the primary guarantee of freedom of belief and religion. When speaking of conscience, a particular difficulty lies in its etymological meaning, since its function goes beyond strict legal frameworks and is, above all, the subject of philosophical reflection. Just as freedom of conscience marks the beginning of individual freedom, so neutrality marks the beginning of the modern state.[10]

2.1. Historical Aspects of the Formation of Freedom of Conscience

It is often considered that the idea of neutrality toward religion is the best interpretation of the complex set of rules that regulate the relationship between law and religion in a democratic state.[11] As Sidney Hook wrote in his book "Religion in a Free Society", "A truly democratic state, especially one that encompasses a diversity of religious beliefs, must be neutral in matters of religion and regard it as essentially a private affair."[12] The Supreme Court of the United States has repeatedly affirmed its commitment to "state religious neutrality, both among different religions and between religious and

5 *Boumis, P. I.,* Canonical Law, translated by I. Garakanidze, Tbilisi, 2007, 188 (in Georgian).

6 Khutsurauli, I., The Interrelation between Christian Religion and Law in the State, journal "Law", No. 9–10, 2001, p. 22 (in Georgian).

7 The Epistle of the Apostle Paul to the Romans, 13:1 (in Georgian).

8 "Peter and the apostles replied: 'We must obey God rather than men'," Acts of the Apostles (as recorded by Luke the Evangelist), 5:29 (in Georgian).

9 Javakhishvili, Mikheil, Peasant Letters, 1906 (in Georgian).

10 *Böckenförde E.,* Religion, Law, and Democracy, Oxford University Press, 2022, 185.

11 *McConnell M.W., Posner R.A.,* An Economic Approach to Issues of Religious Freedom, University of Chicago Law Review, 56, 1989, 1-60.

12 Hook S., Religion in a Free Society, Lincoln: University of Nebraska Press, 1967, 27.

non-religious activities."[13] It should also be noted that this appeal to state religious neutrality resonates well with an important proposition of modern liberal theories, which understand such moral neutrality as the best interpretation of the liberal state, one that is committed to the protection of individual freedoms in accordance with John Stuart Mill's principle of "harm to others."[14]

The idea of freedom of conscience emerged in the confessional and political disputes of the sixteenth and seventeenth centuries. It first appeared clearly in the Union of Utrecht of 1579 and subsequently in the Peace of Westphalia of 1648.[15] This treaty was concluded between the "Holy Roman Empire," on the one hand, and Sweden and France, on the other. It was through this treaty that the nearly thirty-year-long war came to an end and the foundations of the fundamental right to freedom of conscience were laid.[16]

If the principal aim of the constitutional state (Rechtsstaat) and liberal democracy is to ensure individual freedom, then the individual's conscience being the most important core of personality, must be inviolable and protected from the state. Is it possible for conscience to be perceived as an authority upon which a state system can be built without obstruction? Christian theology approaches such reasoning with caution in its theological argumentation. On the one hand, it recognizes individual conscience as an immediate norm and binding authority for specific ethical and moral action; on the other hand, it proclaims the obligation to guide and shape conscience in accordance with the norms of faith and the teachings of the Church.[17] A Kantian approach also resonates with this position, according to which judgment does not exist without intuition, but without intuition there is no form of cognition other than cognition through concepts.[18] Here Kant develops a very interesting line of reasoning that may be regarded as a cornerstone of any form of unity. In his view, the fundamental principle of coexistence exists in accordance with the law of interaction, that is, interconnection. All substances, insofar as they can be perceived simultaneously in space, stand in complete interaction.[19] Accordingly, from a Kantian perspective, freedom of conscience may be understood not only as the possibility of outwardly expressing inner values, but also as a real condition that exists from the outset through the coexistence of two individuals. However, it is one thing for a condition to exist by nature and another for the state to ensure the protection of natural rights. From this angle, the approach of the Georgian Kantian philosopher Solomon Dodashvili is particularly interesting. According to him, the process of cognition represents the relationship between consciousness and the object of cognition; cognition begins with an external influence upon consciousness.[20] For this reason, it is precisely through freedom of conscience that the necessity arises for states to protect the fundamental right to freedom of belief and religion. In this regard, both Article 135 of the Weimar Constitution and, deriving from it, Article 4 of the Basic Law are of particular interest, as they are linked by their

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13 Roemer V., Board of Public Works, 426 U.S. 1976, 744-746.
14 Ibid.
15 Ibid.
16 Ibid.
17 *Böckenförde E.,* Religion, Law, and Democracy, Oxford University Press, 2022, 169.
18 *Kant, I.,* Critique of Pure Reason, translated by Sh. Papuashvili, 1979, 82 (in Georgian).
19 Ibid., 171.
20 *Dodashvili, S.,* Logic, translated by B. B. Iashvili, 1949, 56 (in Georgian).

external form and constitutional law traditions to the fundamental right of "freedom of belief and conscience" found in nineteenth century constitutions.[21] At that time, the content of this fundamental right was clearly defined; however, determining it on the basis of the texts of the documents is difficult, and even more so on the basis of the hierarchy of values reflected in them. Its essence can be understood only through constitutional history, through the development of freedom of conscience. Despite Article 136 of the Weimar Constitution and certain provisions of the articles that followed it, by abolishing the religious and ecclesiastical sovereignty of the state, the Weimar Constitution diminished freedom of belief and conscience.[22] The 1919 Constitution of the Weimar Republic officially separated these two institutions from one another, while at the same time providing for cooperation in socio-cultural matters of significance to the country.[23]

2.2. The Scope of the Freedom of Conscience and Its Reflection in the Legal Acts of Different Countries

It is significant that the term "religion" has to this day not been defined either by Article 9 of the European Convention for the Protection of Human Rights and Fundamental Freedoms or by the case law of the European Court. Of course, this is not accidental, since any legal definition of a term limits the scope of its application, which may become a major problem in the process of protecting freedom of conscience. According to the European Court, the purpose of the Convention is to ensure the practical and effective protection of rights and freedoms, because interpretations of norms that would restrict non-traditional forms of religion are impermissible.[24]

As a legal concept, freedom of conscience has always had the meaning of a defensive right, protecting the individual from direct coercion in matters of religion. It concerned only issues of belief and religion; therefore, the term "freedom of belief and conscience" later emerged and became the standard. This related to the religious ban imposed by the sovereign (*Religionsbann*) and to the *ius reformandi*, against which a certain sphere of individual freedom was legally defined and protected.[25]

The political and legal path taken by the United States is also noteworthy, according to which freedom of conscience underwent certain changes. It should be emphasized that the initial draft of the United States Constitution used the term *liberty of conscience*; however, the final choice was made in favor of "*free exercise*," which, according to the views of the time, more effectively protected freedom of belief and expression.[26] Taking this into account, the case law of the United States courts developed accordingly. Initially, in the 1878 case *Reynolds v. United States*,[27] the Court did not uphold the claim

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21 Constitution of Bavaria (1818), IV.9.I; Constitution of Württemberg (1819) (in Georgian).

22 *Robbers, G.*, State and Church in Germany, in: State and Church in the Member States of the European Union, edited by G. Robbers, translation of the 2nd edition, Tbilisi, 2011, 86 (in Georgian).

23 Ibid., 90.

24 İzzettin Doğan and Others v. Turkey [GC], §114; <https://hudoc.echr.coe.int/eng?i=001-162697≥.

25 *Maclure J., Taylor, C., Todd J. M.,* Secularism and freedom of conscience, .92-107 Harvard University Press, 2011, <https://doi.org/10.4159/harvard.9780674062955> [25.10.2025].

26 *Gedicks F., McConnell M.,* The Free Exercise Clause, 2001, 122.

27 United States v. Reynolds, 2021 U.S. Dist. LEXIS 160409, <https://plus.lexis.com/document/openwebdocview/United-States-v-Reynolds-2021-U-S-Dist-LEXIS-

brought by the Mormon Church regarding the scope of application of laws that restricted polygamous relationships. The Court explained that the application of laws extends to persons of any religion, and that determining their scope was the responsibility of the legislative branch, specifically Congress, rather than the judiciary.[28] In this way, the Court upheld the fragile positivist model of the separation of powers and refused to give the norm a broad interpretation. By contrast, in 1963, in *Sherbert v. Verner*,[29] the Court interpreted the scope of freedom of conscience in a completely different manner and, in assessing the issue, applied a strict scrutiny test, thereby establishing a practice according to which the free exercise of religion could not be restricted by general and broadly framed legal norms.[30]

From this perspective, in the case of German constitutional development as well, freedom of conscience was the first fundamental right, precisely in the sense of a secular individual freedom that belonged to the individual, legally released them from certain obligations, and protected this sphere of freedom from the interference of the sovereign.[31] Freedom of conscience, which was recognized in the Union of Utrecht and the Peace of Westphalia, was oriented toward the individual and independent of the ruler, which also opened the door to the recognition of the rights of religious minorities and religious "others."[32]

The content and scope of freedom of conscience were, of course, limited. Substantively, it concerned only freedom from coercion to adopt or maintain a particular belief or confession; it included internal prayer according to one's own religion and the right to emigrate in order to be able to practice one's religion.[33] Moreover, this freedom extended only to the three Christian confessions.

In this form, freedom of belief and conscience was included in the list of "civil rights" set out in Article 16 of the Federal Act of 1 September 1949.[34] The connection of this freedom with matters of religion thus remained essentially intact.

Freedom of belief and conscience was presented in the Paulskirche Constitution together with full freedom of worship and freedom of religious assembly, and in the same way it took its place in the Weimar Constitution as well. This was partly due to the preservation of certain elements of tradition in constitutional texts despite changed circumstances in constitutional law; however, it was also linked to the immense importance attributed to freedom of conscience in nineteenth-century intellectual movements and political debates. This importance stemmed from the idea of personal autonomy, as well as from the concept of the innate human freedom of thought and judgment, first articulated by

160409/?pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A63FT-KVC1-F06F-2282-00000-00&pdcomponentid=6416&cbc=0&pdmfid=1530671&crid=b3f64ab2-a5f0-41d2-a00e-cbaa6a3d8d09#/document/8e11a083-18f9-4007-8fe5-b498c799e340> [25.10.2025].

28 *Marin K.,* Employment Division v. Smith: The Supreme Court Alters, The State of Free Exercise Doctrine, The American University Law Review, Vol. 1436, 1991.

29 Sherbert v. Verner, 374 U.S. 1963, 1963, 398, <https://supreme.justia.com/cases/federal/us/374/398/> [25.10.2025].

30 *Marin K.,* Employment Division v. Smith: The Supreme Court Alters, The State of Free Exercise Doctrine, The American University Law Review, Vol. 1436, 1991.

31 *Böckenförde E.,* Religion, Law, and Democracy, Oxford University Press, 2022, 171.

32 Ibid.

33 Instrumentum Pacis Osnabrugense, Article V, sections 34, 35, 37.

34 The Federal Act (*Bundesakte*) of 1 September 1949.

thinkers of European rationalism from the seventeenth century onward and especially emphasized in Kant's philosophy.[35]

Conscience became the organ of the individual's moral consciousness, through which the individual related directly to themselves and determined the laws of action on their own.[36] Thus, freedom of conscience meant not only one's own religious practice – against the sovereign; it also meant freedom of religion and, beyond these limits, a more general freedom that allowed the individual to act and behave in accordance with the laws imposed on them by their own conscience.[37] It was precisely this freedom of conscience that the Roman Catholic Church opposed in the nineteenth century.[38]

To the extent that this view spread within the intellectual environment of the period, a new question inevitably arose concerning the content of freedom of conscience in constitutional law.[39] This question, of course, also arose from the changes in constitutional law brought about by the adoption of the Weimar Constitution. By fundamentally eliminating religious and ecclesiastical sovereignty, despite Article 136 and the residual elements contained in the subsequent articles, the Weimar Constitution removed the foundational anchor of freedom of belief and conscience.

Against the background of these historical perspectives, the case law of the European Court developed in an interesting manner, establishing the range of people to whom Article 9 of the Convention should apply. In one case, the European Court unequivocally developed the reasoning that freedom of thought, conscience, and religion is a fundamental value for people who are skeptical toward religion, as well as for atheists and agnostics.[40]

3. French Laïcité

Largely, European states' relations with Christian churches are already defined. What remains contested is the place of religions in the public sphere at the national, European, and international levels. Secular law encounters difficulties when regulating new religious voices that demand greater protection, greater participation, and exemptions when secular law comes into conflict with religious norms.[41] Conflicts between law and religion simply cannot be eliminated or avoided; they repeatedly manifest themselves in various forms. The way to deal with these conflicts is not to abandon secular law or to compromise it with other forms of behavioral regulation. Secular law is a necessity for a legal and political framework that does not rely on a transcendental worldview but is firmly grounded in the immanent (this-worldly) realm. Secular law is also the instrument through which the legal-political framework can be regulated to ensure human well-being and social peace.[42]

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35 Böckenförde E., Religion, Law, and Democracy, Oxford University Press, 2022, 174.

36 Ibid.,175.

37 Ibid.

38 *Doyle A. M.,* Catholic Church and state relations in French education in the nineteenth century: the struggle between laïcité and religion. International Studies in Catholic Education, 9(1), 2017, 108–112.

39 Ibid., 110-122.

40 Kokkinakis v Greece, § 31; <https://hudoc.echr.coe.int/eng?i=001-57827> [25.10.2025].

41 *Zucca L.,* A Secular Europe, Oxford, 2012, 190.

42 *Zucca L.,* A Secular Europe – Law and Religion in the European Constitutional Landscape, Oxford university Press, 2012, 191.

Developments in Central Europe made it particularly necessary to redefine the political and legal relationship between church and state. It is no coincidence that a distinct and original model of secularism emerged precisely in France.

Laïcité, together with the Law of 9 December 1905 concerning the separation of churches and the state, constitutes a unique French model of the political and legal relationship between church and state. The history of the adoption and development of this model is important; it began during the French Revolution and was reflected in Article 10 of the 1789 Declaration of the Rights of Man and of the Citizen. Its contemporary significance is enshrined in Article 1 of the French Constitution and in the Law of 9 December 1905.

3.1. The History of the Creation of Laïcité

In France, secularism is not merely a social evolution; it is also – and above all – a political and legal process. This is what is referred to as *Laïcité*.[43] *Laïcité* is part of French republican ideology. The term, which originates from Christian vocabulary, became established in the second half of the nineteenth century.[44] In Catholicism, a *laïc* is a person who is not a member of the clergy.[45] Accordingly, a secular state or a secular society is one that clearly and voluntarily distances itself from any ecclesiastical influence.[46]

Republican ideology was based on the ideas of positivism, and in accordance with their rationalist beliefs, republicans sought to free French society from religious influence, especially from Catholicism. From this perspective, *Laïcité* is more an ideal than a legal concept; more specifically, *Laïcité* is an anti-religious ideology.[47]

Politically, throughout the nineteenth century the Catholic Church supported kings (Louis XVIII and Charles X) and emperors (Napoleon I and III). When republicans came to power in 1879, anticlericalism was perceived as a necessary policy for consolidating the new democratic institutions.[48]

After the French Revolution, religion came under state control.

The Concordat concluded in 1801 between Napoleon and the Vatican temporarily restored France's Catholic identity, but a century later the separation of church and state was definitively consolidated. This event greatly enhanced Napoleon's authority and enabled him to wield significant influence throughout the Christian world.[49] Until 1791, the Catholic Church had maintained the status of an "established" church in France for centuries. This status was restored by Napoleon's Concordat

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43 *Davis S. M.,* Rise of French Laïcité: French Secularism from the Reformation to the Twenty-first Century, 1st ed., Vol. 7, 2020, 85-110.

44 *Davis S. M.,* Rise of French Laïcité: French Secularism from the Reformation to the Twenty-first Century, Pickwick Publishers, 2020, 25-40.

45 Nathalie Caron, Laïcité and Secular Attitudes in France , Institute for the Study of Secularism in Society and Culture 114-115.

46 Ibid.

47 *Kaczmarczyk R.,* Laicizm vs Freedom To Manifest And Practice Religion On The Example Of Musilm Clothing Issues In France, 2016, 31-40.

48 *Hirschl R.,* Comparative Constitutional Law and Religion, in: Comparative Constitutional Law, Edited by T. Ginsburg and R. Dixon, Cheltenham, 2011, 423.

49 *Géraud A.,* The Lateran Treaties: A Step in Vatican Policy, Foreign Affairs, №7, 1928-1929, 572;

of 1801 as one of four official religions; however, under the 1905 law the Catholic Church was removed from temporal affairs and returned to a purely spiritual role. Since then, it has been excluded from secular education: religion is not taught in schools, clergy are not teachers, students are prohibited from wearing religious symbols and clothing, and religious images and ornaments are banned from classrooms. The Church also does not participate in official marriage procedures. Due to the strict application of the principle of separation between state and religion, France does not collect data on religious affiliation in the national census.[50]

This "secularization" of education, implemented through the laws of 1881–1882, by which the state ensured free and compulsory public education, was soon followed by the transfer of other public-interest institutions (such as hospitals) from church control to the state. Through the "great secularization laws" of the 1880s, within a few years a secular state was established that fully assumed responsibility for providing essential national services for the benefit of society that had previously been the responsibility of a fragmented network of Catholic institutions.[51]

As Gwénaële Calvès explains: "Under the Napoleonic system, which recognized four 'recognized religions,' all clergy were appointed by the state and received salaries from it. This practice continues to this day in Alsace and Moselle, two departments that were part of the German Empire at the time the 1905 status was adopted (when these territories were returned to France in 1918, their local laws remained in force)."[52]

Because bishops are responsible for the administration of church affairs, the state's power to appoint them and to exercise a veto directly affected the church's system of governance and the relationship between local churches and councils throughout France. However, this power is now much more limited and is exercised only in Strasbourg and Metz.[53]

It should also be emphasized that the initial precondition for the commencement of these secular processes must be seen in developments that began in schools between 1879 and 1886. These aimed at shaping a new republican citizen educated in shared national moral values.[54] Religion was replaced by civic and moral instruction in public schools; clergy were removed from educational processes, and the cross was banned from educational institutions. Over these years, the process of laicization affected most public services: cemeteries (1882), Parliament (1884), through the abolition of public prayers, as well as courts and town halls.[55]

This process also extended to civil legislation, particularly with the Naquet Act of 1884, which reintroduced divorce, which had been legalized during the French Revolution before Napoleon promulgated the French Civil Code. The final separation of church and state was achieved in 1905

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50 Ibid., 323.
51 Ibid.
52 Ibid.
53 Ibid.
54 *Daly E.,* The Ambiguous Reach of Constitutional Secularism in Republican France: Revisiting the Idea of Laïcité and Political Liberalism as Alternatives. Oxford Journal of Legal Studies, 32, 2012, 583-588.
55 Religion, Rights and Secular Society: European Perspectives, 2012; აგრეთვე იხ: Edward Elgar Publishing, Incorporated, 149-152.

with the Law of 9 December, which abolished the statutory system of churches (*système des cultes reconnus*) that had existed since 1801 throughout the nineteenth century.[56]

This was preceded by a lengthy process during which the church's social functions were transferred to the state. From 1792 onward, the status and social role of the church began to diminish: marriages were declared legally civil acts and lost their religious character;[57] the registration of births, marriages, and deaths was transferred from the church to the state;[58] in 1793 the working week was extended to include Sundays. In 1879, priests were removed from the administration of hospitals and charitable councils. In the 1880s, nuns in hospitals were replaced by laywomen. The Jules Ferry laws of 1881–1882 made education secular and prohibited religious instruction in all schools.[59] In 1886, all teaching positions became secular. The state's assumption of the church's traditional civil responsibilities continued through the introduction of divorce; the complete secularization of schools and hospitals; the prohibition of opening parliamentary and local government sessions with prayers;[60] the removal of religious symbols and religious elements of oaths in courts; and the ending of the practice of accompanying armed forces with religious processions.[61]

The 1905 law guarantees religious freedom, encompassing "freedom of conscience" and the "free exercise of religion." However, this protection is limited by its subordination to the state's interest in maintaining public order. The law also provides that the state neither remunerates nor subsidizes religious activities.[62]

In theory, the 1905 law excludes the possibility of state support for religion, but in practice the state nevertheless does so, including by covering the salaries and operating costs of personnel in religious schools; maintaining and preserving churches and other religious buildings; and granting tax benefits to registered religious institutions. Although at the initial stage the state strictly limited the Catholic Church's traditional civil functions and rigorously separated church and state institutions, a degree of reconciliation began in the 1920s. This process culminated in the 1926 Briand–Ceretti Agreement with the Vatican, based on which the state regained a role in the process of selecting diocesan bishops.

3.2. The Etymological and Substantive Meaning of Laïcité

In France, Christianity became established in the second century and for approximately 1,500 years coexisted symbiotically with the state. During this period, France was regarded as the "eldest

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56 Ibid.,151.

57 *Basdevant-Gaudemet, B.,* State and Church in France, in: State and Church in the Member States of the European Union, edited by G. Robbers, translation of the 2nd edition, Tbilisi, 2011, 209 (in Georgian).

58 Ibid.

59 *Davis S. M.,* Rise of French Laïcité: French Secularism from the Reformation to the Twenty-first Century, Pickwick Publishers, 2020, 212-220.

60 *O'Halloran K.,* State Neutrality-the sacred, the secular and equality law, Cambridge University Press, 2021, 309.

61 *Géraud A.,* The Lateran Treaties: A Step in Vatican Policy, Foreign Affairs, №7, 1928-1929, 572.

62 Law of 9 December 1905, Articles 1 and 2 (in Georgian).

daughter of the Church," and the state was embodied in the monarchy.[63] However, after the French Revolution, the state freed itself from the influence of both the monarchy and the Church.[64] From this moment onward, the principle of *Laïcité* became the main determinant of relations between church and state in France.[65]

In post-revolutionary France, from 1795 onward, a process of full secularization of the state and the Church began. Opinions regarding this development were expressed in various ways.[66] For certain groups, the French model was assessed as a great victory for secular authority, while others perceived these processes as a declaration of war against the Church.[67]

The word *Laïcité* is an exclusively French term for which there is no exact equivalent in the English language. The most common translation of *Laïcité* is "secularism."[68] However, conversely, the word "secularism" does not exist at all in the French lexicon. The closest related term, "secularization," is used in the field of sociology and is not a legal term.[69]

In French usage, "secularization" describes a condition of a country in which religion has lost its influence over society and, consequently, over state authority.[70] To a certain extent, secularism is the condition of Western materialist societies in which belonging to a religious group does not entail any particular obligation; rather, it represents a decision made by the individual. This is what is referred to in France as secularism.[71]

The objective of *Laïcité* derives primarily from the necessity of freeing state authority from religious influence. Religion, by virtue of its historical role, has the potential to undermine state unity. For this reason, it is necessary to weaken the influence of religious institutions over-state bodies and to fully privatize them within the private civil sphere. Ultimately, religion should occupy a place in the private sphere as one of the influential components of civil society.

3.3. The Legal Definition of Laïcité

As noted above, *Laïcité* in France initially existed as an ideal of French republicans. It was consistently described as an "idea," an "ideology," a "culture" or "viewpoint," a "spirit of emancipation," a "doctrine," or even an "ethic." Nevertheless, despite this ideological character, the

63 *O'Halloran K.,* State Neutrality-the sacred, the secular and equality law, Cambridge University Press, 2021, 309.

64 Ibid.

65 Ibid.

66 *Torfs R.,* Church and State in France, Belgium, and the Netherlands: Unexpected Similarities and Hidden Differences, "Brigham Young University Law Review", №4, 1996, 951.

67 *Basdevant-Gaudemet, B.,* State and Church in France, in: State and Church in the Member States of the European Union, edited by G. Robbers, translation of the second edition, Tbilisi, 2011, 180 (in Georgian).

68 *Norton B. J.,* A Question of Balance: A Study of Legal Equality and State Neutrality in the United States, France, and the Netherlands, Lexington Books, 2016, 47-48;

69 Ibid., pp. 47-49.

70 *Baubérot, J., Willaime, J.-P., Portier P.,* A brief history of French laïcité. In Religion and Secularism in France Today, 2022, 11–15,

71 *Portier P., Willaime J.-P.,* The three stages of French secularism. In Religion and Secularism in France Today, 2022, 23-27,

principle primarily fulfilled a legal function, and therefore its legal definition represents the main challenge. Formally, the legal concept of *Laïcité* was established in the text of the 1946 Constitution.[72] The term was not used in the 1905 Act, but after the Second World War, in 1946, the Assembly of the Fourth Republic of France decided that *Laïcité* should be enshrined in the Constitution.[73] Of particular interest is the wording of Article 1, which defines *Laïcité*: "France shall be an indivisible, secular, democratic, and social Republic." This formulation was supported by Christian Democrats, who emphasized during the debates that *Laïcité* should be understood as the religious neutrality of the state. Ultimately, Article 1 was adopted unanimously.

The 1946 Constitution also refers to *Laïcité* in relation to schools: "The State shall guarantee equal access for children and adults to education, vocational training, and culture. The organization of free, *laïque* public education at all levels shall be a duty of the State."[74] In 1958, Article 1 was directly transposed into the new Constitution. Only two sentences were added, personally introduced by de Gaulle: "France shall be an indivisible, secular, democratic, and social Republic. It shall ensure equality of all citizens before the law, without distinction of origin, race, or religion. It shall respect all beliefs."[75] In addition, the Preamble of the 1958 Constitution explicitly refers to the Preamble of the 1946 Constitution, which means that its declaration of social rights (and especially the reference to a secular educational system) remains in force. It should be emphasized, however, that this constitutional provision did not initially have direct legal effect. The main reason for this should be understood as the absence of constitutional review prior to 1958; such review developed later, in the 1970s. Another possible reason was that *Laïcité* lacked a substantive definition. Consequently, courts refrained from interpreting it, in order to avoid addressing issues such as religious neutrality, freedom of conscience, or the prohibition of state funding of religions.

The 1959 "Debré Law" constituted an important step toward improving relations between church and state. Based on this law, a system was established for state funding of private schools, including Catholic schools.[76]

Until 1965, when the Second Vatican Council issued the Declaration on Human Dignity (*Dignitatis Humanae*), the Catholic Church had not formally accepted the principle of religious freedom. At the same time, the Church acknowledged that the state could uphold this principle by adopting a position of neutrality.[77]

Following this, Stéphanie Hennette-Vauchez argues that for most of the twentieth century the state interpreted *Laïcité* as a principle obliging public authorities to respect citizens and, despite guaranteeing religious freedom, requiring strict religious neutrality from state institutions.[78]

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72 Constitutional Secularism in an Age of Religious Revival. (2014), OUP Oxford, 154-155.

73 Ibid., 155-159.

74 *Pacillo V.,* Secularism in French Cultural Discourse: Timeless Laïcité, Cambridge Scholars Publishing, 2024, 140-143.

75 *O'Halloran K.,* State Neutrality-the sacred, the secular and equality law, Cambridge University Press, 2021, 310.

76 Ibid.

77 An Introductory Dictionary of Theology and Religious Studies, Liturgical Press, 2007, 348-349.

78 *Vauchez S. F.,* Is French Laïcité Still Liberal? The Republican Project under Pressure, Human Rights Law Review, vol. 17, 2017, 285–312, 286–287.

Contemporary French *Laïcité* has acquired illiberal dimensions and is defined as the antonym of religious freedom – a legal basis for justifying various restrictions. *Laïcité*, considered a product of the French Revolution, in a broad sense as a secular principle, entails the right to freedom of conscience and religion and, at a minimum, the separation of church and state. This means that governments and, more generally, public life must shield themselves from any influence of religion or religious organizations.[79]

Its current status was determined by the adoption of the 1905 law, which formally separated church and state and prohibited any recognition or funding of religion by the state. However, *Laïcité* goes beyond a neutral demarcation of spheres of influence between church and state, such as the approach adopted, for example, in the United States. It implies a stricter exclusion of religion and of any ideology from public affairs than would be possible in other developed countries. This may be explained by the revolutionary and constitutional emphasis on equality, which requires from all citizens the same allegiance to the state, free from distinctions of status or disorder caused by conflicting loyalties.[80]

4. Conclusion

For the purpose of a final assessment of the issue, it is possible to identify three important aspects that emerged within the framework of the present study. In order for modern states governed by law to respond to the main challenges and to place human well-being at the center of the exercise of governmental power, it is necessary to regulate the political and legal relationship between church and state through constitutional and legal mechanisms. Such regulation must, first and foremost, be based on the fundamental right to freedom of conscience. In addition, the full secularization of state institutions is required, and during this secularization process it is essential to select a model that best ensures the peaceful coexistence of individuals. From this perspective, in order to choose the most appropriate model of secularism for a particular state, it is necessary for that country's legislation to clearly define the fundamental right to freedom of conscience, its scope of application, and the institutions responsible for ensuring the effective implementation of constitutional norms.

As noted, this latter task constitutes a purely legal process, the realization of which requires consideration of best practices in the contemporary world. The refinement of this right should form the basis for selecting a model of secularism, which is largely a political process. As revealed by the research, French *Laïcité*, during its creation and development, emerged as a form of secularism founded on the complete separation of secular authority from religious influence. As a result, the authority of political institutions in the eyes of society was further strengthened. It was precisely this model of *Laïcité* that ensured the legal development of the French state and the protection of its citizens, regardless of their religious beliefs. Naturally, this approach generated numerous problems within religious communities, and in certain cases the full secularization of the state and secular

[79] *O'Halloran K.,* State Neutrality-the sacred, the secular and equality law, Cambridge University Press, 2021, 310.

[80] Ibid.

institutions led to restrictions on citizens' freedom of belief and religion. The main research question of the present study is therefore the search for a balance that, on the one hand, frees state institutions from religious influence and, on the other hand, imposes the least possible restrictions on citizens' religious freedoms.

Ultimately, a question arises: since guarantees of freedom of conscience call for a comprehensive legal examination of the issue, while the choice of a form of secularism is the outcome of purely political debate, in cases of conflict should the political order be constrained by legal arguments, or should legal norms be narrowed through political argumentation? It is precisely to address this question that the present initial scientific research project was devoted to the history of the origin and development of the fundamental right to freedom of conscience, secularism, and *Laïcité*.

Bibliography:

1. The Acts of the Holy Apostles (recorded by Luke the Evangelist) (in Georgian).
2. The Epistle of the Apostle Paul to the Romans (in Georgian).
3. The Constitution of France [3 September 1791] (in Georgian).
4. The Constitution of the Kingdom of Bavaria [26 May 1818] (in Georgian).
5. The Constitution of the Kingdom of Württemberg [25 September 1819] (in Georgian).
6. The French Law on the Separation of Churches and the State [9 December 1905] (in Georgian).
7. The Federal Act (Bundesakte) [1 September 1949] (in Georgian).
8. The Declaration of the Rights of Man and of the Citizen of France, affirmed by the Constitution of France [4 October 1958] (in Georgian).
9. *Basdevant-Gaudemet, B.*, State and Church in France, in: State and Church in the Member States of the European Union, edited by G. Robbers, translation of the 2nd edition, Tbilisi, 2011 (in Georgian).
10. *Boumis, P. I.,* Canonical Law, translated by I. Garakanidze, Tbilisi, 2007 (in Georgian).
11. *Dodashvili, S.,* Logic, translated by B. B. Iashvili, 1949 (in Georgian).
12. *Kant, I.,* Critique of Pure Reason, translated by Sh. Papuashvili, 1979 (in Georgian).
13. *Locklin, R. B.,* Many Windows in the Wall, journal "Constitutional Law Review", No. 5, 2012 (in Georgian).
14. *Robbers, G.,* State and Church in Germany, in: State and Church in the Member States of the European Union, edited by G. Robbers, translation of the 2nd edition, Tbilisi, 2011 (in Georgian).
15. *Khutsurauli, I.,* The Interrelation between Christian Religion and Law in the State, journal "Law", No. 9-10, 2001 (in Georgian).
16. *Javakhishvili, M.,* Peasant Letters, Tbilisi, 1906 (in Georgian).
17. *Javakhishvili, M.,* The History of the Papacy in the Middle Ages, Tbilisi, 2015 (in Georgian).
18. *An Introductory Dictionary of Theology and Religious Studies,* Liturgical Press, 2007.
19. *Baubérot J., Willaime J.-P., Portier P.*, A Brief History Of French laïcité. In Religion and Secularism in France Today, 1st ed., 2002.
20. *Böckenförde E.*, Religion, Law, and Democracy, Oxford University Press, 2022.
21. *Constitutional Secularism in an Age of Religious Revival.,* OUP Oxford, 2014.
22. *Daly E.*, The Ambiguous Reach of Constitutional Secularism in Republican France: Revisiting the Idea of Laïcité and Political Liberalism as Alternatives. Oxford Journal of Legal Studies, 32(3), 2012.

23. *Davis S. M.*, Rise of French Laïcité: French Secularism From The Reformation To The Twenty-first Century (1st ed., Vol. 7), 2020.
24. *Doyle A. M.*, Catholic Church and state relations in French education in the nineteenth century: the struggle between laïcité and religion. International Studies in Catholic Education, 9(1), 2017.
25. *Ferrari S.*, Introduction to European Church and State Discourses, in: Law & Religion in the 21st Century – Nordic Perspectives, Edited by L. Christoffersen, K. Å. Modeér, S. Andersen, Copenhagen.
26. *Gedicks F., McConnell M.*, The Free Exercise Clause, 2001.
27. *Géraud A.*, The Lateran Treaties: A Step in Vatican Policy, Foreign Affairs, №7, 1928–1929.
28. *Hirschl R.*, Comparative Constitutional Law and Religion, in: Comparative Constitutional Law, Edited by T. Ginsburg and R. Dixon, Cheltenham, 2011.
29. *Kaczmarczyk R.*, Laicizm vs Freedom To Manifest And Practice Religion On The Example Of Musilm Clothing Issues In France, 2016.
30. *Maclure J., Taylor, C., Todd, J. M.*, Secularism and freedom of conscience, 92–107, Harvard University Press, 2011.
31. *Marin K.*, Employment Division v. Smith: The Supreme Court Alters The State of Free Exercise Doctrine, The American University Law Review, Vol. 1436.
32. *McConnell M.W., Posner R.A.*, An Economic Approach to Issues of Religious Freedom, University of Chicago Law Review, 1989.
33. *Caron N.*, Laïcité and Secular Attitudes in France, Institute for the Study of Secularism in Society and Culture.
34. *Norton B. J.*, A Question of Balance: A Study of Legal Equality and State Neutrality in the United States, France, and the Netherlands, Lexington Books, 2016.
35. *O'Halloran K.*, State Neutrality-the sacred, the secular and equality law, Cambridge University, 2021.
36. *Pacillo V.*, Secularism in French Cultural Discourse: Timeless Laïcité, Cambridge Scholars Publishing, 2024.
37. *Portier P., Willaime, J.-P.*, The three stages of French secularism. In Religion and Secularism in France Today (1st ed. Routledge), 2022.
38. *Religion, Rights and Secular Society: European Perspectives,* Edward Elgar Publishing, Incorporated, 2012.
39. *Roemer V.*, Board of Public Works, 426 U.S. 1976.
40. *Hook S.*, Religion in a Free Society, Lincoln: University of Nebraska Press, 1967.
41. *Torfs R.*, Church and State in France, Belgium, and the Netherlands: Unexpected Similarities and Hidden Differences, "Brigham Young University Law Review", №4, 1996.
42. *Vauchez S. F.*, Is French Laïcité Still Liberal? The Republican Project under Pressure (2004-15), Human Rights Law Review, vol. 17, 2017.
43. *Von Ranke L.*, Französische Geschichte, ed. Willy Andreas, Wiesbaden, 1957.
44. *Zucca L.*, A Secular Europe – Law and Religion in the European Constitutional Landscape, Oxford University Press, 2012.
45. *İzzettin Doğan and Others v. Turkey.*, 26.4.2016.
46. Kokkinakis v. Greece, 25.05.1993.
47. *Sherbert v. Verner.*, 374 U.S. 398, 17.06.1963.

48. *United States v. Reynolds.*, 345 U.S. 1, 09.03.1953.
49. <https://hudoc.echr.coe.int/eng?i=001-162697> [11.02.2025].
50. <https://doi.org/10.4159/harvard.9780674062955> [05.02.2025].
51. <https://plus.lexis.com/document/openwebdocview/United-States-v-Reynolds-2021-U-S-Dist-LEXIS-160409/?pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A63FT-KVC1-F06F-2282-00000-00&pdcomponentid=6416&cbc=0&pdmfid=1530671&crid=b3f64ab2-a5f0-41d2-a00e-cbaa6a3d8d09#/document/8e11a083-18f9-4007-8fe5-b498c799e340> [15.02.2025].
52. <https://supreme.justia.com/cases/federal/us/374/398/> [12.02.2025].
53. <https://hudoc.echr.coe.int/eng?i=001-57827> [09.02.2025].

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